OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER VI
JULY 2019
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Bench&Bar MINNESOTA

MSBA President 2019-20

TOM NELSON

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The case for mandatory legal malpractice insurance

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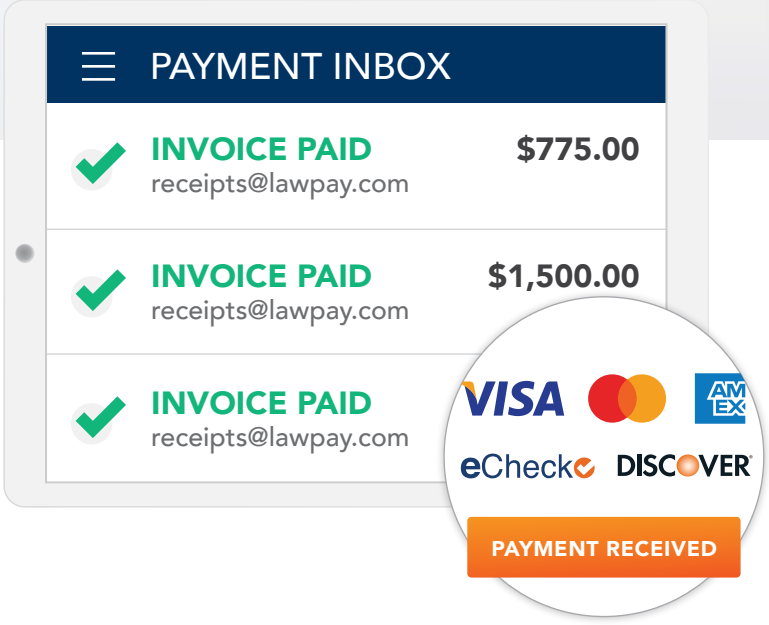

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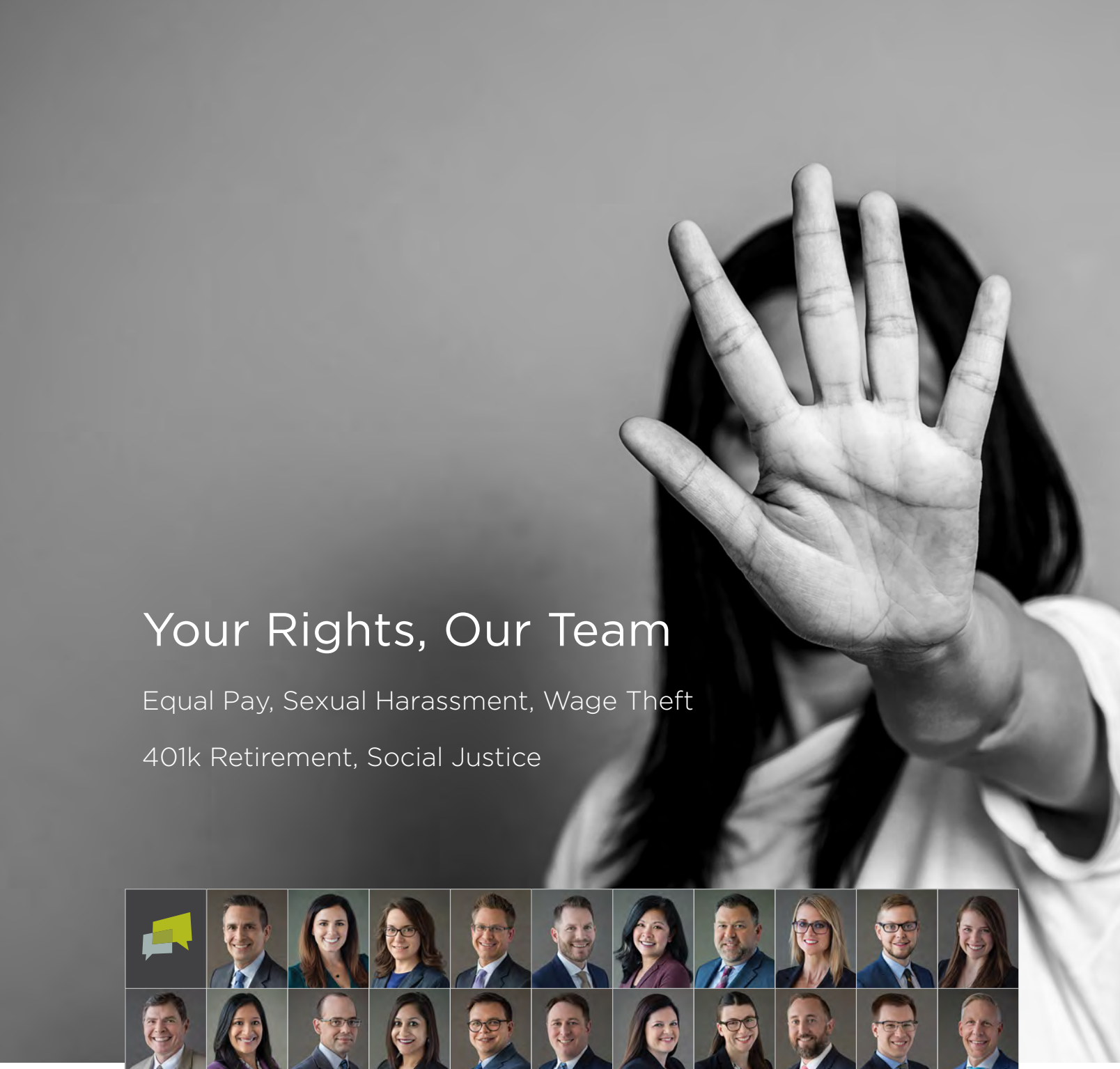

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Bench&Bar OF MINNESOTA

ON THE COVER

Photos by Stan Waldhauser

Bench&Bar OF MINNESOTA

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

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

MSBA

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

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

MSBA an amicus in lawyer's office search case

The Court recently accepted the MSBA's request to appear as amicus in *K.M. vs. Burnsville Police Department* (A19-0414) without supporting either party. The case involves the issuance and execution of a search warrant for an attorney's office and the seizure of all client files. As noted in the MSBA's request to appear, the case presents important questions, including:

- Did the search comply with the Supreme Court of Minnesota's holding in *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979)?
- Were the search and seizure reasonable in light of client confidentiality concerns, the attorney-client privilege, the attorney-work-product doctrine, and protections under the state and federal constitutions?
- What safeguards should be in place in circumstances like these to protect the rights and confidentiality of attorneys' clients?

Because these issues potentially affect all Minnesota clients and attorneys, the attorney-client relationship, attorney-client privilege, and the attorney-work-product doctrine, the MSBA is involved. Thank you to Robin Wolpert of Sapientia Law Group and Charles Webber of Faegre Baker Daniels for representing the MSBA in this matter.

Did you know: CLE credit for pro bono service

Attorneys constantly look for cost-saving ways to obtain CLE credits. Did you know that, since 2009, Minnesota attorneys have been eligible to receive CLE credit for their pro bono service? CLE Rule 6C sets the requirements for obtaining CLE credit and the Minnesota Board of CLE provides information and guidance on its website at *www.cle.mn.gov/lawyers/pro-bono-representation-2/*. In order to qualify, the pro bono service must be performed in conjunction with a referral from one of the legal aid programs funded by the Minnesota Supreme Court's Legal Services Advisory Committee (LSAC) or an approved program as determined by LSAC.

For every six hours of service, an attorney may receive one hour of CLE credit, up to a maximum of six CLE credit hours in a reporting cycle. To claim the credit, attorneys must complete and submit a certification form available on the CLE board website and linked off of the OASIS CLE reporting page. The CLE board staff will review the certification form and award credit. This is an excellent way to fulfill your CLE credit requirement and help eliminate the cost barrier that prevents many Minnesotans from obtaining legal advice and representation. For more information on CLE credit for pro bono or to connect with one of the many pro bono opportunities offered by Minnesota's civil legal aid organizations, please contact MSBA Public Service Director Steve Marchese at *smarchese@mnbars.org* or 612-278-6308.

Study: Professional services tax would harm Minnesota

Imposing a tax on professional services would have a negative impact on the Minnesota economy, according to a new study conducted by Matrix Global Advisors, a national economic consulting firm. The study, *Economic Impact of Taxing Professional Service in Minnesota*—sponsored by the MSBA and several other Minnesota professional associations—shows that a professional services tax would effectively raise the price of those services, resulting in private-sector job losses beyond the professional sector, a decline in the state's GDP, and a decline in labor income.

Serious efforts to enact a tax on professional services surface periodically at the Minnesota Legislature, most recently in 2013. A bill introduced in 2019 proposed to replace income and business taxes with a broader sales tax that would include professional services, such as legal services. The proposal did not gain traction. The discussion will undoubtedly happen again, with the most serious threat likely to arise the next time the state faces a budget deficit.

The success of previous efforts to defeat service tax proposals was largely due to a broad and cohesive coalition of organizations, including the MSBA, that opposed the proposals. What our arguments have lacked, however, was hard data. We have that now thanks to the economic impact study. We expect this study to serve us well for years to come as we argue that taxing professional services is bad policy.

Construction Law Section wins at Capitol

A couple of years ago the MSBA Construction Law Section Legislative Committee (consisting of Scott Andresen of Bassford Remele and Dean Thomson of Fabyanske, Westra, Hart & Thomson PA), with the help of the Construction Law Section Council, drafted and proposed legislation to give original jurisdiction to district courts for public procurement actions (bid protests). The action came in response to the Rochester Lines case, in which the Minnesota Supreme Court ruled that some portions of an action needed to be filed in district court while other portions needed to be filed with the Minnesota Court of Appeals. The Section approved the legislation in 2018, but there were other legislative priorities at the time.

This year, the Section's legislation was designated as an MSBA priority and lobbyist Bryan Lake was tasked with the lobbying efforts at the Capitol (see "2019 Legislative Session Recap," p. 27). The efforts of Bryan Lake and the Legislative Committee were successful: The bill was signed into law on May 10 and became effective immediately. Here is a link to the legislation: *www.revisor.mn.gov/laws/2019/0/Session+Law/Chapter/21/*

Greetings from the 2019 MSBA Convention at Mystic Lake Center!

Clockwise from top left: Outgoing MSBA President Paul Godfrey passes the ceremonial gavel to 2019-20 President Tom Nelson; ABA President Bob Carlson appears on a panel about lawyer wellness; Patrick Costello receives the 2019 MSBA Lifetime Achievement Award; members meet and mingle (three photos); 2019 MSBA Professional Excellence Award winners Jenneane Jansen, Michael Boulette, and Chris Bowman.

Upcoming MSBA Certification events/offerings

The MSBA's Certification Program will be offering three certification exams in the coming months. All the exams will be held at the MSBA offices in Minneapolis. The dates for the exams are as follows:

Civil Trial Law:
Sunday, September 15, 2019
Labor & Employment Law:
Saturday, October 26, 2019
Real Property Law:
Saturday, April 25, 2020

In addition, the Real Property Law Certification Board is hosting several study group/CLE sessions to prepare for the certification exam in April. A list of the upcoming sessions/CLEs and registration details is available on the MSBA website at *www.mnbar.org/members/certification/real-property-law*. Any questions regarding certification can be directed to Sue Koplin at 612-278-6318 or *skoplin@mnbars.org*.

Disclosing errors

Everyone makes mistakes. Law is a challenging field, and the stakes are often high for our clients. It has long been the position of the Lawyers Professional Responsibility Board that lawyers have an ethical duty to their clients to disclose errors that may provide a reasonable basis for a non-frivolous malpractice claim.[1] The American Bar Association has provided additional guidance on this topic. ABA Formal Opinion 481, issued last year, provides:

> [Rule] 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the [rules] to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.[2]

Basis of this obligation

This obligation arises from our fundamental duty to communicate with our clients. Rule 1.4, Minnesota Rules of Professional Conduct, mirrors the ABA Model Rule, and sets forth our communication obligations. As a refresher, lawyers must "promptly inform" clients of any "decision or circumstance" where the client's informed consent is required.[3] We must "reasonably consult with the client about the means by which the client's objectives are to be accomplished."[4] We must "keep the client reasonably informed about the status of" her matter, and must "promptly comply with reasonable requests for information."[5] We must also consult with the client about any limitation imposed by the ethics rules on our ability to assist the client, and, importantly, we must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[6] Given the breadth of our communication obligation with our clients—particularly the requirement that we must explain matters such that clients can make informed decisions about their case—it is unsurprising that we have an ethical obligation to report to our client a material error.[7]

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.

What is material?

When the Lawyers Board reviewed this subject in 2009, the board focused on "a non-frivolous malpractice claim" as the event triggering the disclosure obligation. In doing so, the board focused in part on Rule 1.7, concurrent conflicts of interest. Certainly it is true that the possibility of a malpractice claim presents a potential concurrent conflict of interest if the lawyer is concerned about avoiding liability such that it may materially limit the representation of that client.[8] The recent ABA opinion posits, however, that "it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice."[9] I agree, and the Lawyers Board is proposing to amend Opinion No. 21 to bring it into line with ABA Opinion 481.

As the opinion notes, errors occur on a continuum. For purposes of your disclosure obligation, if the error is material, you have a duty to inform a current client. As noted above, an error is material if a disinterested lawyer would conclude that it is reasonably likely to harm or prejudice the client or of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. Errors on the ends of the continuum are generally easy to discern (missing the statute of limitations, for example—disclosure obligation; missing a non-substantive deadline that causes no issues—no disclosure obligation), but between the two ends, each matter will need to be reviewed on a case-by-case basis from an objective perspective. Remember, too, that your disclosure must be "prompt" under the circumstances, which again will be a fact-specific inquiry.

What about former clients?

Because this duty springs from Rule 1.4, which is limited to current clients, the ABA Opinion limits its application to current clients. Accordingly, if you discover a material error after the representation has concluded, you do not have an ethical obligation to communicate that material error to your former client. There may be reasons, for risk management purposes or otherwise, that might counsel toward disclosure to a former client (such as the ability to mitigate harm), but that would be a matter of choice, not ethics, for the lawyer. Practitioners may also wish to review ABA Opinion 481 for its discussion of when a current client becomes a former client for additional guidance.

Obligation to self-report to the Lawyers Board?

One of the most persistent myths I have encountered as Director is the wide-spread belief that we have an ethical duty to report our own misconduct to the Lawyers Board. There is no duty to self-report ethical violations, whether it is your commission of a material error while handing a matter or otherwise. You do have an ethical duty to report the misconduct of another lawyer if you know that a lawyer has

committed a rule violation that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer.[10] While there may be reasons you may wish to self-report an ethical violation, you do not have an ethical duty to do so.

Conclusion

The Lawyers Board has issued an amended draft of Opinion No. 21 on its website to bring it into conformity with ABA Opinion 481.[11] You may comment on the proposed amendment through August 16, 2019, by sending an email to me at *susan.humiston@courts.state.mn.us*, or writing to the board c/o Office of Lawyers Professional Responsibility, 1500 Landmark Tower, 345 St. Peter St., St. Paul, MN 55102. The board will vote on the proposed amended Opinion No. 21 at its quarterly meeting on September 27, 2019. If you have a question as to whether you have an ethical duty to disclose an error in a particular circumstance, you can call the ethics hotline at 651-296-3952 or 1-800-657-3601. ▲

Notes

[1] Lawyers Board Opinion No. 21 (2009).
[2] ABA Formal Opinion 481 (4/17/2018).
[3] Rule 1.4(a)(1), Minnesota Rules of Professional Conduct (MRPC).
[4] Rule 1.4(a)(2), MRPC.
[5] Rule 1.4(a)(3), MRPC; Rule 1.4(a)(4).
[6] Rule 1.4(a)(5), MRPC; Rule 1.4(b), MRPC.
[7] "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Rule 1.4, Comment [5].
[8] Rule 1.7(a)(2), MRPC, defining a "concurrent conflict" to include "a significant risk that the representation of one or more clients will be materially limited... by a personal interest of the lawyer."
[9] ABA Formal Opinion 481 at 4.
[10] Rule 8.3(a), MRPC.
[11] *www.lprb.mncourts.gov/rules/pages/pendingrules.*

Physical security should be part of your incident response plan

In their efforts to assure the best and strongest cybersecurity measures, I think many organizations need to get back to basics. To effectively mitigate the risks associated with the cyberthreats we face every day (phishing, malware, social engineering, tailgating, etc.), organizations rely on cybersecurity measures to protect their critical networks, systems, and data. But they also rely on physical security measures as a critical protection against intrusion. The goal of physical security is to prevent "hands-on" tampering, theft, or destruction of critical technologies, information systems, or data. If a criminal walks into your office and steals a box full of important client data, this constitutes a breach as surely as if it had happened over your networks.

Physical security is too often seen as a category separate from cybersecurity, even though they both share the same objectives. A holistic approach to security requires that both of these areas be combined in organizational cyber policies, procedures, and incident response plans. Just as an organization should have practiced, well-documented measures in place for responding to a data breach, it should be well known what the procedure is for handling physical breaches of security.

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

The CIA triad

Information security is guided by the terms set forth in the CIA triad model: "In this context, confidentiality is a set of rules that limits access to information, integrity is the assurance that the information is trustworthy and accurate, and availability is a guarantee of reliable access to the information by authorized people." This model is used to help direct and articulate the tenets of an ideal information security program. Physical security aims to prevent disruption to organizational physical assets—especially assets relating to information systems—without limiting their operationality. These measures prevent misuse, damage, unauthorized access, and unauthorized removal from the primary physical location.

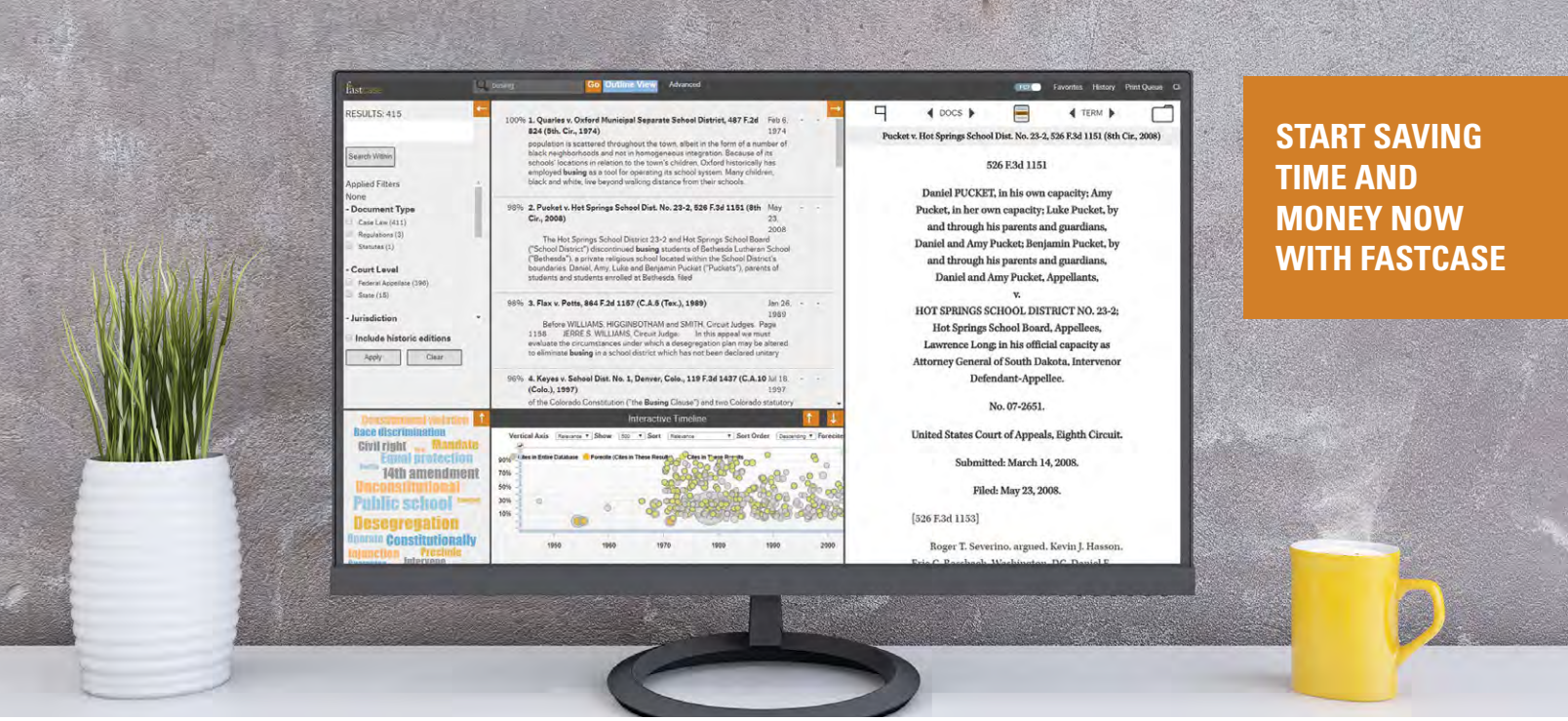
Establishing physical security baselines requires a consistently updated and reviewed log of assets, as well as a mobile device management (MDM) solution that manages and tracks all portable devices. Other methods of physical security include barriers to personnel-only areas, card keys that limit access to information technology to relevant personnel (such as IT departments and upper management), and various detection devices. More sophisticated measures may also include behavior detection to actively seek out potential attackers, depending on the size of the organization and the assets in need of protection.

Keep in mind that physical security issues are similar to cyber threats in that while your organization is trying to bar potential outsiders, it may be the insider threat that ultimately causes the damage. If a disgruntled employee gains access to the server room and inserts a thumb drive infected with malware, that is a breach of physical security as well as cybersecurity. Social engineering attacks can also be conducted in physical space and may facilitate unauthorized access. Limiting access controls is critical both in physical and cyberspace. Preventing "access creep" requires vigilance and frequent review, especially when employees are terminated.

A question of mindset

In addition to established, centralized access control and identity management when it comes to authorizing employees to access information systems, integrating physical security and cybersecurity practices must entail a comprehensive and visible implementation method. This includes understanding that cybersecurity is a company-wide initiative that extends far beyond the IT department as well as using physical security to support these practices; thus, everyone needs to participate in ensuring the protection of systems, networks, and data. On the level of personnel, access controls are better managed with a combined approach (especially when a new employee is hired). As the Internet of Things allows remote access that extends far beyond the physical space of the office, security measures must take identity management into account. The physical security of third-party vendors should also be audited regularly.

Combining physical security and cybersecurity protocols is important. Physical security is often treated separately or overlooked altogether in creating an organization's cyber posture; it deserves to be viewed as a foundational part of any security plan. Keeping track of, and improving upon, physical security measures should be part of standard security assessments. They can even be used to demonstrate to employees how easy it may be to enact social engineering attacks by taking advantage of physical vulnerabilities. Experts agree that holistic approaches to security are always stronger than a segmented protocol. Viewing physical security as an administrative responsibility and prioritizing cybersecurity measures leaves an organization vulnerable to myriad easily preventable attacks and intrusions. ▲



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Success from the bottom

A new lawyer's perspective

Often, we hear that only those with the top GPAs or top 10 percent finishes in law school get jobs that pay well and offer full benefits. This leaves those with GPAs that aren't so stellar with job prospects more than a little bleak. Or at least that's what we've been led to believe. As a student who didn't graduate in the top 10 percent of her class, I want to let you know that being in the bottom 50 percent isn't a career death sentence if you know how to stop sulking about the past and get creative.

I graduated at the bottom of my class, and the closest I ever got to a valedictorian speech was sitting in the front row at graduation. Like many others, I fell prey to an awful first year. It wasn't until my second year of law school that I finally figured out how to take a test. But by that point, my first year GPA dragged me down no matter how many times I made the dean's list.

DEBORAH AUTREY served in a corporate capacity for Walmart, Inc. in the Regulatory Compliance Division. She has recently transitioned back to Minnesota to pursue a career in health care, civil, and contract litigation. Deborah can be contacted for questions at deborahrautrey@gmail.com or at 501-545-0956.

I applied for every on-campus interview with the big corporations and law firms and never once got a call back for an interview. It was around this point that I realized I was never going to make it on my GPA alone. No one was even taking the time to look at my resume. Once they saw the GPA at the top of my resume, that was it. I knew that if I wanted to get my dream job, I needed to do something different.

Creativity isn't just for art students

I was never going to beat out any of my classmates for jobs if all anyone ever knew about me was my GPA. I knew if I could just get in front of a hiring manager, they would recognize how smart I was and give me a fair shot. So what's the best way to get in front of your hiring manager before everyone else? Internships and externships. I applied to every externship I possibly could in the areas that interested me. Landing an externship interview was a lot easier than landing a work interview. Internship and externship interviewers are generally more understanding and looking for a personality fit rather than someone who is at the top of their class.

Eventually, I landed an externship at a leading Fortune 500 company during the year, and I made sure to go above and beyond what was asked of me. Working hard puts your name out there to anyone and everyone you come into contact with. When someone needs a job done, they will know they can rely on you to do it. I had finally given myself a leg up over my top-tier classmates. When openings became available, I was the first person in the interviewer's mind before the top 10 percent of my classmates' resumes even hit the desk. But hard work isn't enough to get you a job every time—you also have to network.

Network smarter, not harder

Networking is a great thing, but it's meaningless if done incorrectly. You could meet one time with 50 people without advancing your career. Meeting three times with five people, however, can do amazing things.

Start by remembering that there are two different types of networking meetings: those in which you want to establish a connection (someone who will sponsor you or sing your praises when you apply for a job), and those in which you want to get an upper hand with the hiring manager. Narrow down your specific interests and work on meeting people in those areas alone.

For the networking meetings that you want to gain a sponsor, the most important question that you need in your repertoire is the one that gets people talking about themselves. People love to talk about themselves because it's the subject they know the most about. The key thing to remember for these types of meetings is not to suck every piece of information out of a person to use to your advantage. The important part for these meetings is to establish a connection, so when they walk away from the coffee table or office couch, they think about the pleasant conversation that they had with a young attorney.

Watch, listen, and reuse

Networking with hiring managers will probably be easier than finding a sponsor. Watch which areas seem to be expanding at a faster rate than others and thus might need more headcount. Listen to the people around you. You'll be surprised how much people are willing to tell you if you just listen. Listen to who's unhappy in their job, or who might be ready to take on bigger challenges and responsibilities. Once you've got this figured out, find out who the hiring manager is for the job you're interested in. One of the greatest opportunities of an externship or internship is that you get first-hand contact with those who probably will make all the hiring decisions. Use that to your advantage. Sit down with the hiring manager and ask them about the position you're interested in. Take notes. When you're applying for the job, you can talk about the key qualities highlighted by the hiring manager in your resume and interviews.

Seal the deal

For those whose grades are not the best, you must make it impossible for your interviewer not to hire you. This requires a lot of behind-the-scenes work in your internships and externships to

make sure you're getting that first interview. Work hard and network, but most importantly prove your worth. At this point, you should be rubbing elbows with your future team.

In that interview, drown them in all of your good qualities, so they don't even remember your GPA. Remind them of all the hard work you've done for the company already. Let them know you're more familiar with the business than any other applicant. Even if the job does not require it, always come prepared with references from your sponsors. Don't ever force the interviewing panel to take your word for anything when you can provide them with proof.

If you feel your GPA is insurmountable, travel back in time to your Trial Advocacy course on direct examination and remember to remove the sting. Bring it up first in the interview so that you can direct the narrative. Let the interview panel know what went wrong and how you sought to correct it. Show them that you learn from your mistakes.

Success

My externship eventually led me to the job I currently have today working for the same company. Even in my corporate role, I still try to make sure I'm developing transferable skills with my future career in mind. No matter what role you take on, make sure you develop skills that will be easily marketable to future interviewers.

I know how easy it is to lose confidence in yourself when you don't perform as well as you thought you would in law school. No one goes into law school with the goal of being in the bottom 10 percent at graduation. Your below-average GPA just means that you don't have the luxury of submitting a resume and hoping everything works out. You've got to be creative, work hard, and network—and, most importantly, know you have options. ▲

'Every day I learn new things'

Why did you go to law school?

I knew I needed an advanced degree, and law caught my interest. I didn't know whether I would practice law or not, but I figured with a law degree I could do pretty much everything I could with an MBA—but with a few more options.

Much of your career has been tied up with military service, and you hold the distinction of being the Minnesota Army National Guard's first female brigadier general. Is military service a tradition in your family? Did you intend to make a career of it when you entered?

My father was a Vietnam veteran who retired from active duty after 27 years of service. Experiencing active duty military life first-hand and living the challenges of a loved one living with PTSD, I swore I would never join the military or marry anyone in the military. Well, don't swear "never." I did both. There is no way Private Wivell could have ever envisioned being where General Clyborne is now, 29 years later. It's not been easy. Balancing a law firm practice, military duty—which is often just as demanding—and a family has been a challenge over the years, but looking back, I would not change the path I took.

Last year you served as commissioner of information technology for the state of Minnesota, and your bio noted that cybersecurity was a priority in your National Guard service as well. What led you to become interested in cybersecurity?

As an Army officer, at every rank, you study war and its evolution. As technology and society advances, it changes how you look at war. The sheer beauty and simultaneous challenge of cyberwarfare is that it is asymmetric. During my deployment to Iraq, I became fascinated with the concept that a non-peer adversary could find and exploit small holes in the massive defenses of a country that they could never defeat on the traditional battlefield. The military also taught me to appreciate that not all cyberattacks are similarly motivated, which I believe is essential to thinking about how our government and industries (and our own legal practices) might address those threats.

No matter how diligent we are, cyber threats are not going to go away. On the contrary, because of our dependence on and use of information systems, and the rapidness with which technology evolves, it will continue to proliferate at a dramatic rate. This means that cybersecurity will need to be a discipline that everyone in our country takes seriously, not just our military.

You've done an enormous amount of volunteer work with a number of organizations, including your service as chair of the MSBA Military and Veterans Affairs Section. What have you gotten out of your professional involvement in the bar, and your volunteer work more generally?

I have always felt that for those to whom much is given, much is expected in return. I have been blessed in so many ways. We all have ways that we can contribute to our communities. I also believe that, as a member of a profession, you need to belong to those organizations, such as the MSBA, that support you in your profession. I definitely feel like I get far more out of volunteering than I give. Every day I learn new things, positively impact the lives of people in our communities, and have developed an incredible support network of friends and colleagues along the way. I am a better attorney, a better leader, and a far better person because of the volunteer work I have been involved in.

What do you like to do when you're not working?

Wait, you can do things other than work? I love to read—something I plan to do more of now that I am down to having only two jobs. I enjoy traveling, and those who know me know I am a huge Disney fanatic. I love running Disney races. Currently, I am a Perfect Dopey runner.

***JOHANNA CLYBORNE** is a partner of the Shakopee-based law firm Brekke, Clyborne, and Ribich, L.L.C., where she focuses on family law, military pension, and federal benefits. She is a frequent presenter and author on military family law matters. Johanna has been recognized as a Super Lawyer and a member of Minnesota Top Women Lawyers. She also has served her state and nation for the past 29 years in the military. Johanna currently holds the rank of brigadier general in the Minnesota National Guard and is serving as the state's deputy adjutant general.*

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MSBA PRESIDENT 2019-20

TOM NELSON

A LIFE OF SERVICE

By Amy Lindgren

Tom Nelson, a partner at Stinson, LLP (*née* Leonard, Street and Deinard) and the incoming President of the Minnesota State Bar Association, isn't shy about telling his age. He just doesn't think it's particularly relevant to his life choices. At almost 72, he has effectively held two careers simultaneously for decades—one as a successful, award-winning attorney specializing in business litigation and "door law" (as in, whatever walks through the door), and another as public servant, donating thousands of hours to groups as seemingly divergent as Global Rights for Women, the Givens Foundation for African American Literature, the Landmark Center, the American Swedish Institute, and many others. Not to mention his work through the MSBA, which he is about to lead as part of what his wife, the Honorable Susan Richard Nelson (U.S. District Court, District of MN), calls the capstone of his contribution to the legal profession. "Tom's very proud of the bar and all its work," she says. "He's one of its best supporters."

Jeffrey Keyes, a retired U.S. District Court magistrate judge, is impressed with the example Nelson sets by working with such intensity at this stage in his career. "He's willing to give back, and to tell other lawyers, 'You can make a contribution, at any age.'" On the other hand, having golfed with Nelson for more than a decade, Keyes might be the first to counsel him that retiring to such traditional pastimes would not be a good bet anyway. After tactfully evading the question of his friend's golf prowess, Keyes acknowledges that Nelson may eventually cure his slice: "He does improve year over year. But it's a slow process." It's lucky, then, that Nelson isn't planning to retire anytime soon.

In fact, just the opposite seems to be true. Nelson is looking forward to a year of amplified public service in relation to the bar association, traveling the state promoting not only the value of bar membership, but the *values* that the bar association advances, and that bar members help to support through their participation. In his ideal, every member would recognize and embrace what he calls the association's four key roles: to lead, speak for, support, and connect lawyers. If that were to happen, Nelson says, the result would be a richer bar in all aspects. After more than 40 years in the profession, he's excited to lead the charge. Pretty remarkable when you consider that he is still surprised that he became a lawyer at all.

From the classroom to the courtroom

If it weren't for teacher's strikes in New Haven, Connecticut during the 1970s, and an acquaintance's off-hand remark—"You should be a lawyer"—Nelson might never have entered the legal profession. He loved teaching, but the original plan had been to study pre-med at St. Olaf College, moving forward to medical school and life as a doctor. But as the first in his family to attend college, he may not have grasped the transitory nature of freshman career planning. What sounded good on paper turned out to be less appealing in the classroom. It was organic chemistry that finally did him in, early in the second semester. He recalls thinking "I have no idea what these people are talking about" and "What am I doing here?" And so, "I got up right then and left class and went to change my major to philosophy. Friends of mine still remember that. They were saying, 'Where's Tom going?'"

"Tom's very proud of the bar and all its work," says his wife, the Hon. Susan Richard Nelson. "He's one of its best supporters."

Photo by Stan Waldhauser

"Tom has certain qualities that are really special," says friend Tom Sheridan. "At the top of the list is empathy. He's really good at getting into the mind and spirit of the other person."

Although he didn't realize it at the time, where Nelson was going was onto a lifetime of viewing the world through the lens of the great philosophers, learning to apply the insights of Bertrand Russell, Kierkegaard, Plato, Aristotle, Heraclitus, and everyone in between to situations as everyday in nature as the MSBA treasurer's report—or as momentous as matters pertaining to the lives of Guantanamo detainees or the students he taught. Nelson fell in love with philosophy and decided to extend the affair by moving to New Haven after college to pursue a master's degree in religion at Yale. It was there that he tumbled into teaching, when a work-study assignment evolved into the opportunity to help create a new type of alternative public high school in the city. In no time at all, the would-be physician was writing curriculum, teaching rooms full of teenagers, and collaborating with experienced educators to forge a new education model.

For a young man from Bloomington, Minnesota, with degrees in philosophy and religion, the experience was profoundly influential. Not only were the school's students from a broad swath of backgrounds, but the air was electric with a sense of possibility. As Susan Nelson notes, "You have to put yourself back into the late '60s. It was a different world and everybody was intensely involved in making change. It's a piece of both of us that we have in common. At the time we were being molded, being in public service was everything, and he's never lost sight of that."

The experimental school thrived. Nelson might still be teaching there, had he not heard that whisper about being a lawyer just when he did. After surviving—and leading—multiple school strikes in just a few years, he began to wonder if there might be a more stable way to earn a living. Asked and answered: Nelson entered the Connecticut School of Law as a slightly older-than-usual 1L and launched himself on to the new path.

Mastering the law, one dog bite at a time

Although Nelson found the first year of law school to be harder than expected ("It took me a while to get my bearings"), he knew he had made a good choice. He summer-clerked with a venerable New Haven firm, and after law school clerked for the Honorable Thomas J. Meskill of the U.S. Court of Appeals for the 2nd Circuit.

Tom Sheridan, now a partner with Simmons Hanly Conroy, LLC in New York, became one of his best friends. Although he was younger than Nelson, he was Nelson's senior as a law clerk for Judge Meskill, putting them in the position of both teaching and learning from each other. Their two-year clerkships overlapped for just one year, but it was enough to establish the relationship. They would go on to serve as best man in each other's weddings and to share life experiences such as the birth of their children. "Tom has certain qualities that are really special," Sheridan says. "At the top of the list is empathy. He's really good at getting into the mind and spirit of the other person. You get the sense that he's listening carefully to what you're saying."

Sheridan also appreciates his friend's humility, which he says influences everything from Nelson's desire to keep learning to his ability to take instruction. On the other hand, Sheridan says he quickly learned that being humble wouldn't equate to being a pushover, particularly when it came to editing each other's work for the judge. "He doesn't take anything for granted," Sheridan says. "There are things you put in a draft that you're assuming are true because other lawyers assume it. He would say, 'How do you know that's true? We should check that out.'"

Sheridan says Nelson carried that thoroughness into the practice of law, sometimes to a hilarious degree. When the neighborhood's canine bully attacked one of Nelson's two little Cairn Terriers, Sheridan recalls, "Tom wrote up a complaint against the owner of the pit bull that used every word you can think of for one dog to bite another. Every possible synonym for bite. I didn't even know some of those words."

If Nelson was happy to augment his friend's vocabulary, he was even more in his element holding court with the lawyers at the New Haven firm he joined, Tyler, Cooper, Grant, Bowerman & Keefe. Susan, who is a few years younger, remembers meeting her future husband in the early '80s. "He was a senior associate and I was a junior associate, and the lawyers we hung out with would tease him about giving out so much advice when we all got together. So we made him a badge that said *Senior Associate*." With someone else, the propensity to dispense advice might seem overbearing, but his friends saw it differently. "He's an extraordinary mentor," Susan notes. "And he really is an excellent advisor. Young people still make a point to come see him because he gives the best advice."

Public service and pickled beets

Tom and Susan married in 1983 and soon moved to Minnesota, where they had two sons, Rob and Mike. The opportunity to live near Nelson's parents was a draw. "They were remarkable people," Susan says. "Salt of the earth, filled with gratitude. Very glass-half-full kind of people." The Nelsons built a home less than two miles from Tom's parents, a choice Susan calls "the best decision we ever made as a couple." In addition to passing on their excitement for life to their children and grandchildren, Tom's parents modeled public service, an unwavering work ethic, and respect for the roles of women. His father, Ed, was a World War II Navy veteran and airline reservations agent who wrote a meticulously researched history of his two ships' involvement in World War II—including the Battle of Leyte Gulf; his mother, Fern, was a new-born nurse who worked throughout their long marriage. "Tom's relationship with his parents was extraordinary," Susan says. "It's what defines him."

Settling into suburban family life, the Nelsons juggled their jobs as attorneys with the boys' school and sports schedules (especially baseball). As a partner with Robins, Kaplan, Miller & Ciresi, Susan worked on the 1998 landmark tobacco trial before starting her judicial career in 2000. Tom, meanwhile, worked at Pophaim Haik until 1997, when he made the switch to Leonard, Street and Deinard. It would be easy to gloss over this period of 30-plus years in Nelson's career as "typical lawyer stuff" were it not for the incredible productivity he displayed. In addition to conducting a distinguished full-time law practice, he also threw himself into volunteer roles that ranged from nonprofit boards to coaching baseball for the boys' teams when they were young. Then he began to fold in service to the bar, joining committees for both the Hennepin County and Minnesota State Bar Associations.

For all the variety of Nelson's activities, some patterns do emerge. For example, projects and committees related to diversity and inclusion stretch back decades, giving him a certain gravitas on a topic that many are only now beginning to grapple with. Jeannine Lee, a partner with Stinson, experienced this aspect of Nelson firsthand when he sought her out to join the firm in 2010. "Tom was trying to implement solutions for the lack of women at the firm, especially in litigation," Lee recalls. "When he heard I was thinking about moving my practice, we got together to discuss things and I was really impressed with his commitment to the women's initiative."

Lee has since served on a diversity committee with Nelson, and talks with him frequently about philosophical approaches to handling litigation on related issues. She has learned, however, that if their conversation is going to cover lunch, it will likely happen at The Brothers in the skyway near the office. Not necessarily as a matter of proximity, but for the free buffet. "He'll probably order something standard, like a cup of soup," she reports, "but it's the buffet that drives that dining decision—that's where he can load up on herring and pickled beets."

Now that the word is out, Nelson might find pickled beets on the canapé list around the state as he goes about his MSBA presidential duties. He'll be toting his tan canvas briefcase with the MSBA logo stitched on the front—the one he had made last year, which he's been carrying around the state and posing like a traveling garden gnome in front of landmarks like the Duluth lift bridge. As for his agenda, Nelson says he's taking a lesson from his earlier presidency of the Hennepin County Bar Association (2014-15), and from MSBA presidents before him: Don't overplan. His term will encompass the first full bar year since the MSBA combined staff operations with the Hennepin and Ramsey County bars and, while Nelson anticipates everything will continue smoothly, he knows that extra time could be needed for parts of the transition. In the meantime, he does have a few areas that he wants to promote during his year as president: diversity and inclusion; wellness issues for attorneys; the development of programming that will help build relationships between young attorneys and their more experienced counterparts; and support for Greater Minnesota and solo/small firm lawyers. Within seconds of meeting him, people will see how much he enjoys and admires lawyers, and how deeply he reveres our legal and justice system.

Lynn Anderson, executive vice president and general counsel for Holiday Companies—and a founding board member of Global Rights for Women, where Nelson has volunteered for a number of years—believes he is the right person for the job. "I think of Tom as the Great Connector," she says. "He's a philosopher, a big thinker, an egalitarian, and a brilliant writer, but ultimately he's a public servant. He's just very committed to making a difference in the world and this role is an extension of that commitment." Jeff Keyes, Nelson's golfing buddy, agrees completely. "Tom Nelson is an unbelievably enthusiastic and positive person about all aspects of life," Keyes notes. "I think we'll really see that in this role for the bar association. He truly believes in the good of the profession." ▲

Hard work. Creativity. Fun.

Everyone in Tom Nelson's circle seems to have a tale to tell about times he has interjected a creative aspect into his work.

According to those who know him best, Nelson can hardly take on a project without immediately seeking a creative approach. Moreover, he seems surprisingly able to convince others to take the long road along with him. Asked to present a eulogy in 2008 for the judge he served as a clerk (Thomas J. Meskill, Chief Judge, United States Court of Appeals for the 2nd Circuit), Nelson eschewed the obvious stand-and-deliver process in favor of a partnered give-and-take with fellow clerk and friend Tom Sheridan—which required special permission from the chief judge and the memorial committee, and hours of rewrites and practice. Too much? Hardly. As Sheridan notes, "It was never brutal. It was more, 'How can we make this better? How can we make the reasoning stronger?' I have a very clear memory of sitting on a bench in Central Park, practicing what we were going to say." It went over well indeed.

Nelson engineered a similar above-and-beyond effort when he partnered with Lynn Anderson in the 1990s as part of an alumni project for their alma mater, St. Olaf College. What was originally conceived as a simple conversation for students on the linkages between liberal arts and the law quickly became a full-fledged annual series on topics in business, law, and medicine, featuring such impressive speakers as Ralph Nader, Medtronic CEO Bill George, U.S. Supreme Court Justice Harry Blackmun, and Minnesota State Supreme Court Chief Justices Douglas Amdahl and Robert Sheran.

They didn't stop there. When he and Anderson decided to revive their involvement with St. Olaf a few years ago, they hatched a plan over lunch at the Dakota that saw Nelson creating the name and visual branding on the back of a napkin for what became Ole Law, one of the school's most popular off-campus annual events. Anderson credits Nelson's creativity for developing a program that attracted more than 200 students and 100 alumni lawyers to meetings that resulted in internships, mentorships, and cross-generational friendships over the course of several years.

As it turns out, Nelson's creativity is underpinned with artistic talent. In addition to being a gifted writer, he has a facility with visual art. His wife, Susan, remembers the first time she understood this. When their son Rob was a youngster, she recalls him asking them to explain "horse and carriage." Before Susan could offers a definition, Tom had pulled out scissors and paper to create a perfect free-hand cutout of the objects in question. "It was alarming," she says drily.

This off-hand kind of creativity seems to extend to every area of Nelson's life. When he plays golf with friends, he doesn't just keep score. He keeps elaborately annotated scorecards, complete with symbols and color-coding, which he savors later as mementos of the outings. Likewise, tasked with finding holiday gifts for clients, Nelson will bypass the obvious pen sets and portfolios in favor of engraved magnifying glasses, hour glasses, and compasses, all with messages about the value of relationships. Lynn Anderson remembers the mysterious boxes he placed on the tables at the Hennepin County Bar Association annual meeting a few years back—which turned out to be filled with Legos for the purpose of "building bridges" together at their tables. "His theme for the year was building bridges," she notes. "That lunch was a lot of fun."

Keeping things light is one of Nelson's hallmarks, even when his creative solutions are meant to answer larger problems. For example, recognizing the growing chasm between young attorneys and their more experienced counterparts, Nelson created the Vintage Lawyers Group. The loosely organized group of experienced attorneys provides semi-regular events for younger attorneys to benefit from mentoring and a shared learning experience. Topics have ranged from the experienced attorneys describing mistakes or challenges they've faced to younger lawyers providing tutelage to vintage attorneys on the use of technology and social media.

Jeffrey Keyes, one of those "vintage lawyers," has seen Nelson's creative mindset extend to his legal work as well. "Tom approaches every legal problem by asking the large questions," Keyes says. "Tom will not only ask, 'How do we get there?' but he'll ask at the beginning, 'Why are we going there?' He's very challenging in that respect. He brings a fresh, creative perspective." Keyes expects to see the same approach in Nelson's new role. "I think he's going to bring that to leading the bar association," he says. "In his columns for the Hennepin bar when he was president, you can see that he asks the tough questions."

Like most attorneys, Nelson's work demands a lot of writing. But unlike some, Nelson actually enjoys the process and looks forward to opportunities to do it, both professionally and personally. When his father passed away earlier this year, Nelson wrote an extended obituary he called a love letter, describing in detail his father's long life, his career and military service, and even the bright red peonies his father grew on the two-acre property of Tom's childhood home by Bush Lake—peonies that Tom now takes pride in growing, along with hostas and ferns, in the nearby home where he and Susan raised their own children.

Nelson is looking forward to applying creativity to his new role, with all the opportunities for writing, partnering and problem solving that it offers. His friend Tom Sheridan can't imagine otherwise: "He's always bringing forward new ideas. He's a catalyst." ▲

Just the Facts | *Bio Bits on Tom Nelson*

Family

Raised in Bloomington by Fern and Edward O. Nelson in a family of three children
First-generation college graduate, along with siblings Mark and Karen
Married 35 years to the Honorable Susan Richard Nelson, U.S. District Judge, District of Minnesota
Children: Rob (married to Anna; son, Caleb Thomas) and Michael (married to Christine)

Education

Juris Doctorate, University of Connecticut School of Law, 1977
Master of Arts, Religion, Yale University, 1971
Bachelor of Arts, Philosophy, St. Olaf College, 1969
Bloomington High School, 1965

Legal career

Partner, Stinson LLP (formerly Stinson Leonard Street), Minneapolis, MN, 2014-present
Partner, Leonard, Street and Deinard, Minneapolis, MN, 1997-2014
Partner & Associate, Popham Haik, Minneapolis, MN, 1983-1997
Associate, Tyler, Cooper, Grant, Bowerman & Keefe, New Haven, CT, 1979-1983
Law Clerk, Judge Thomas J. Meskill, U.S. Court of Appeals for the 2nd Circuit, NYC, 1977-1979
Law Clerk, Tyler, Cooper, Grant, Bowerman & Keefe, New Haven, CT, 1975

Prior career

Founder/Teacher & Unit Head, High School in the Community, New Haven, CT, 1970-1974
Teacher, The Cloverdale Project, Nevada

Bar leadership roles (selected)

Minnesota State Bar Association
President, 2019-20
At-large member, Diversity and Inclusion Leadership Council, 2015-present
Past (Founding) Chair, Arts Law Committee
Delegate, MSBA delegation to Cuba, National Union of Cuban Jurists, 2013

Hennepin County Bar Association
President, 2014-2015
Chair, Bar Memorial Committee
Member, Bench and Bar Committee; Diversity & Inclusion Committee

Additional legal volunteerism & membership

(selected, past & present)
Member, American Bar Association
Member, Diversity and Inclusion Task Force, Federal Bar Association, MN Chapter & FBA Board of Directors
Member, U.S. Magistrate Judge Merit Selection Panel
Panel Co-chair, 8th Circuit Judicial Conference on Baseball and the Law
Pro Bono Counsel, University of Minnesota Law School Guantanamo Defense Project

Community volunteerism

(selected, past & present)
Board Chair, American Swedish Institute
Commissioner, City of Bloomington Charter Commission
Commissioner, Minneapolis Arts Commission
Board member, Landmark Center
Board member, The Givens Foundation for African American Literature
Board member, Global Rights for Women
Board member, The Playwrights' Center
Faculty, Disability Justice (online resource for legal professionals and law students)
Past Co-chair, St. Olaf College Conferences: Liberal Arts & the Law; Ole Law; Ole Biz; Ole Med

Recognition (selected)

Richard S. Arnold Award for Distinguished Service and Lifetime Achievement, U.S. Court of Appeals for the 8th Circuit
Professionalism Award, Hennepin County Bar Association, 2008
Pro Bono Award for Outstanding Legal Service in the Legal Interest, Leonard, Street and Deinard
St. Olaf College Outstanding Service Award
Stinson 2019 Diversity & Inclusion Champion Award, Stinson LLP
Attorney of the Year, *Minnesota Lawyer*
Inducted into the Litigation Counsel of America
Included in *Super Lawyers* every year since its inception
Named one of Minnesota's Top Attorneys in Business Litigation, *Super Lawyers Corporate Counsel Edition*
Named in *The Best Lawyers in America* in five practice areas
2016 Minneapolis Insurance Law Lawyer of the Year, *Best Lawyers*

Lawyer, Redeemed

Proving moral change in reinstatement and bar admission cases

By William J. Wernz

Stock fraud, welfare fraud, civil fraud, theft by swindle, perjury, armed robbery, and a decade or so of dishonest activities—these were the impediments to bar admission or reinstatement that clients have faced in my many years of representing them. These matters were among the most challenging and rewarding I ever undertook. Almost all the clients now have law licenses and have become successful in their careers. I hope sharing my insights from working with these clients will help others.[1]

The evidentiary hearings (before the Lawyers Board or Board of Law Examiners) were the dramatic high point of these representations. Let me start with the questions I expected to ask at hearing, and the preparation needed for getting supportive and effective answers.

Questions

The witnesses I have called in reinstatement or admission hearings usually testified both as to facts and character. A witness or two were from the place of employment of petitioner (we'll call her Pat), another might be a counselor or spiritual adviser. A lawyer or law professor might also testify, as well as an old friend. One witness was the donee of Pat's kidney.

My first substantive questions were: "Do you know what actions of Pat have led to this hearing?" and "How do you know?" The witnesses responded that Pat had given them the documentary record of misconduct and tried to explain the misconduct. I would also ask, "Do you believe Pat's misconduct displayed Pat's character or were actions that were out of character?" and "Why do you have this belief?"

After prepping witnesses on other questions, I would tell them to expect a special, final question. I did not want to rehearse or even know their answers. They should not memorize, but they should think carefully and speak from the heart. The final question was, "Do you have anything more to say to this hearing panel about why Pat should [again] be licensed as an attorney at law of the state of Minnesota?"

There was never a bad answer. The best answer was, "I would say that Pat has spent the last six years restoring her soul." The restoration of Pat's soul became the theme of the case. One witness was so persuasive that a board member later asked me, "Bill, if I ever get in trouble, could you ask the reverend to testify for me?"

My last witness was always Pat. I wanted Pat to hear that people whom she knew, respected, and often loved, would swear that the better angels of her nature were now ascendant. Pat was always the star of the show. Zealous and experienced lawyering, and solid witnesses, would not persuade the hearing panel if Pat was evasive, or in denial, or treated the proceeding as pro forma.

One admission client told me before the hearing, "It's not that I don't care about the result. I do want to be a lawyer. But the most important thing—what we went through preparing for this hearing—has already happened. I'm very grateful for that. I know and my witnesses know I'm a better person."

Hearing preparation

"A searching and fearless moral inventory." The first step for a petitioner or applicant who has committed serious misconduct is also the fourth step of Alcoholics Anonymous. The inventory requires getting the facts straights and complete, giving the misdeeds due weight, and trying to understand the reasons for the misconduct. In some cases, the misconduct was in a generally lawless phase of life, but in others it was isolated. In a typical first meeting, the client gives an account of past misconduct that is perhaps 70-80 percent complete and accurate. Before filing an application or petition, the client must fully come to terms with the facts and their meaning.

Proof of "moral change" is the most important requirement for reinstatement and "rehabilitation" as proof of good character is the parallel standard for bar admission. Related issues, such as recognition of past misconduct and the continuing impact of "suffering from thought distortions," are considered under the rubric of moral change.[2]

Gaining a law license involves many legal and procedural requirements, but the petitioner must understand that although these hurdles are important, the heart of the matter is personal, moral, and even spiritual. "[T]o prove moral change a lawyer must show remorse and acceptance of responsibility for the misconduct, a change in the lawyer's conduct and state of mind that corrects the underlying misconduct that led to the suspension, and a renewed commitment to the ethical practice of law."[3]

The inventory can be difficult. One problem is that we tend to remember *versions* of our own misdeeds and shortcomings. For bar applicants, the facts may be old, complex, and incompletely documented, as in juvenile records. One applicant—who committed frauds for years under a dominant older person—tried to identify and disclose all his misconduct, but the board found more. Sometimes it may be best to state candidly that the disclosed list of misconduct may be incomplete.

The inventory requires self-understanding—*why* did I act so badly? If the misconduct was isolated, why did I act out of character? If the misconduct involved a pattern of bad behavior over a period of years, is there another time when my better self was manifest? A counselor or spiritual advisor may well be needed.

Some bar applicants who would otherwise gain admission without difficulty create problems by omitting or inaccurately describing past problems. The standard of admission is *current* good character. A current inaccurate report converts a *past* problem into a *current* issue. "The applicant's candor in the admissions process" and "the materiality of any omissions or misrepresentations" are crucial factors.[4]

Reinstatement law sheds light on admissions law, in two ways. First, a reinstatement petitioner "is required to provide stronger proof of good character and trustworthiness than is required in the original application for admission to practice."[5] A bar applicant can argue that if a petitioner was reinstated notwithstanding very severe misconduct and imperfect rehabilitation, an applicant with similar or lesser problems should, *a fortiori*, be admitted. For example, I pointed out that an applicant's stock fraud offense occurred 19 years before the admission hearing, while a lawyer who was convicted of fraud in business dealings was reinstated after five years.[6] Second, about 30 years ago, the Minnesota Supreme Court stopped publishing opinions on bar admissions appeals. Without recent bar admission jurisprudence, bar applicants may borrow from reinstatement law.[7] Applicants should also rely on bar admission rules, which codify relevant standards in far more detail than their reinstatement counterparts. Indeed, the Board of Law Examiners uses these rules as a road map for their analysis.[8]

A petitioner must be patient, because establishing moral rehabilitation is a multi-step process. The petitioner may need years to build a record of rehabilitation, achieve self-understanding, make amends, and work with witnesses who can testify to a successful process. An insufficient time for preparation will be all too evident: "Disconcerting to the Panel was that the conversations the character witnesses had with petitioner regarding his moral change took place in only the last three to four weeks. The character witnesses have all known the Petitioner dating back well before his suspension. The knowledge of Petitioner's misconduct each displayed at the hearing seemed superficial/incomplete, thus the weight the Panel gave to their testimony as to his moral change is not great."[9]

Admitting and explaining misconduct, remorse

In addition to moral change, for reinstatement the Minnesota Supreme Court considers (1) recognition of wrongfulness; (2) the time since the misconduct and discipline; (3) seriousness of misconduct; (4) factors susceptible to correction, such as illness or transitory pressure; and (5) competency to practice.[10]

The Court has repeatedly said, "We typically look favorably on petitioners who have openly admitted the wrongfulness of their conduct."[11] Admitting wrongfulness is—with a very limited exception, discussed below—an essential first step.

A witness cannot testify to rehabilitation without knowing the exact nature of the related misconduct. Testimony reflects adversely on the applicant's candor

A petitioner must be patient, because establishing moral rehabilitation is a multi-step process. The petitioner may need years to build a record of rehabilitation, achieve self-understanding, make amends, and work with witnesses who can testify to a successful process.

when the witness has not been told the whole truth. In one case, five character witnesses were ineffective because they were unfamiliar with the petitioner's misconduct and could not give clear examples of how he purportedly had undergone a moral change; the applicant also denied misconduct he had admitted at the time of suspension.[12]

Why does a person engage in very serious misconduct? An applicant must try to understand and explain. One of my clients testified that, although there were some relevant circumstances, she could not explain why she acted so out of character. I added that the human heart is sometimes a mystery, even to itself.

Petitioners must understand the difference between explaining and explaining away misconduct. The distinction is fine enough that Lawyers Board panels have twice erred in making adverse findings that petitioners tried to explain away their misconduct.[13] Petitioner can testify, "I do not explain away my misconduct as the fault of others, or as the product of circumstances, but in trying to understand what I did, I believe some circumstances are relevant."

First impressions

The petition or bar application makes the first impression on both the staff attorney who investigates and the board members who conduct an evidentiary hearing. To make a good impression, the petition should aver that petitioner has complied with all specific requirements of the discipline order and Rules 18, 24(d) and 26, R. Law. Prof. Resp. In my view, the petition should provide some specifics supporting averments that the petitioner is (1) competent to practice law; (2) has achieved insight into prior moral failings; (3) is reliable and honest; (4) has addressed any chemical or psychological issues; and (5) has made amends for misconduct.

A complete and accurate petition, or bar application, is Exhibit A for the record. Staff attorneys investigate the petition or application, and make a recommendation to the board. A positive recommendation is very important. A staff attorney who has little left to investigate because the petitioner has provided most of the necessary facts and evidence is more likely to recommend licensure.

The petitioner should understand that the process will be searching and deep. The counsel who investigate petitions are experienced and capable. The investigation includes searching court records and contacting prospective witnesses, employers, and others. One client included a felony conviction on an employment application, but the employer did not notice it or ask any questions, and later promoted the client to a supervisory position. When OLPR counsel interviewed the employer, she reported that after the promotion the petitioner informed her of the conviction and she later testified in support of the petition.

The board hearing members are dutiful, discerning, and fair. The basic issue—whether the Court can confidently certify a petitioner or applicant as competent and trustworthy to handle clients' important affairs—requires much of all involved. Petitioner and counsel must show the board members respect. Petitioner and counsel should sincerely thank them for their volunteer efforts in undertaking a difficult task.

In one hearing a lawyer-witness for petitioner decided, in defiance of my preparatory instructions, to give what amounted to his own closing argument. He told the board that the petitioner was wrongly convicted and that the board would abet the injustice if they did not do their plain duty by recommending that petitioner be licensed. When the witness left the room, I apologized for him. I told the board members that we knew they had a heavy burden in doing their duty, that they were required to regard the conviction as dispositive, that the petitioner would respect their determination, whatever it was, and that we would not have called the witness if he had disclosed his intended testimony.

Denying misconduct: A very limited permission

In this same case, my client insisted that he was wrongly convicted of stock fraud and that he was the victim of a big-time manipulator who inveigled small brokers into unrecognized fraud. Refusal to admit wrongdoing can preclude bar admission, as where the applicant pled guilty or there was overwhelming evidence of a crime for which specific intent was not required.

However, a famously convicted and disbarred lawyer, Alger Hiss, regained his license, notwithstanding that he would not admit the perjury for which he had been convicted. The Massachusetts Supreme Court explained, "Simple fairness and fundamental justice demand that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal act he honestly believes he did not commit." The Minnesota Supreme Court has followed *Hiss*.[14]

In presenting the admission case, we acknowledged that the board had to regard the conviction as dispositive, but we asked the board to consider that the applicant's insistence on innocence was not wholly unreasonable. To do that, we presented a very condensed portion of the evidence in the stock fraud case. The client was admitted.

Reinstatement after disbarment or lengthy suspension

The gravity of an offense only "rarely" precludes reinstatement. The Court declined to make permanent the disbarment of a lawyer who arranged the murder of his wife and, after his release from incarceration 20 years later, plundered the assets of an elderly widow.[15] In recent years, the Court has reinstated several petitioners after disbarment.[16] Some of the petitioners still had substantial problems.

Believing that "human beings, generally, are redeemable," the Court has characterized unwarranted denials of reinstatement as a "cruel hoax."[17] Reinstatement petitions have succeeded in

some cases where the petitioner appears far from perfect. Most recently, a hearing panel found that a petitioner was remorseful only "to the extent to which he is capable." This extent was limited, because petitioner, "continues to deflect responsibility for his problems and blame financial circumstances, rather than his own decisions." Petitioner "was less than forthright" with his own character witnesses in describing his misconduct. The panel was "troubled" by the "lack of depth" in petitioner's statements of remorse and amends. The Director argued that the panel's reinstatement recommendation was clearly erroneous, but the Court followed the recommendation.[18]

The Court does not give deference to the board panel's recommendation regarding reinstatement; more importantly, though, without clear error the Court will not reverse panel findings regarding key, often-decisive issues, such as moral change, remorse, and credibility.[19] The clear error standard makes the panel hearing and findings extremely important.

In 1989, the Lawyers Board adopted a Panel Manual to guide panels, respondents, and reinstatement petitioners in the law and procedure for hearings and pre-hearing procedures. Unfortunately, the manual cannot now serve its purpose, because it was last updated in 2007. The effects of this neglect are apparent in two cases where board panels made the same clear error. In the second case, the Court specifically and repeatedly cited the first case.[20] There is nothing to prevent the same error a third time.

Summing up

In reinstatement petitions and bar admission character and fitness proceedings, all concerned parties—the Court, its board, their staffs, the petitioner or applicant, counsel, and witnesses—deal with deep and important things. Especially when the petitioner has committed dishonest and even felonious conduct, a great deal of evidence and caution are needed before deciding to certify the petitioner as one who can handle the public's important and intimate matters. I am privileged to have played an important role, as counsel, in a number of these proceedings. More importantly, I was challenged and inspired in preparing petitioners for the hearings. The rigorous journeys needed for success, in a personal as well as a legal sense, were difficult and profound. I hope this article will assist future petitioners and applicants. ▲

Notes

[1] This article updates and expands on subjects addressed in William J. Wernz, *Character, Fitness and Redemption,* Bench & Bar of Minn., Oct. 2007. This article also addresses these subjects more from the perspective of a lawyer representing and advising clients.

[2] *In re Severson,* 2019 Minn. LEXIS 64, 2019 WL 575856.

[3] *In re Mose*, 843 N.W.2d 570, 575 (Minn. 2014).

[4] Rule 5. B.(4)(i) and (j), R. Bd. Law. Exam.

[5] *In re Ramirez,* 719 N.W.2d 920, 925 (Minn. 2006).

[6] *In re Scallen,* 269 N.W.2d 834 (Minn. 1978); 337 N.W.2d 694 (Minn. 1983).

[7] Recent important cases include *In re Severson,* 889 N.W.2d 291 (Mem) (Minn. 2016) (denying reinstatement) and *In re Severson,* 2019 Minn. LEXIS 64, 2019 WL 575856 (granting reinstatement). Other important cases include *Dedefo, Griffith, Stockman, Ramirez,* and *Anderley,* cited below.

[8] Criteria for identifying relevant misconduct, considerations for weighing the misconduct, and factors proving "rehabilitation" from the misconduct are specified in Rule 5, especially subparts (d) and (e), R. Bd. Law. Exam. Reinstatement procedures and requirements are found in Rule 18, R. Law. Prof. Resp. Rule 26 prescribes "Duties of Disciplined, Disabled, Conditionally Admitted, or Resigned Lawyer." "Petitioner" is used here both for bar admission applicants and reinstatement petitioners.

[9] Panel Findings of Fact, Conclusions of Law and Recommendation, *In re Severson*, 889 N.W.2d 291 (Mem) (Minn. 2016). The Panel added, "Compare *In Re Petition for Reinstatement of Dedefo*, 781 N.W.2d 1 (Minn. 2010) where petitioner's character witnesses were aware in great detail of Dedefo's conduct almost from the day Dedefo's suspension occurred."

[10] *In re Singer*, 735 N.W.2d 698, 703 (Minn. 2007).

[11] *In re Dedefo*, 781 N.W.2d 1, 10 (Minn. 2010), citing *In re Wegner*, 417 N.W.2d 97, 99 (Minn. 1987).

[12] *In re Griffith*, 883 N.W.2d 798, 802 (Minn. 2016) (Reinstatement denied).

[13] *In re Stockman*, 896 N.W.2d 851 (Minn. 2017); *In re Dedefo*, 781 N.W.2d (Minn. 2010).

[14] *In re Hiss*, 333 N.E.2d 429, 437 (1975). *In re Hedlund*, 293 N.W.2d 63, 65–66 (Minn. 1980). "A disbarred attorney is not required to admit his past misdeeds nor make a rote confession of remorse and repentance as a precondition for reinstatement." *In re Swanson,* 405 N.W.2d 892 (Minn. 1987).

[15] *Ramirez,* 719 N.W.2d at 925. *In re Thompson*, 365 N.W.2d 262 (Minn. 1985) (discussed in William J. Wernz, *Character, Fitness & Redemption*, Bench & Bar of Minn., Oct. 2007.) The Court did deny Thompson's reinstatement. The Court once ordered a permanent disbarment (for "indecent assault" of a 15-year-old boy), but it is doubtful it would do so again. *In re Van Wyck*, 290 N.W. 227 (1940); 29 N.W.2d 654 (1947).

[16] *In re Lieber*, 834 N.W.2d 200, 202 (Minn. 2013); *In re Ramirez,* 719 N.W.2d 920 (Minn. 2006); *In re Anderley,* 696 N.W.2d 380 (Minn. 2005); *In Re Trygstad,* 472 N.W.2d 137, (Minn. 1991).

[17] *In Re Trygstad,* 472 N.W.2d 137, 140 (Minn. 1991). *In re Kadrie,* 602 N.W.2d at 877, *citing In re Swanson,* 343 N.W.2d 662, 664 (Minn. 1984).

[18] *In re Severson,* (Minn. 2019) *supra*. The Court denied Severson's prior reinstatement petition. *In re Severson*, 889 N.W.2d 291 (Mem) (Minn. 2016). Perhaps Severson's current age (78) and apparent lack of intent to engage in the private practice of law produced sympathy for him.

[19] *In re Dedefo,* 781 N.W.2d 1, 7 (Minn. 2010); *In re Mose*, 843 N.W.2d 570, 573 (Minn. 2014).

[20] *In re Stockman*, 896 N.W.2d 851, 857-8 (Minn. 2017), cited *In re Dedefo*, 781 N.W.2d (Minn. 2010) four times in less than one page, repeatedly stating, "As in *Dedefo, ...*"

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The Case for Mandatory Legal Malpractice Insurance

Why Minnesota should require lawyers licensed to practice law in Minnesota who represent private clients to carry professional malpractice insurance

By Seth Leventhal

Most of us carry insurance because we are required to by law (*e.g.*, automobile insurance) or, by choice, to protect ourselves and our loved ones from unforeseen but known risks (*e.g.*, life insurance, property insurance, etc.). Businesses carry insurance for the same reasons—that is, because they are required to by law or out of a sense of prudent business practices.[1]

Lawyers should be required to carry professional malpractice insurance to protect their clients.

A significant part of my legal practice for the past 10 years or so has been bringing claims of legal malpractice against Minnesota lawyers. "Coming from a guy who makes his money by suing lawyers, you take a surprising position, advocating mandatory professional malpractice insurance for Minnesota lawyers," some readers might cynically comment.[2]

To be clear, (1) my civil litigation practice is far broader than legal malpractice cases, (2) I turn away well over 95 percent of the potential legal malpractice claims that I encounter, and (3) frankly, if I had to live off of the money I recover in legal malpractice cases, my family would be living below the poverty line. Legal malpractice cases are extremely difficult and strong claims are relatively rare.[3] In addition, in all but one of the malpractice claims I have pursued, or even investigated, over the past 10 years, the lawyers have carried legal malpractice insurance. In short, self-interest, financial or otherwise, has nothing to do with my opinion.

10%

of active Minnesota lawyers representing private clients carry no professional malpractice insurance

Having said that, my advocacy in favor of requiring Minnesota lawyers to carry mandatory legal malpractice insurance is *informed* by my experience suing Minnesota lawyers;[4] it simply isn't *motivated* by it nor by financial self-interest. My advocacy is motivated by a passion for the special role that lawyers play in our society and in the lives of their clients.

As all lawyers know, lawyers are "officers of the court."[5] In all instances, they are (or should be) trusted fiduciaries. They owe their clients "something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive…."[6] Clients often place a tremendous amount of trust, confidence, and faith in lawyers. And they should be encouraged to do so. The trust and confidence between lawyer and client are essential to the sound functioning of our legal system.

Nevertheless, at the same time, most if not all lawyers are humans; they make mistakes. Sometimes those mistakes cause damages and sometimes those mistakes constitute professional malpractice.[7] But approximately 10 percent of active Minnesota lawyers representing private clients carry no professional negligence insurance.[8] The uninsured lawyers are generally solo or small-firm lawyers[9] who tend to represent the least sophisticated, relatively poor, and most vulnerable clients.

Why *don't* we require Minnesota lawyers to carry malpractice insurance? Minnesota, along with many states, does not require that its lawyers carry malpractice insurance; Minnesota just requires the lawyers to disclose whether they carry insurance or whether they are "going bare"—that is, practicing law with no professional liability insurance.

Disclosure is not enough

As of 2018, 24 states (including Minnesota) required lawyers who represent private clients to disclose whether they carry malpractice insurance.[10] The nature of the required disclosure varies a lot from state to state.[11] In some states, lawyers must notify clients in writing if they carry no malpractice insurance or if their coverage is under a certain threshold dollar amount. In South Dakota, lawyers must specify on their letterhead if they carry no malpractice insurance or if their coverage is less than $100,000 per claim. Many states, like Minnesota, require annual certification as to whether the states' licensed lawyers who represent private clients carry legal malpractice insurance.[12]

To be blunt, though, Minnesota's disclosure rule is a joke. It is ineffective. The so-called public disclosure is almost impossible for prospective clients to find.[13] It is nominal public disclosure, not meaningful public disclosure. (There is a name for "nominally public information:" "practical obscurity.")

In theory, South Dakota's rule requiring a disclosure on firm letterhead could genuinely inform clients that their lawyers have no malpractice insurance, but is that even enough? As discussed above, the point of malpractice insurance is that it is part of taking care of one's clients. It is not consistent with the idea of fiduciary duty responsibilities to rely on disclosure. Would we countenance cruise lines operating without lifeboats or flotation devices on their vessels so long as they disclose their absence to passengers? Presumably not.

The arguments against mandatory professional malpractice insurance for lawyers are unpersuasive

There are a number of arguments against mandatory professional malpractice insurance for lawyers, of which I'll address two here.[14] First, there are those attorneys who adopt an absolute ideological "free market"/anti-regulation position: "It's not the government's business to tell Minnesota lawyers that they have to have insurance; let clients decide for themselves whether that matters to them." Call it "the libertarian objection."

A second and far more common objection is that a mandate would raise costs for Minnesota lawyers and clients ("the money objection").

The libertarian objection

Presumably, those who adopt the libertarian objection have to take the view that there should be *no* regulation of lawyers at all. "Let the client beware" is the logic of their ideology. As a fallback to this extreme (and widely rejected) position, they would presumably argue that if there has to be regulation, it should be minimal regulation; that is, disclosure should be enough. These two positions highlight the weakness of the libertarian objection: If you take the logic literally, it calls for a system that very few, if any, seriously want (no regulation of lawyers). But if you moderate this extreme position, the compromise fallback (disclosure) neither satisfies the libertarian objection nor offers any genuine remedy for the problem. Disclosure, particularly the kind of disclosure that Minnesota now provides for, is a useless, impotent, and inert remedy.

Again, it is important to keep in mind that the majority of uninsured lawyers tend to be solo and small firm lawyers. (See note 9.) These lawyers, in turn, have the least sophisticated clientele. Moreover, rare indeed is the client, sophisticated or not, who hires a lawyer and, at the outset, fully appreciates that a lawsuit against the very attorney just hired is remotely likely or even possible. Thus, disclosures of "no insurance" fall on deaf ears.

The money objection

Those who oppose mandatory malpractice insurance often suggest that it would be financially burdensome. But here's the thing: Legal malpractice insurance is not very expensive.[15] This statement is based, in part, on personal/anecdotal experience. The author's premium for one year of coverage ($1 million/claim; $3 million/aggregate) is approximately $3,000. The annual mean wage for lawyers in Minnesota is about $120,000.[16] Thus, the cost of malpractice insurance is the proverbial "drop in the bucket." This anecdotal information is supported by broader scholarly research.[17]

Further, requiring all Minnesota lawyers who represent private clients to have malpractice insurance could *lower* insurance rates. As with health insurance pools, if one increases the pool of covered individuals, the risk spreading is broader and coverage is less expensive.[18]

Is mandatory malpractice insurance feasible?

Yes. The state of Oregon has had mandatory malpractice insurance for over 40 years.[19] The Idaho Supreme Court adopted a similar requirement that went into effect in 2018.[20] California, Washington, New Jersey, Nevada and Georgia have all been studying the possibility of imposing mandatory malpractice insurance.[21]

Is mandatory malpractice insurance a critical need?

Yes (and no). Most Minnesota lawyers are thorough, honest, competent, and capable. Further, under Minnesota law, legal malpractice cases are very difficult to win. So the question of the availability of malpractice insurance will not be relevant to the vast majority of legal matters handled by Minnesota lawyers representing private clients.

But think back to my analogy to lifeboats and flotation devices on cruise ships. Minnesotans do not need them on every boating outing or cruise ship. In fact, we all hope we'll never need them and most of us won't. But, in the rare and unforeseen disaster scenario, they will make all the difference.

Minnesotans with strong legal claims (or defenses) who lose those claims (or defenses) due to their lawyers' negligence need, deserve, and should have protection. Malpractice insurance should be mandated, in keeping with lawyers' obligations to their clients and their roles as trusted professionals.

And, finally, an added benefit to mandatory legal malpractice insurance is that it would result in fewer (or no) self-represented lawyer-defendants in malpractice claims. We all are well aware of the old adage, "Lawyers who represent themselves have fools for clients." Mandatory malpractice insurance would ensure that lawyer-defendants have experienced, qualified, insurance-provided lawyers defending them. This, in turn, would make for better representation and more efficient dispute resolution. ▲

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Notes

[1] Incidentally, *see* Anne Dieble, "Kidnapping: A Very Efficient Business," New York Review of Books, May 9, 2019 issue, a fascinating discussion of multinational companies and news organizations buying insurance against kidnapping and ransom demands for executives and employees.

[2] Perhaps akin to kidnappers urging companies to obtain kidnapping and ransom insurance?

[3] Explaining the numerous hurdles facing legal malpractice plaintiffs under Minnesota law is beyond the scope of this article. Briefly, I have coined the term "the three C's" to describe the challenges. That is, the cases are expensive ("cost"), establishing "but for" causation can be very difficult ("causation"), and, in general, the professional culture of judges ("culture"). (After all, judges are lawyers themselves who are extremely familiar with the overwhelming pressures and challenges faced by lawyers (i.e., themselves). They are also often socially and emotionally interwoven with members of the bar and are loath to engage in "20/20 hindsight" or second-guessing that they might feel is unfair.)

[4] My advocacy is also informed by my 12 years serving as a volunteer investigator for the Lawyers Professional Responsibility Board for the 4th District of the Minnesota State Court System.

[5] *In re Greathouse*, 248 N.W. 735, 737 (Minn. 1933) ("[Lawyers'] conduct should command public confidence."); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (U.S. Sup. Ct., 1867) ("[Lawyers] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character.")

[6] *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928) (said of the duty that one business partner owes another, but discussing the nature of the duties of fiduciary).

[7] Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, draft of an article forthcoming in Volume 9, Issue II of St. Mary's Journal on Legal Malpractice & Ethics (*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348541*). ("We all make mistakes. We are distinguished as professionals by the manner in which we handle mistakes and treat those we injure.")

[8] The author obtained this data from Minnesota's database of licensed lawyers, which sets out (1) licensed lawyers who represent private clients; and (2) whether they carry malpractice insurance.

[9] Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, draft of an article forthcoming in Volume 9, Issue II of St. Mary's Journal on Legal Malpractice & Ethics (*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348541*) ("Uninsured lawyers are predominately in solo practice or firms of five or fewer lawyers").

[10] *https://www.bna.com/avoiding-accountability-rise-n57982093773/*

[11] *https://www.americanbar.org/groups/bar_services/publications/bar_leader/2003_04/2804/malpractice/*

[12] *Id*.

[13] Anyone "shopping" for a lawyer can theoretically go here: *http://mars.courts.state.mn.us/* and find out whether a particular lawyer has insurance. Consumers of legal services are not directed to this site and, anecdotally, intuitive Google searches (i.e., "Does Attorney Seth Leventhal carry malpractice insurance?") do not work.

[14] Other objections ((1) there is no need; (2) required insurance would "invite litigation") are discussed and rebutted in Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, draft of an article forthcoming in Volume 9, Issue II of St. Mary's Journal on Legal Malpractice & Ethics (*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348541*).

[15] *https://www.bls.gov/oes/current/oes_33460.htm#23-0000*.

[16] *https://www.bls.gov/oes/current/oes_mn.htm#23-0000*. This annual salary is likely drawn down by Minnesota lawyers working in the public sector and many newer or younger lawyers whose malpractice premiums are covered by their employers. Further, the mean annual salary of lawyers in metropolitan areas is higher and thus the relative burden of the malpractice premium is lower for most Minnesota lawyers (and a great deal lower for many).

[17] Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, draft of an article forthcoming in Volume 9, Issue II of St. Mary's Journal on Legal Malpractice & Ethics (*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348541*) ("objections based on cost are overstated").

[18] *See id*. ("Lawyers in other states, including California, Washington and Oregon explored the possibility of lowering insurance costs by requiring all lawyers in the state to purchase legal malpractice insurance.") *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348541*

[19] *Id*.

[20] *https://www.bna.com/avoiding-accountability-rise-n57982093773/*

[21] Supra note 17.

2019 Legislative Session Recap

By Bryan Lake

MSBA AGENDA FINDS SUCCESS AMID A STATE OF GRIDLOCK AT THE CAPITOL

The 2019 legislative session featured power shifts, conflict, and rival parties compromising to cut a deal.

The dynamics of the session were established on Election Day last November, when a DFL wave washed across Minnesota and produced a divided Legislature—a rare thing in a country filled with states colored in deepening shades of red or blue. Minnesotans replaced retiring Gov. Mark Dayton with another Democrat—former Congressman Tim Walz—and DFLers also won a majority of seats in the House of Representatives, ending four years of GOP control. Senators were not on the ballot in 2018, however, so Republicans maintained their majority in the Senate.

The legislative session kicked off in early January, and the months ahead were grueling. Predictably, Republicans and Democrats found much to disagree on. In general, House committees were far more active and ambitious than their Senate counterparts. The judiciary and public safety omnibus bill provided a telling example: The House version swelled to 298 pages, while the Senate companion was a streamlined 31. The two chambers had little in common in many other areas as well.

Due to stark philosophical differences, many controversial items failed to cross the finish line, including proposals related to gun control, sexual harassment standards, recreational marijuana, paid family and medical leave, and driver's licenses for immigrants without legal status. Despite months of frenetic activity at the Capitol, actual accomplishments were minimal. In fact, the Legislature sent only 65 bills to the governor during the regular session, the lowest total during an odd-numbered year in at least four decades.

Thirteen additional bills reached the governor's desk following a 21-hour overnight special session that was necessary to complete a budget deal. As is typical in budget years, there were many complaints about closed-door negotiations and a lack of transparency, but to their credit, Gov. Walz, House Speaker Melissa Hortman (DFL-Brooklyn Park), and Senate Majority Leader Paul Gazelka (R-Baxter) maintained a respectful tone in public while they privately hammered out a compromise budget agreement and avoided a government shutdown—no small feat in today's hyper-partisan political environment.

The budget compromise included wins and losses for both parties. The DFL was able to increase education funding and permanently extend the health care provider tax, while the GOP secured a middle-class income tax cut and blocked a large gas tax increase.

Throughout the session, the MSBA was active in advocating for adequate funding for the justice system. Courts, public defenders, and civil legal services all received budget increases, albeit at lower levels than they had requested. The court system will receive additional funding for pay increases, cybersecurity, mandated psychological services, and treatment courts. In addition, a new judge unit will be added in the 7th Judicial District. Civil legal services got about half of the additional funding they requested, while public defenders received extra funding for salary increases as well as new attorneys and support staff.

MSBA AGENDA

Numerous MSBA proposals were in play at the Capitol this year, and several passed despite the difficult operating environment. The first MSBA bill to get signed into law was Chapter 21, which establishes original jurisdiction in the district courts for public procurement bid protests. This procedural clarification eliminated confusion about whether such actions needed to be filed in district court or the court of appeals or both courts. The chief authors of the bill were a pair of lawyer-legislators, Rep. Dave Pinto (DFL-St. Paul) and Sen. Mark Johnson (R-East Grand Forks). *Effective 5/10/2019.*

Another lawyer-legislator, Sen. Jerry Relph (R-St. Cloud), along with Rep. Jeanne Poppe (DFL-Austin), sponsored multiple MSBA proposals that were part of this year's tax bill (Spec. Sess. Ch. 6). The proposals, a pair from the Probate & Trust Law Section and a pair from the Tax Law Section, included:

- Attributing a deceased spouse's ownership to a surviving spouse for purposes of the three-year holding requirement in the qualified farm and small business estate tax exemption. (Art. 2, Sec. 23 & 24) *Effective retroactively for estates of decedents dying after 12/31/17.*
- Allowing married farm couples who hold their property in two trusts to maintain agriculture homestead status. (Art. 4, Sec. 12) *Effective beginning for property taxes payable in 2020.*
- Enabling automatic state relief for taxpayers who qualify for "equitable" innocent spouse relief under federal law. (Art. 2, Sec. 9) *Effective for returns first due for taxable years beginning after 12/31/18.*
- Removing the six-year timeline for an innocent spouse to request separation of tax liability. (Art. 2, Sec. 9) *Effective for returns first due for taxable years beginning after 12/31/18.*

A fifth MSBA tax proposal—conforming with the federal refund period for overpaid taxes—was included in the Senate tax bill but did not survive in conference committee. Two other MSBA bills also did not make it across the finish line this year. The first would provide student loan repayment assistance for rural lawyers; the second would establish a right to counsel for public housing tenants in breach-of-lease cases. We will continue to work on these bills.

In addition to the previously discussed bills, there was action this year on an issue raised by the MSBA-initiated Commission on Juvenile Sentencing for Heinous Crimes. Currently, key portions of Minnesota's Heinous Crimes Act are unconstitutional as applied to juveniles. The MSBA has recommended that the Legislature take action consistent with the commission's recommendations, which were to either adopt sentencing factors or eliminate the sentence of life without the possibility of release. The House judiciary and public safety bill contained language providing parole eligibility after 25 years for juveniles sentenced to life for heinous crimes, but the proposal died in conference committee.

On the defensive front, two family law bills opposed by the MSBA were stopped: a joint physical custody presumption and a private divorce program that would be administered with no court oversight. A floor amendment was offered to add the joint custody presumption language to the House judiciary and public safety omnibus bill, but the amendment failed on a tie vote. In the Senate, the proposal moved through one committee but did not reach the floor. The private divorce bill was included in the judiciary and public safety omnibus bill in the House but not the Senate, and it did not survive in conference committee. ▲

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NOTABLE NEW LAWS

- **Assisted living:** Ch. 60 establishes rights and protections for assisted living residents and creates new dementia care requirements for assisted living facilities. Ch. 60 also creates a framework for licensing assisted living facilities, an idea that was supported by the MSBA's Elder Law Section. *Various effective dates.*

- **Criminal sexual conduct:** Ch. 16 repeals the marital rape exception. *Effective 7/1/19.* And Spec. Sess. Ch. 5 Art. 4 contains numerous changes related to criminal sexual conduct, including:

  - Expanding the definition of "position of authority." *Effective 8/1/2019.*
  - Not requiring proof of penetration for certain first-degree sexual conduct crimes involving victims under age 13. *Effective 8/1/19.*
  - Prohibiting peace officers from engaging in sexual contact with detained individuals. *Effective 8/1/2019.*
  - Enhancing penalties for certain child pornography offenders. *Effective 8/1/2019.*
  - Eliminating the exception for touching clothed buttocks. *Effective 8/1/2019.*
  - Enabling sexual assault victims to initiate investigations through any law enforcement agency regardless of where the assault took place. *Effective 8/1/2019.*
  - Enhancing penalties for certain surreptitious intrusion offenses. *Effective 8/1/2019.*

- **Domestic abuse:** Spec. Sess. Ch. 5, Art. 2, Sec. 27 allows domestic abuse no-contact order violations to be used as evidence against an accused person. *Effective 5/31/19.*

- **Driving:** Several driving-related changes were signed into law this year, including:

  - Ch. 10 applies reckless and careless driving provisions to light rail transit operators. *Effective 8/1/19.*

- Ch. 11 prohibits drivers from using handheld communication devices. *Effective 8/1/19.*
- Ch. 35 provides that reports from qualified work zone flaggers can give peace officers probable cause to issue citations to drivers who violate work zone laws. *Effective 8/1/19.*
- Spec. Sess. Ch. 3 mandates that drivers stay out of the left lane if practicable when driving slowly (Art. 3, Sec. 39) and yield to school buses that are attempting to enter a lane from a shoulder or right turn lane (Art. 3, Sec. 40). *Effective 8/1/19.*

■ **Duty to warn:** Ch. 28 expands duty to warn requirements for counselors. *Effective 8/1/19.*

■ **Exoneration:** Spec. Sess. Ch. 5, Art. 2 amends the definition of "exonerated" in response to *Back v. State. Effective 8/1/19.*

■ **Human Rights Act:** Spec. Sess. Ch. 5, Art. 2, Sec. 9 enables a charging party and respondent to access private or nonpublic data from the Department of Human Rights when a charging party brings an action under the Human Rights Act. *Effective 8/1/19.*

■ **Landlord-tenant:** Spec. Sess. Ch. 1, Art. 6, Sec. 56-58 modifies residential lease requirements. *Effective for leases entered into or renewed on or after May 31, 2019.*

■ **Predatory offenders:** Spec. Sess. Ch. 5, Art. 5 modifies various provisions related to predatory offenders, including:

- Requiring DNA samples and fingerprints from registrants. *Effective 8/1/19.*
- Requiring notice when a registered predatory offender receives services from a home care provider. *Effective 8/1/19.*
- Modifying predatory offender criminal penalty provisions in response to *State v. Mikulak. Effective 8/1/19.*
- Requiring registration for individuals who commit (1) felony-level surreptitious intrusion offenses, or (2) registerable offenses in other states and are in Minnesota for an aggregate of over 30 days. *Effective 8/1/19. (For 2019, the 30-day aggregate period only counts days spent in the state on or after 8/1/19.)*

■ **Restrictive covenants:** Ch. 45 enables restrictive covenants to be discharged. The new law incorporates many technical changes suggested by the MSBA's Real Property Section. *Effective 8/1/19.*

■ **Retainage:** Spec. Sess. Ch. 7, Art. 9, Sec. 1 & 13 modifies retainage requirements for building and construction contracts. *Effective for agreements entered into on or after 8/1/19.*

■ **Reunification:** Ch. 14 allows parents who have lost their custody rights to petition for reunification. *Effective 8/1/19.*

■ **Vehicular operations:** Spec. Sess. Ch. 5 Art. 6 modifies several vehicular operations provisions, including:

- Mandating the loss of operating privileges for DWI test failure involving snowmobiles, boats, and ATVs. *Effective 8/1/19.*
- Expanding the prior convictions that enhance offenses to felony DWI. *Effective 8/1/19.*
- Exempting DWI offenders from vehicle forfeiture if they participate in the ignition interlock program. *Effective 8/1/19.*
- Making permanent the driver's license reinstatement diversion pilot project. *Effective 7/1/19.*

■ **Wage theft:** Spec. Sess. Ch. 7, Art. 3 enhances wage theft provisions. *Effective 8/1/19.*

Editor's note: The full text of new chapters of law noted in this article can be found at *https://www.revisor.mn.gov/laws/91.*

U.S. Supreme Court Protects Trademark Licensees

Tempnology decision eliminates bankrupt entities' power to rescind most executory contracts

By George H. Singer and Aaron E. Brown

What is the consequence when a bankrupt exercises its statutory right to reject a contract in bankruptcy? This precise question has divided the courts since 1985, when the 4th Circuit held, in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, that a patent license agreement could be rejected by the debtor in bankruptcy and thereby result in the rescission of all rights granted to the licensee under the contract.[1] Mass outrage over this decision and the impact the ruling had on licensees of intellectual property caused Congress to amend the Bankruptcy Code to allow nondebtor licensees to continue to use the contracted-for intellectual property irrespective of whether the debtor-licensor rejected the license agreement in its bankruptcy proceeding.[2] But this amendment to the Bankruptcy Code did not expansively define "intellectual property" to include all categories of proprietary rights—leaving out of the definition trademarks and other types of intellectual property.[3]

In the intervening decades, courts have heard challenges to the idea that executory contracts may be not only rejected but also rescinded when the licensor files for protection in bankruptcy—the practical effect being that the nonbreaching party is no longer able to retain any of the benefits of the breached contract and must instead get in line with every other unsecured creditor. Several courts have, however, rejected the holding in *Lubrizol* and instead concluded that a rejection of a contract acts as a breach but not as a rescission of the entire agreement.[4] Therefore, although the license agreement can be rejected and the debtor-licensor does not have to perform its own ongoing obligations under the contract, the licensor cannot rescind the contract and thereby terminate the licensee's right to use the debtor's trademark.

The United States Supreme Court, in *Mission Product Holdings, Inc. v Tempnology, LLC*,[5] has resolved a circuit split with respect to the effect of a debtor's rejection of an executory contract by concluding that rejection in bankruptcy cases breaches the agreement but does not rescind the entire contract.[6] The 8-1 decision finally brought at least a little clarity to what the International Trademark Association characterized as "the most significant unresolved legal issue in trademark licensing."

Factual background

In 2012, Tempnology entered into a license agreement with Mission Product Holdings. The license agreement allowed Mission to distribute Tempnology's "Coolcore" brand of products—which consisted of clothing and accessories designed to allow the wearer to stay cool when exercising. The agreement also gave Mission a non-exclusive license to use the Coolcore trademark both in the United States and around the world.

A little less than a year before the agreement was set to expire, Tempnology filed for bankruptcy protection. After doing so, Tempnology asked the bankruptcy court to allow it to reject the licensing agreement under Section 365(a) of the Bankruptcy Code.[7] The bankruptcy court approved the rejection of the license agreement, which as a matter of course allowed Tempnology to stop performing under the contract, and also allowed Mission to assert a pre-petition claim in the proceeding for damages relating to Tempnology's breach. Tempnology also believed that a natural consequence of rejecting the licensing agreement was that the rejection would terminate the rights it granted to Mission to sell products using the Coolcore trademarks. Accordingly, Tempnology moved for a declaratory judgment in bankruptcy court to affirm its position.

Tempnology's argument boiled down to a negative inference, with Tempnology pointing out that several subsections of Section 365 of the Bankruptcy Code compel the rejection-as-rescission theory. For example, Subsection 365(n) (the amendment Congress passed in response to the *Lubrizol* decision) allows a debtor-licensor to reject certain intellectual property licenses while allowing the non-debtor licensee to use the license so long as it makes the payments as provided by the contract. Another Subsection, 365(h), allows a debtor-landlord to reject a lease agreement but also allows the tenant to continue its tenancy and occupy the property until the lease term expires as long as the tenant pays the rent required under the contract. Because Section 365 covers these specific instances and provides what Tempnology argues is an exception to the "general" rule, Tempnology asserts that the debtor's rejection must extinguish the rights that the agreement had granted.

The bankruptcy court agreed with Tempnology's negative inference argument and concluded that Tempnology could reject and rescind the agreement, which terminated Mission's rights to use the Coolcore trademarks in connection with the sale of goods.[8] Mission appealed to the Bankruptcy Appellate Panel, and the panel reversed the lower court's finding in favor of Mission. The panel did so by following a 7th Circuit opinion from 2012, *Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC*.[9] In *Sunbeam Products*, the 7th Circuit rejected the negative-inference argument, and instead focused on Subsection (g) of Section 365, which states that rejection of the contract "constitutes a breach."[10] Moreover, outside the bankruptcy context, a breach of an agreement does not eliminate a right the contract confers on the nonbreaching party (such as the ability to continue to pay to receive the benefits of the contract). Breach is not defined in the Bankruptcy Code. Thus "breach" means the same thing under the Bankruptcy Code as it means in contract law outside the bankruptcy process.[11] This allowed the 7th Circuit to determine that the rejection-as-rescission rule for executory contracts established in *Lubrizol* was incorrect.

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After the Bankruptcy Appellate Panel's ruling, Tempnology appealed the ruling to the Court of Appeals for the 1st Circuit, which reversed the Bankruptcy Appellate Panel's decision and reinstated the bankruptcy court's decision. With the 1st Circuit's decision in *Tempnology*, a circuit conflict was created between the 7th and 1st Circuits, setting the stage for the Supreme Court to resolve an ongoing conflict that has troubled the courts for the past three decades.

Supreme Court decision

The Supreme Court ruled in favor of Mission and determined that Tempnology's rejection of the contract did *not* operate to rescind the contract. The high court concluded that the plain text of the Bankruptcy Code resolves much of this issue. Section 365(a) gives the debtor the option to "assume or reject any executory contract."[12] Importantly, rejection "constitutes a breach of [an executory][13] contract" that occurs "immediately before the date of the filing of the petition."[14] Although breach is not defined in the Bankruptcy Code, its meaning in bankruptcy is the same as outside bankruptcy.[15]

Under contract law, if a party breaches an executory contract, then the nonbreaching party has the option of retaining the benefits of the bargain (in the present case, Mission would continue to pay for use of the trademark and sue for damages for Tempnology not servicing the trademark). Or the nonbreaching party can elect to terminate the contract and sue for all damages incurred because of the breach. The bottom line, though, is that the breaching party does not have the ability based on its own breach to terminate the agreement. Rather, the nonbreaching party retains the rights it has received under the agreement. And since this is equally true in the bankruptcy context as it is in contract law generally, the Supreme Court concluded that Tempnology's breach did not terminate Mission's rights to the trademarks. Although Tempnology can stop performing its remaining ongoing obligations under the agreement (e.g., protecting the trademark) by electing to reject the agreement, the license cannot be unilaterally terminated by the breaching party. Or, put another way, declaring bankruptcy does not grant the debtor more protections than it possessed before the case was commenced.

The Supreme Court reached this conclusion in spite of Tempnology's argument, which centered around the negative-inference argument used in the lower courts and the idea that the 1988 licensing carve-out added by Congress to the statute in the shadow of *Lubrizol* created a specific intent not to protect trademarks. For its part, Congress did state that its omission of trademarks was very much intentional due to the lack of "extensive study" on the issue and the fact that "trademark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee."[16] In the end, Congress concluded that it would "postpone" a decision on trademark's inclusion under Section 365(n) and instead "allow the development of equitable treatment of [the] situation to bankruptcy courts."[17]

Be that as it may, the high court noted that the inclusion of specific exceptions in the Bankruptcy Code should be seen as a legislative response to ensure that certain congressional rights survive rejection—and not a negative inference that others do not. Or, put differently, each of the exceptions highlighted by Tempnology were responses that took place over the span of a half century, and each exception "responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges."[18] As stated by the majority, "[t]he code of course aims to make reorganization possible. But it does not permit anything and everything that might advance that goal."[19]

Conclusion

The Supreme Court in *Tempnology* provides a clear answer to the question of whether rejection's breach under Section 365 of the Bankruptcy Code also termi-

nates rights that the contract previously granted: *Rejection breaches but does not rescind the contract.*[20] And that means all the rights that would ordinarily survive a breach of contract, including rights granted by a licensor to a licensee, remain in place.[21]

Importantly, the Supreme Court in *Tempnology* made multiple references to the general rule it was now pronouncing with the caveat that "no special contract term or state law" amend it. In the future, we expect the *Tempnology* ruling to force parties to specifically address the issue of termination of executory contracts in bankruptcy and whether such a termination will rescind the contract under the contract's terms. This type of contractual provision could amend the general approach as articulated by the Supreme Court in *Tempnology* and provide the debtor party with much greater latitude. At a minimum, the broad, generalized pronouncements made by the Supreme Court regarding the effects and consequences of rejection under Section 365 may also result in nondebtor counterparties to contracts arguing that certain of their contractual rights continue notwithstanding the debtor's rejection.

As courts have noted in the past, "[t]he effect of rejection is one of the great mysteries of bankruptcy law."[22] The *Tempnology* decision confronts the conceptual question in business bankruptcy cases of how one should think about a debtor's contractual relations. The Supreme Court's ruling makes it clear that a rejection does not mean a rescission or termination, but it remains to be seen what other types of contractual rights may be able to survive a debtor's rejection. That question will likely need to work itself out in the coming years, but for now nondebtors can relish the fact that debtors will not be provided more rights in bankruptcy than they would have following a breach of contract outside of a bankruptcy.

Debtors can no longer, through rejection, stop licensees from using the licensor's trademark assets in accordance with the terms of an otherwise enforceable license agreement. As a result, debtor licensors will be required to decide whether their trademark assets are valuable enough to justify continuing to incur the costs associated with maintaining quality controls over licensees and otherwise protecting their trademarks. As the Supreme Court summarized:

> Through rejection, the debtor can escape all of its future contractual obligations, without having to pay much of anything in return. But in allowing rejection of those contractual duties, Section 365 does not grant the debtor an exemption from all the burdens that generally applicable law—whether involving contracts or trademarks—imposes on property owners…. Nor does Section 365 relieve the debtor of the need, against the backdrop of that law, to make economic decisions about preserving the estate's value—such as whether to invest the resources needed to maintain a trademark.[23] ▲

Notes

[1] 756 F.2d 1043 (4th Cir. 1985).
[2] *See* 11 U.S.C. §365(n).
[3] *See id.* §101(35A) (defining "intellectual property").
[4] *See, e.g., Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC,* 686 F.3d 372, 376-77 (7th Cir. 2012).
[5] 203 L. Ed. 2d 878 (2019).
[6] *Id.* at 881.
[7] Section 365 of the Bankruptcy Code authorizes the debtor, subject to court approval, to assume or reject any executory contract. 11 U.S.C. §365(a). The *Tempnology* case is rooted in the fact that although bankruptcy affords the bankrupt debtor a virtually unqualified right to reject contracts in order to free itself of burdensome obligations, the Bankruptcy Code contains an exception for licenses of "intellectual property" as defined in the statute. 11 U.S.C. §§101(35A), 365(n).
[8] *See In re Tempnology, LLC,* 541 B. R. 1 (Bankr. D.N.H. 2015).
[9] 686 F.3d 372, 376-77 (7th Cir. 2012).
[10] *Id.*
[11] *See Field v. Mans,* 516 U.S. 59, 69 (1995) (noting that when Congress uses terms that have accumulated settled meaning under the common law, a court should infer that Congress means to incorporate the established meaning of those terms unless a statute says otherwise).
[12] *Tempnology,* 203 L. Ed. 2d at 886.
[13] An executory contract is a contract that neither party has finished performing. *Id.* at 882
[14] 11 U.S.C. §365(g).
[15] *Id.*
[16] S. Rep. No. 100-505 at 3204 (1988).
[17] *Id.*
[18] *Tempnology,* 203 L. Ed. 2d at 889.
[19] *Id.* at 891.
[20] *Id.* at 881.
[21] *Id.*
[22] *In re Henderson,* 245 B.R. 449, 453 (Bankr. S.D.N.Y. 2000).
[23] *Tempnology,* 203 L. Ed. 2d at 891.

Landmarks in the Law

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

CRIMINAL LAW

JUDICIAL LAW

Sentencing: Consecutive sentences for attempted murder and criminal sexual conduct are a departure requiring written reasons. Appellant pleaded guilty to attempted second-degree murder and second-degree criminal sexual conduct. The district court imposed consecutive sentences and a 10-year conditional release term on both sentences. Appellant filed a motion to correct his sentence, arguing the consecutive sentences were an unlawful upward departure and the conditional release term for the attempted second-degree murder offense was not permitted by law. The district court treated the motion as a postconviction petition and dismissed the petition. The court of appeals vacated the conditional release term for the attempted murder charge but affirmed the consecutive sentences. Appellant petitioned for review solely on the consecutive sentences issue.

Under the 2007 sentencing guidelines, in effect at the time of appellant's offense, when a defendant is convicted of "multiple current offenses… concurrent sentencing is presumptive." Minn. Sent. Guidelines II.F (2007). However, under specific circumstances, consecutive sentences are "presumptive" or "permissive." A consecutive sentence "in any other case constitutes a departure…" When departing from the guidelines, the district court must provide reasons that show "identifiable, substantial, and compelling circumstances to support" the departure. Minn. Sent. Guidelines II.D (2007). Section II.F lists seven categories of convictions that are eligible for permissive consecutive sentences, including a category that provides that "[m]ultiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences found in Section VI may be sentenced consecutively to each other." Minn. Sent. Guidelines II.F.2. Section VI lists second-degree criminal sexual conduct as an offense eligible for permissive consecutive sentencing, but does not list attempted second-degree murder. The plain language of sections II.F.2 and VI does not authorize permissive consecutive sentences in this case, because only one of appellant's two felony convictions is contained on the list.

The sentences in this case were a departure and required the support of written reasons, which are absent here. Therefore, appellant's sentence was not authorized by law. The court of appeals is reversed, and the case is remanded to the district court for imposition of concurrent sentences. ***Bilbro v. State***, 927 N.W.2d 8 (Minn. 5/8/2019).

Sentencing: Multiple sentences allowed for violating OFP's no-contact provision as to multiple protected persons. An OFP prohibited appellant from contacting his former girlfriend and their minor child. He pleaded guilty to two counts of violating the OFP after meeting his former girlfriend and their child at a hotel to help them get a room. The district court sentenced him to 24 months on the first count and 12 months on the second, to be served consecutively. The issue on appeal is whether the district court erred by sentencing appellant to consecutive terms of imprisonment for two counts arising from a single behavioral incident.

Generally, a person cannot receive multiple sentences for two or more offenses that were committed as part of a single behavioral incident, unless (1) there are multiple victims and (2) the sentences do not unfairly exaggerate the criminality of the defendant's conduct. The court of appeals first concludes that there were multiple victims of appellant's conduct, rejecting appellant's argument that violating an OFP is a crime against the court, not against the protected persons. While the elements of the crime of violating an OFP do not include harm to a victim, harm to a victim need not be an element for the multiple-victim rule to apply, nor is direct harm to the victims

necessary. Indirect harm and general societal harms with some personal components are sufficient victimization for the multiple-victim rule. Violation of an OFP can be prosecuted as criminal contempt, but that does not make it a crime against only the court. It is an offense against the protected persons *and* also contempt of court.

The court also finds that the imposition of multiple sentences did not exaggerate the criminality of appellant's conduct. It is a defendant's burden to show a sentence unfairly exaggerates the criminality of his conduct. The court concludes appellant failed to satisfy his burden. The district court is affirmed. ***State v. Alger***, No. A18-1000, 2019 WL 2079356 (Minn. Ct. App. 5/13/2019).

■ **Interference with privacy: "Intent to intrude upon or interfere with" privacy when entering property of another not required.** While staying at his brother's home, appellant gave beer to his minor niece and three of her minor friends, made sexual remarks to the girls, touched one of his niece's friend's inner thighs and buttocks, and was caught on the garage roof watching his niece's friends undress. He was convicted of interference with the privacy of a minor, furnishing alcohol to a minor, and disorderly conduct. On appeal, he argues the evidence is insufficient to support his privacy interference conviction because the state did not prove he entered another's property "with the intent to intrude upon or interfere with the privacy of a member of the household." The state argued appellant forfeited this argument because it was not raised before the district court. The court of appeals held that appellant did not forfeit the argument, but affirmed his conviction. Both parties challenge the court of appeals' conclusions.

First, the Supreme Court holds that a sufficiency-of-the-evidence challenge based on a statutory interpretation argument may be raised for the first time on appeal. As such, appellant did not forfeit his sufficiency-of-the-evidence argument here.

Next, the Court considers appellant's argument that the state was required to prove that he had an intent to intrude upon the victim's privacy when he entered his brother's property, not just when he peeped at the girls undressing. The Court interprets the interference with privacy statute under which appellant was convicted, Minn. Stat. §609.746, subd. 1(e)(2), which incorporates subd. 1(a). Subdivision 1(a), lists three elements of interference with privacy: (1) enters upon another's property; (2) surreptitiously gazes, stares, or peeps in the window or any other aperture of a house or place of dwelling of another; and (3) does so with the intent to intrude upon or interfere with the privacy of a member of the household. The question is whether "does so" in clause (3) requires that an intent to intrude upon privacy be present for each of the acts set forth in clauses (1) and (2), or only those set forth in clause (2).

The Court finds the intent requirement in subdivision 1(a) ambiguous. The Court rejects a number of the parties' suggested cannons of construction as inapplicable and unhelpful in resolving the ambiguity. Instead, the Court looks to the statute's legislative history and the purpose for enacting the statute, protecting personal privacy. The Court

ultimately concludes that the intent requirement of clause (3) in subdivision 1(a) applies only to the peeping conduct described in clause (2). That is, the state was required to prove only that appellant had intent to intrude upon or interfere with the privacy of his victim when he peeped in the window while his victim was changing, not that he had this intent when he entered his brother's property. The evidence was sufficient to satisfy this element, and appellant's conviction is affirmed. ***State v. Pakhnyuk***, 926 N.W.2d 914 (Minn. 5/8/2019).

■ **Tribal authority: Tribal officer has authority to detain non-Indian suspected of violating DWI statute on reservation.** Appellant was called to the Red Lake Indian Health Service Hospital on the Red Lake reservation to pick up his brother, and the nurse who spoke with him perceived him to be intoxicated. The nurse notified Red Lake Police Department Officer Bendel, who went to the hospital and saw appellant drive up. Officer Bendel noted a number of indicia of intoxication and administered a PBT, which revealed a BAC of 0.121, and additional field sobriety tests. Officer Bendel then placed appellant in handcuffs, Mirandized him, and placed him in the back of the squad car. Officer Bendel drove appellant to the reservation boundary, where appellant was transferred to Beltrami County Deputy Roberts. Deputy Roberts also observed indicia of intoxication upon taking custody of appellant, drove him to the jail, and read the implied consent advisory. Appellant consented to a breath test, which reported a BAC of 0.11. Appellant argues he was unlawfully arrested by Officer Bendel, because Officer Bendel is not a "peace officer" for purposes of the DWI statute.

First, the court of appeals concludes a tribal police officer is not a "peace officer" under the DWI statute. Under Minn. Stat. §169A.40, subd. 1, a "peace officer" may arrest a driver if there is probable cause to believe they have committed DWI, and the term "peace officer" is specifically defined in Minn. Stat. §169A.03, subd. 18, to mean: "(1) a State Patrol officer; (2) University of Minnesota peace officer; (3) police officer of any municipality… or county; and (4) … a state conservation officer." The state argues a tribal police officer falls under section (3), because an Indian tribe can be considered a "municipality." The court rejects this argument and notes that no law or cooperative agreement exists to give Red Lake Band's police officers concurrent jurisdiction to enforce state criminal law on the Red Lake Reservation.

Next, the court determines Officer Bendel did have authority to arrest appellant for violating Minnesota's DWI statute on the Red Lake reservation. Indian tribes retain authority to prosecute Indians for violations of the tribe's criminal code that are committed on the reservation, but cannot prosecute a non-Indian for violating the tribe's criminal code if the crime is victimless or if the victim is a non-Indian. Generally, absent a special grant of jurisdiction, states may exercise jurisdiction over criminal offenses on an Indian reservation only to the extent that the federal government and a tribe may not do so. Neither the United States Supreme Court nor Minnesota's courts have considered whether a state may prosecute a non-Indian for committing a state DWI offense on an Indian reservation. However, courts in other states have held that a state does have such authority. The court notes that, because there is no particular victim of appellant's DWI offense, the state has jurisdiction to prosecute him in this case.

It follows, then, that the state may enforce its DWI laws on the Red Lake reservation if such an offense is committed by a non-Indian and, conversely, that the Red Lake police is authorized to enforce its own impaired driving laws on the reservation if such an offense is committed by an Indian. However, an officer will not immediately know whether a driver is an Indian or non-Indian, and courts have held that tribal officers may stop a driver long enough to ascertain whether they are an Indian or non-Indian. If a non-Indian, case law makes clear that the tribal officer has authority to detain a violator and deliver them to state or federal authorities.

Here, it is undisputed that Officer Bendel had probable cause to believe appellant violated Minnesota's DWI statute. He was authorized to detain appellant, drive him to the reservation boundary, and delivery him to the deputy sheriff, because of both tribal law enforcement's general power to restrain and eject those who disturb public order on the reservation and more specific power to detain a non-Indian who has committed a criminal offense that may not be prosecuted by the tribe and transport him to the proper authorities. Thus, the district court did not err in denying appellant's motion to suppress evidence. ***State v. Thompson***, No. A18-0545, 2019 WL 2079426 (Minn. Ct. App. 5/13/2019).

■ **Evidence: Court must instruct jury on proper use of relationship evidence admitted under Minn. Stat. §634.20, unless defendant objects.** At appellant's trial for first-degree burglary and fourth-degree criminal sexual conduct, the district court admitted relationship evidence under Minn. Stat. §634.20. The victim and a number of other witnesses testified that appellant repeatedly verbally and physically abused her during their relationship. Appellant did not request and the district court did not give the jury a limiting instruction as to the proper use of this evidence. On appeal, appellant argues the district court committed plain error by failing to *sua sponte* instruct the jury on the proper use of the 634.20 evidence.

At the time of appellant's appeal, case law on this issue was unclear. In *State v. Word*, 755 N.W.2d 776 (Minn. Ct. App. 2008), the court of appeals said failure to *sua sponte* instruct the jurors on the proper use of 634.20 evidence is plain error. Later, in *State v. Melanson*, 906 N.W.2d 561 (Minn. Ct. App. 2018) (decided when appellant's appeal was still pending), the court of appeals held "the district court did not plainly err in failing to provide a limiting instruction *sua sponte* to the jury regarding the admission of [634.20] evidence." Given these conflicting opinions, the law at the time of appellate review of appellant's case did not clearly require a district court to *sua sponte* instruct the jurors on the proper use of 634.20 evidence. As such, appellant did not establish an error that was plain.

The Supreme Court takes this opportunity to clarify the law and adopts a new rule, applicable to future cases: "[W]hen a district court admits relationship evidence under Minn. Stat. § 634.20, over a defendant's objection that the evidence does not satisfy section 634.20, the court must *sua sponte* instruct the jurors on the proper use of such evidence, unless the defendant objects to the instruction by the court." ***State v. Zinski***, 927 N.W.2d 272 (Minn. 5/15/2019).

■ **Medical marijuana: Transfer of cannabis oil from one wholly owned subsidiary of parent company to another is a transfer to another "person."** Vireo Health, LLC (VH) wholly owns two subsidiary companies: Minnesota Medical Solutions, LLC (MMS) and Vireo Health of New York, LLC (VHNY). MMS is one of two companies in Minnesota allowed to manufacture and distribute medical marijuana, while VHNY does the same in New York. To

resolve a supply issue with VHNY, the chief security officer and chief medical officer of MMS transferred 5.6 kilograms of cannabis oil from MMS to VHNY and falsified inventory records for both MMS and VHNY. The MMS officers were charged with intentionally transferring medical cannabis to a person other than allowed by law, in violation of Minn. Stat. §152.33, subd. 1.

The district court certified this question, an issue of first impression: Are two wholly owned sister subsidiaries of the same parent company legally one "person," such that a transfer of medical marijuana from one to another does not constitute a transfer to another "person"? The court of appeals holds that sister wholly owned subsidiaries of the same parent corporation are separate "persons" under the plain language of Minn. Stat. §152.33, subd. 1.

Section 152.33, subd. 1, is not ambiguous and includes limited liability companies in the definition of "person." Section 152.33, subd. 1, states that "a manufacturer or an agent of a manufacturer who intentionally transfers medical cannabis to a person other than a patient, a registered designated caregiver or… a parent or legal guardian of a patient is guilty of a felony…" Section 152.01, subd. 13, defines a "person" as "every individual, copartnership, corporation or association of one or more individual." With this definition of "person," section 152.33, subd. 1, unambiguously prohibits the transfer of medical marijuana to an unauthorized limited liability company. There is no statutory exemption for the transfer to a separate corporation with shared ownership. ***State v. Owens***, No. A18-1800, 2019 WL 2167730 (Minn. Ct. App. 5/20/2019).

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■ **Jury instructions; pretext not required.** A jury verdict rejecting a Richfield police officer's age discrimination and retaliation lawsuit was upheld after remand. The Minnesota Court of Appeals affirmed the jury instructions given by a Hennepin County District Court despite the absence of reference to pretext, which the claimant argued was required. It reasoned that the charge properly directed the jury to determine whether the officer's prior lawsuits against the city were a "motivating factor" in his discharge, which the jury declined to do. ***Peterson v. City of Richfield***, 2019 WL 1510703 (Minn. Ct. App. 4/8/2019) (unpublished).

■ **Military discrimination; USERRA claim denied.** A returning military veteran whose request for reinstatement to his prior job was refused lost his claim of discrimination under the federal Uniformed Services Employment and Re-employment Rights Act (USERRA), 38 U.S.C. §4301, *et seq.* The Minnesota Court of Appeals, after another remand, affirmed dismissal of the lawsuit on grounds that the veteran refused several "comparable" job offers after his position had been eliminated and there was insufficient evidence that his military status was a substantial or "motivating" reason for the job elimination. ***Breaker v. Bemidji State University,*** 2019 WL 1510687 (8th Cir. 4/8/2019) (unpublished).

■ **Defamation *per se*; harm presumed.** A defamation *per se* lawsuit by a 911 dispatch supervisor in Scott County due to alleged false statements made by two former co-workers during a background check was allowed to proceed. The appellate court reversed and remanded the lower court's decision dismissing the lawsuit on grounds that harm to reputation is presumed for defamation *per se*, while upholding dismissal of one of the employee defendants, and directing the lower court to determine whether the other employee's statements were made with actionable malice. ***Sames v. Scott County,*** 2019 WL 1510948 (8th Cir. 4/8/2019) (unpublished).

■ **Pension benefits; reinstatement rejected**. A request by a widow for pension benefits following the death of her school teacher husband was rejected by the appellate court, which upheld a decision by the Teacher's Retirement Association (TRA). The TRA was not negligent in erroneously informing the widow that the benefits would continue for her life, and equitable or promissory estoppel was inapplicable because the organization's recantation of its incorrect representation was not arbitrary or capricious. ***In re petition of Kuehne,*** 2019 WL 1983370 (8th Cir. 5/6/2019) (unpublished).

■ **Workers' compensation; no standing for auto insurer.** Following precedent, the Minnesota Court of Appeals rejected a claim by an employer's automobile insurance carrier against the employer's workers compensation insurer for wrongfully denying an employee's claim for injuries incurred in a work-related accident. Affirming a ruling of the Hennepin County District Court, the appellate tribunal held that the auto insurer lacked standing under existing case law. ***Integrity Insurance Co. v. First Dakota Indemnity Co.,*** 2019 WL 2079474 (8th Cir. 2/22/2019) (unpublished).

■ **Unemployment compensation; four applicants lose.** A quartet of employees in a variety of circumstances recently lost unemployment compensation claims decided by the Minnesota Court of Appeals.

The violation of a company's attendance policy constituted disqualifying "misconduct." Upon remand, the repeated denial of benefits was deemed not arbitrary or capricious. ***Choronzy v. Viracon, Inc.,*** 2019 WL1510691 (Minn. Ct. App. 2/25/2019) (unpublished).

Another "misconduct" ruling was upheld against an employee who was fired after testing positive for drugs following a prior failed drug test. ***Thaemert v. Electrolux Home Appliances***, 2019 WL 1510838 (8th Cir. 4/8/2019) (unpublished).

An executive chef at a restaurant in Minnetonka was denied benefits after she quit because a former employee made her feel unsafe, and she claimed the facility failed to implement recommendations of a private security consultant. She was not entitled to benefits because an "average, reasonable employee" would not have resigned under these circumstances. ***Sarazin v. Ruth Stricker's Fitness Unlimited, Inc.,*** 2019 WL 2079480 (Minn. Ct. App. 5/13/2019) (unpublished).

Failure to appeal an adverse determination of ineligibility for benefits within the 20-day time period barred benefits. An employee's untimely appeal precluded the court from considering the merits of the application. ***Westphal v. Friedges Landscaping, Inc.,*** 2019 WL 1510868 (Minn. Ct. App. 4/18/2019) (unpublished).

LOOKING AHEAD

■ **Harassment.** Cutting-edge issues concerning sex harassment law are to be addressed by the Minnesota Supreme Court, which in May granted the claimant's petition for review of an appellate court decision this winter affirming summary judgment by the Hennepin County District Court in ***Kenneh v. Homeward***

Bound, Inc., A18-0174 (5/28/2019). The Court will be deciding whether to maintain the "severe" or "pervasive" standard and the quantum of evidence required to sustain a harassment claim under the Human Rights Act. A hearing will probably take place later this year and a ruling rendered in 2020 on a case that has attracted considerable attention and *amici* participation.

LEGISLATION

2019 legislative session. Few employment laws emerged from the recently concluded 2019 session of the Minnesota Legislature.

But one important measure was included within the Omnibus Jobs & Economic Development Finance Bill, creating what has been characterized as one of the toughest "wage theft" measures in the country. The law, which includes several changes in labor and industry policy in the state's unemployment insurance system, makes it a felony for an employer to fail to pay employees more than $1,000 in earned wages, if there is "intent to defraud" on the part of the employer or for retaliating against an employee who complains about claimed wages shortages. It also provides $4 million to the Department of Labor and Industry to enforce the measure, along with the enforcement wing of the Attorney General's office.

The effort to wipe out the $15 minimum per hour wage ordinance of Minneapolis and St. Paul with a retroactive pre-emption bill, advanced by Republicans in the Senate, was not enacted. A major priority of the Minnesota Chamber of Commerce, which claimed that specific rules on wages could not be enacted on a municipal basis, was fended off by DFLers and left out of the omnibus bill.

Two other workplace measures, both of them supported by DFLers and opposed by Republicans, failed to make it through session. One would have established a mini-version of the federal Family & Medical Leave Act (FMLA), providing a 12-week paid leave of absence for employees for family medical purposes. The other bill would have expanded the existing "severe" or "pervasive" standard for sexual harassment claims with a lesser one of offensive behavior.

At the federal level, the U.S. House of Representatives, on largely partisan grounds, approved a sweeping measure promoted by Democrats entitled the "Equality Act," an expansion formerly known as EDNA (End Discrimination Now Act). It would prohibit workplace discrimination on grounds of sexual orientation or gender identification, as well as barring discrimination in education, housing, and jury service on these grounds. The bill, however, is dormant in the Republican-controlled Senate and unlikely to be enacted in the current session of Congress.

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ENVIRONMENTAL LAW

JUDICIAL LAW

Court of appeals reverses PUC's Line 3 final environmental impact statement adequacy determination. The Minnesota Court of Appeals issued an opinion overturning the Minnesota Public Utilities Commission's (PUC) adequacy determination of the final environmental impact statement (FEIS) for the proposed Line 3 pipeline project being undertaken by Enbridge Energy due to its failure to address potentially significant issues raised during the scoping and public comment period.

The court of appeals consolidated three appeals made by different environmental organizations and tribal bands (plaintiffs), all of which challenged the decision by the PUC determining that the FEIS for the proposed Line 3 pipeline was adequate. The court of appeals grouped the plaintiffs' arguments into three categories: (1) the identification of alternatives in the FEIS; (2) alleged "danger signals" indicating that the PUC failed to take a "hard look" at the adequacy question; and (3) the analysis of environmental impacts in the FEIS.

In addressing the first category, the court found that the PUC's adequacy determination regarding the need for and purpose of the Line 3 project was proper. The court found that the FEIS adequately defined the need for and purpose of the Line 3 project, and did not err by (a) considering the project proposer's objective when defining the purpose of and need for the project, or (b) excluding from consideration alternatives that would not meet that objective. In addition, the court found that plaintiffs had demonstrated no improprieties in the PUC's determination that Enbridge's "no-action" alternative was adequately addressed in the FEIS.

In addressing the second category, the court found that the alleged "danger signals" argued by plaintiffs did not indicate that the PUC failed to take a "hard look" at the adequacy of the FEIS. The court rejected plaintiffs' argument that the PUC's decision to seek assistance from the Minnesota Department of Commerce's Energy Environmental Review and Analysis division (DOC-EERA) in preparing the FEIS—instead of from the MN Department of Natural Resources (DNR) or the MPCA—was a "danger signal"; the DOC, the court noted, is statutorily obligated to provide technical expertise and other assistance to the PUC in relation to pipeline-routing matters. Additionally, the DOC-EERA designated the DNR and the MPCA as assisting agencies, which further negated plaintiff's argument that the PUC's actions constituted "danger signals."

Finally, in addressing the third category, the court found that although the FEIS adequately analyzed potential impacts to greenhouse gas emissions, potential impacts on historic and cultural resources, the relative impacts of alternative routes, and cumulative potential impacts, it failed to address the issue of how an oil spill from Line 3 would impact Lake Superior and its watershed. Concerns about how an oil spill would impact Lake Superior and its watershed were raised both during the scoping and in public comments on the draft EIS. The PUC's actions in failing to consider this critical aspect of the environmental analysis, the court held, were arbitrary and capricious. Accordingly, the court reversed the PUC's adequacy decision and remanded for further proceedings. ***In re Applications of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border***, Nos. A18-1283, A-18-1291, A18-1292, (Minn. Ct. App., 6/3/2019).

ADMINISTRATIVE ACTION

EPA releases draft interim guidance on PFAS cleanup. On 4/25/2019, the EPA released draft interim guidance addressing groundwater contaminated with PFAS (per- and polyfluoroalkyl substances) in cleanups required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the Resource Conservation and Recovery Act (RCRA). The document was open for public comment until June 10.

PFAS are man-made chemicals—over 5,000 of which have been identified—that were produced for a variety of industries and products, including surface treatments for soil/stain/water resistance; surface treatments of textiles, paper, and metals; and for specialized applications, such as fire suppression for hydrocarbon fires. These chemicals do not easily break down and accumulate over time in the environment and in humans. Major sources of PFAS include fire training and response sites, landfills, and wastewater treatment processes.

The draft interim guidance provides a recommended screening value of 40 parts per trillion (ppt) for two of the most common PFAS, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). The screening value is based on EPA's 2016 lifetime drinking water health advisory (HA) for PFOA and PFOS of 70 ppt in groundwater that is a current or potential source of drinking water. EPA applied a Hazard Quotient (HQ) of .1 to arrive at the recommended screening value.

In addition, the draft interim guidance recommends—in circumstances where a groundwater cleanup program is addressing PFOA- and/or PFOS-contaminated groundwater—using the HA of 70 ppt for the combined concentration of PFOA and PFOS as the preliminary remediation goal (PRG). However, where state or tribal laws or regulations qualify as Applicable or Relevant and Appropriate Requirements (ARARs) for PFOA or PFOS, the guidance clarifies that those standards should be used to develop PRGs. Seventeen states have diverse rules to address PFAS contamination. The Minnesota Department of Health has set health-based values of 35 ppt for PFOA and 15 ppt for PFOS.

LEGISLATIVE ACTION

Minnesota Legislature recap: State bee, water transfers, sugar beets, and more. The 2019 special session of the Minnesota Legislature resulted in several notable environmental bills signed into law by Gov. Tim Walz. These include, in no particular order:

Water transfer rule. The Minnesota Pollution Control Agency (MPCA) has for years allowed water transfers—the conveyance of water from one water body to another without an intervening use—without requiring an NPDES permit, relying on the U.S. Environmental Protection Agency (EPA) "water transfer rule" in 40 C.F.R. §122.3(i), which exempts water transfers from the Clean Water Act's NPDES permit requirement. However, the Minnesota Court of Appeals, in *West McDonald Lake Ass'n v. Minn. Dep't of Natural Res.*, 899 N.W.2d 832 (Minn. Ct. App. 2017), held that the federal water-transfer exemption had not been incorporated by reference in Minnesota's NPDES program, pursuant to Minn. R. 7001.1030, and did not apply in Minnesota. The Legislature addressed the situation by adopting a new part (b) to Minn. Stat. §115.03, subd. 5, which provides: "An activity that conveys or connects waters of the state without subjecting the transferred water to intervening industrial, municipal, or commercial use does not require a national pollutant discharge elimination system permit. This exemption does not apply to pollutants introduced by the activity itself to the water being transferred."

Remote beet piling sites. The Legislature added subdivision 5e to Minn. Stat. §115.03, providing that MPCA may not require a sugar beet company that has a current NPDES or SDS system permit to install an engineered liner for a stormwater runoff pond at remote beet piling sites unless "a risk assessment confirms that there is significant impact on groundwater and that an engineered liner is necessary to prevent, control, or abate water pollution."

State bee. The Legislature added Minn. Stat. §1.1465, which proclaims, "The rusty patched bumble bee, *Bombus affinis*, is the official bee of the state of Minnesota."

Mandatory WQS peer review. The Legislature amended Minn. Stat. §115.035, which previously provided for optional peer review of new water quality standards, to mandate that "[e]very new or revised numeric water quality standard *must* be supported by a technical support document that provides the scientific basis for the proposed standard and that has undergone external, scientific peer review" (emphasis added). The amendments also specify that the purpose of the external peer review process is "to evaluate whether the technical support document and proposed standard are based on sound scientific knowledge, methods, and practices," and require that reviews must be conducted according to the guidance in the most recent edition of the EPA's Peer Review Handbook. No external peer review is required when MPCA is simply adopting, without change, an EPA numeric criterion that has been through peer review at the federal level.

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FEDERAL PRACTICE

JUDICIAL LAW

CAFA; removal; third-party defendant. A divided Supreme Court held 5-4 that 28 U.S.C. §1453(b), the Class Action Fairness Act's removal provision, does not permit removal by a third-party counterclaim defendant, because the term "defendant" in that provision and 28 U.S.C. §1441(a), the general removal statute, refer only to the party sued by the original plaintiff.

Justice Alito, on behalf of four dissenters, argued that the majority's distinction between defendants and third-party defendants read an "irrational distinction into both removal laws." ***Home Depot U.S.A., Inc. v. Jackson***, ___ S. Ct. ___ (2019).

Title VII; failure to exhaust administrative remedies; jurisdiction. The Supreme Court unanimously held that Title VII's charge-filing requirement is a nonjurisdictional claim processing rule that can be waived, rather than a jurisdictional rule not subject to waiver. ***Fort Bend County v. Davis***, ___ S. Ct. ___ (2019).

Order compelling arbitration; stay of action; appealability. Where a district court granted the defendant's motion to compel arbitration, left it to the parties to agree on an arbitrator, and stayed the action pending completion of the arbitration, the 8th Circuit found that it lacked jurisdiction over the defendant's interlocutory appeal, rejecting the defendant's argument that the stay was a final appealable order under 9 U.S.C.

§16(a)(3); that the district court had effectively denied the motion to compel arbitration, thereby creating appellate jurisdiction under 9 U.S.C. §16(a)(1)(B); or that the district court's order was appealable under the collateral order doctrine. ***Webb v. Farmers of N. Am., Inc.***, ___ F.3d ___ (8th Cir. 2019).

■ **Trademark; presumption of irreparable harm; appealability of stay order.** Affirming the denial of a request for a preliminary injunction in a trademark action, the 8th Circuit found that it was "unclear" whether the presumption of irreparable harm in trademark cases had "survived" recent Supreme Court decisions holding that the movant has the burden to demonstrate that irreparable harm is "likely" absent an injunction, and noted decisions from other circuits that have "abandoned" that presumption.

The 8th Circuit also found that it lacked jurisdiction over an appeal from the district court's order staying litigation pending resolution of related proceedings, where the stay order did not "effectively end the litigation." ***Phyllis Schlafly Revocable Trust v. Cori***, ___ F.3d ___ (8th Cir. 2019).

■ **Limited liability company; motion to remand denied; jurisdictional discovery.** Where the plaintiff limited liability company commenced an action in the Minnesota courts, defendants removed the action on the basis of diversity jurisdiction but did not allege the citizenship of the plaintiff, the plaintiff moved to remand (arguing that the defendants had not met their burden to establish its citizenship), and the defendants sought leave to conduct jurisdictional discovery to allow them to determine the citizenship of the members of the LLC, Judge Magnuson denied the motion to remand without prejudice and found that the defendants were "entitled" to jurisdictional discovery. ***MN Airlines, LLC v. Global Aviation Servs. USA, Inc.***, 2019 WL 2296882 (D. Minn. 5/30/2019).

■ **Punitive damages; Minn. Stat. §549.191; Fed. R. Civ. P. 15.** While ultimately denying the plaintiff's motion to add claims for punitive damages, Magistrate Judge Menendez concluded that the motion was governed by Fed. R. Civ. P. 15 rather than Minn. Stat. §549.191. ***In re: McNeilus Mfg. Explosion Coor. Litig.***, 2019 WL 2387110 (D. Minn. 6/6/2019).

■ **28 U.S.C. §1441(b)(2); forum defendant rule; motion to remand denied.** Where the plaintiffs commenced their action against a number of defendants, including persons domiciled in Minnesota, in the California state courts, the defendants removed the action to the Central District of California, and the California federal court transferred the case to the District of Minnesota, Judge Magnuson denied the plaintiffs' motion to remand premised on the so-called forum defendant rule, finding that the rule applies only at the time of removal, and that the removal was proper where no defendant was domiciled in California. ***Bruni Media LLC v. AAPM Media Group, LLC***, 2019 WL 2192781 (D. Minn. 5/21/2019).

■ **Motion to certify question to the Minnesota Supreme Court denied.** While acknowledging disagreement between the District of Minnesota and the Minnesota Court of Appeals on an issue of central importance to the case, Magistrate Judge Menendez denied defendants' motion to certify, finding that resolution of the issue was "premature," and that, having granted review of the court of appeals' decision, the Minnesota Supreme Court was likely to resolve the issue even in the absence of a certified question. ***In re: McNeilus Mfg. Explosion Coor. Litig.***, 2019 WL 2151703 (D. Minn. 5/17/2019).

■ **28 U.S.C. §1367(c)(3); supplemental jurisdiction; order to show cause.** Where the plaintiff commenced an eight-count action in the Minnesota courts and the defendants removed based on a presence of a single federal claim, Judge Nelson granted the defendants' motion for judgment on the pleadings on seven of the eight claims, including the federal claim, and then ordered the parties to show cause why the remaining claim should not be remanded. The defendants urged the court to retain jurisdiction because the case had been pending for nine months and discovery was underway. Judge Nelson remanded the remaining claim, finding that any discovery could be used in the remanded action, and that the "default rule" required remand. ***CH Bus Sales, Inc. v. Geiger***, 2019 WL 2337449 (D. Minn. 6/3/2019).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Board of Immigration Appeals fails to apply *Sanchez-Sosa* factors to remand request.** The 8th Circuit Court of Appeals remanded the case to the Board of Immigration Appeals to explain why it found the petitioner's inclusion of a U visa (nonimmigrant visa for victims of certain crimes) filing receipt in his remand request was of no consequence, when *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012), suggests a completed application should pause the removal process. ***Caballero-Martinez v. Barr***, Nos. 17-2044, 18-1198 (8th Cir. 4/3/2019). *https://ecf.ca8.uscourts.gov/opndir/19/04/172044P.pdf*

■ **Asylum denial to Guatemalan woman abused by domestic partner.** The 8th Circuit Court of Appeals upheld the Board of Immigration Appeals' denial of asylum to the petitioner, finding a reasonable adjudicator would not be compelled to find that the Guatemalan government was and would be unwilling or unable to protect the petitioner against her daughter's abusive father. "Marroquin has conceded that the government was willing to protect her and substantial evidence supports the conclusion that the Guatemalan government was not unable to provide protection." ***Marroquin v. Barr***, No. 17-3780 (8th Cir. 3/29/2019). *https://ecf.ca8.uscourts.gov/opndir/19/03/173780P.pdf*

■ **"Salvadoran female heads of households" does not constitute a social group.** The 8th Circuit Court of Appeals held the Board of Immigration Appeals did not err when ruling the petitioner failed to prove past persecution on account of her membership in the social group, "Salvadoran female heads of households," finding the group lacked social distinction and particularity. The court cites approvingly the board's rationale that "The respondent's proposed group is too broad and amorphous to meet the particularity requirement. The respondent did not show that 'head of household' has a commonly accepted definition with Salvadoran society, nor is such condition necessarily immutable... The respondent also did not establish that such group is socially distinct." ***De Guevara v. Barr***, No. 18-1080 (8th Cir. 3/21/2019). *https://ecf.ca8.uscourts.gov/opndir/19/03/181080P.pdf*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Trademark: SCOTUS holds trademark-licensor's bankruptcy does not revoke licensee's rights. The U.S. Supreme Court recently held that a trademark licensor's bankruptcy did not revoke the licensee's rights to continue use of the trademarks. Tempnology granted Mission Product Holdings a non-exclusive license to use certain trademarks in the distribution of Tempnology products. Tempnology later filed for bankruptcy and asked the bankruptcy court to allow it to reject (i.e., terminate) the contract under §365(a) of the Bankruptcy Code, thereby ending Mission's right to use the trademark. The bankruptcy court approved the rejection, meaning Tempnology could stop performing under the contract and Mission could no longer use the licensed trademarks. The bankruptcy appellate panel relied on a decision from the 7th Circuit in reversing. However, the 1st Circuit reinstated the bankruptcy court's decision to terminate the contract. The Supreme Court heard the case to resolve the circuit split and determine the effect of a debtor-licensor's rejection of a contract under §365(a). The Court relied on the Bankruptcy Code's text, which says a rejection is a breach. "Breach" is not a specialized bankruptcy term, so it means the same thing in the Code as it does in contract law outside of bankruptcy. In non-bankruptcy contract law, after a breach, the injured party can continue performance or refuse to perform, but the breaching party cannot unilaterally revoke the rights created under the contract. Therefore, "the licensee can continue to do whatever the license authorizes" following the rejection of a licensing agreement. ***Mission Product Holdings, Inc. v. Tempnology, LLC.***, No. 17-1657, 2019 WL 2166392 (U.S. 5/20/2019).

Copyright, trade secrets: Failure to demonstrate likelihood of success fatal to motion for preliminary injunction. Judge Magnuson recently denied a preliminary injunction for copyright infringement and trade-secret misappropriation because plaintiff failed to prove likelihood of success. Under the terms of a license agreement, defendants (a group of payroll processors) were able to use MPAY's software for payroll systems. MPAY sued defendants for providing copyrighted source code to unauthorized third parties and for trade-secret misappropriation. MPAY moved for a preliminary injunction. The court first determined MPAY's claims were unlikely to succeed. MPAY claimed that defendants' permissible use of the software did not include providing the source code to third parties, but the license agreement rebutted this claim. The license agreement also allowed defendants to use the source code to develop enhanced software products, "which must necessarily entail providing the source code to others." Therefore, MPAY had not shown a likelihood of success. The court next determined that regardless of whether irreparable harm is presumed in copyright and trade-secret infringement claims, it could not presume irreparable harm in this case because MPAY failed to establish a likelihood of success. Finally, given that MPAY did not demonstrate a likelihood of success and did not establish irreparable harm, the public interest and the balance of equities did not require an injunction. ***MPAY Inc. v. Erie Custom Computer Applications***, No. 19-704 (PAM/BRT), 2019 WL 2099843 (D. Minn. 5/14/2019).

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TAX LAW

JUDICIAL LAW

Pipeline valuation dispute continues. Two decisions have been issued in the valuation dispute between Northern Natural Gas and the commissioner. In the first (2019 WL 2479445), the tax court granted the parties' joint motion to correct clerical errors and further granted in part the commission's motion to amend. In the second, the court issued amended findings of fact, conclusions of law, order for judgment, and an amended memorandum, which supersede in their entirety the court's 1/30/2019 findings of fact, conclusions of law, and order for judgment.

The court summarized the issue as "the market value of the Minnesota portion of the Northern Natural Gas pipeline system, which stretches from the Permian Basin in Texas to the Upper Peninsula of Michigan." Trial on the matter was heard in August 2018 and in January, the court filed the findings of fact, conclusions of law, and order for judgment noted above. In that earlier decision, the court "concluded that the

Commissioner had overvalued Northern's pipeline operating system as of both January 2, 2015, and January 2, 2016, and ordered that the apportionable value of the Minnesota portion of the system be reduced as of both valuation dates."

In the June decision, the court first corrected a clerical error, and then ruled on the parties' motions for rehearing or amendment. The commissioner's challenge to the court's finding that accumulated deferred income taxes were a source of external obsolescence (by comparing the rate of return NNG earned during the years at issue to the after-tax rate of return allowed by the Federal Energy Regulatory Commission (FERC)) was successful. The commissioner argued that the comparison was based on an erroneous figure for the FERC-allowed rate of return. The commissioner also succeeded in its argument that a finding as to the amount spent by NNG on pipeline safety and integrity was unsupported by the record. All other motions or portions thereof were denied. ***N. Nat. Gas Co. v. Comm'r***, Nos. 8864-R, 2019 WL 2479445 and 2019 WL 2490771 (Minn. Tax 6/4/2019).

■ **Unopposed motion for protective order granted.** In a sales and use tax dispute, the commissioner motioned for a protective order to preclude the taxpayer from introducing expert witness testimony in relation to a summary judgment motion. The commissioner argued that the expert was not timely identified under the governing scheduling order. Because the taxpayer filed no response to the commissioner's motion, the court granted it as unopposed. ***Inthermo, Inc. v. Comm'r***, No. 9143-R, 2019 WL 2402287 (Minn. Tax 5/28/2019).

■ **Motion to intervene granted to protect non-public data.** 1300 Nicollet L.L.C. owns a downtown hotel. The owners' written discovery request included a request for "tenancy, income, and expense information" about other downtown Minneapolis hotels. This information had been submitted by the other hotels to the assessor. Such information is denominated "assessor's data" and is classified as private or nonpublic by the Minnesota Government Data Practices Act (MGDPA). The county resisted discovery and the owners then sent to the other hotels a notice that the owners intended to compel the production of the private/nonpublic data. Sometime after receipt of the notice, Ashford Foshay LP, the entity that owns one of the hotels whose private data 1300 Nicollet sought, moved to intervene as a matter of right. Ashford Foshay noted its desire to protect its private propriety financial information. Finding the intervention both "warranted and unopposed," the court granted the motion. ***1300 Nicollet, L.L.C. v. Cty. of Hennepin***, No. 27-CV-17-06284, 2019 WL 2213904 (Minn. Tax 5/15/2019).

■ **Assessor's estimate understates market value.** At issue in this dispute was the valuation, for several tax years, of a "big-box" store along Interstate 35 in Chisago County. In a thorough opinion, the tax court discussed and applied the sales comparison approach to valuation as well as the cost approach. Although testimony was taken concerning the income capitalization approach, the court concluded that "the record does not contain data from which to develop a reliable market rent estimate for the subject property" and therefore did not rely on income capitalization to reach its decision. The court similarly deemed the sales comparison approach "minimal reliable" due to an absence of good comparable sales. In the end, the court relied most heavily on the cost approach, noting that the recency of the building improvements rendered the building "relatively new construction" on each assessment date. For the three years at issue, the court increased the assessed value by between $308,500 and $324,200. ***Shopko Stores Operating Co., LLC v. Chisago Co.***, No. 13-CV-15-852, 2019 WL 2077463 (Minn. Tax Ct. 5/6/2019).

■ **Wages paid to workers holding H-2A and J-1 visas subject to unemployment-insurance taxation.** A fruit and vegetable farm in Foley, Minnesota must pay just over $150,000 in unemployment insurance tax after the Minnesota Supreme Court agreed with the lower court that the wages of certain of the farm's employees are not exempt from the tax. The employer, Svihel Vegetable Farm, conceded that if the same work had been performed by United States citizens or by permanent residents, the tax would be due. The farm argued, though, that since the visa holders were not "in the employ of" the farm as that phrase is defined in federal statute, and the work was not "performed by a farm by an employee" as defined in the CFR, the wages paid to visa holders were exempt. 26 USC §3121(g)(1); 26 C.F.R. § 31.3121(g)-1(b)(1). The high court was not persuaded by the farm's parsing of the Code and Regulations. Minnesota unemployment insurance tax does not incorporate the definitions cited by the farm, the Court held. Instead, "the Legislature imported only the definition of 'agricultural labor' into Minnesota's unemployment-insurance tax statute… that some visa workers' wages are exempt from federal unemployment-insurance taxation is unconnected to the question of whether those wages are covered wages for the purpose of Minnesota's unemployment-insurance tax statute." ***Svihel Vegetable Farm, Inc. v. Dep't of Employment & Econ. Dev.***, No. A17-1250, ___N.W.2d___, 2019 WL 2439726 (Minn. 6/12/2019).

■ **Matter of first impression: Taxpayers may claim EITC based on Medicaid waiver payment that was excluded from gross income.** The Earned Income Tax Credit (EITC) provides a benefit for working people with low to moderate income. To qualify for the credit, taxpayers must have "earned income." In this dispute, the tax court held that income that a taxpayer has excluded from gross income as Medicaid waiver payments under IRS Notice 2014-7 nonetheless qualifies as "earned income" for EITC and ACTC (additional child tax credit) purposes.

The taxpayers' successful argument hinged on the amount of deference the tax court owed to the agency's interpretation of the Code as advanced through a notice. Notice 2014-7 announced that the Service would consider "difficulty of care payments" (the type of payment at issue here) to be excludable from gross income under 131(c). However, as the court noted, "these payments clearly do not meet the plain statutory definition found in the Code." The court was persuaded by the taxpayer's argument that the secretary had no statutory, regulatory, or judicial authority that classifies Medicaid waiver payments as not includible in gross income under section 131. The IRS cannot, through a subregulatory notice, reclassify their otherwise "earned income" as unearned for purposes of determining tax credit eligibility. ***Feigh v. Comm'r***, No. 20163-17., 2019 WL 2124923 (T.C. 5/15/2019).

■ **"Love offerings" from church members to pastor taxable income, cannot be characterized as gifts.** Gifts are excluded from income. Salary, of course is not. Payments received by employees or service providers in a typical workplace are often easy to categorize. As Judge Holmes notes in this opinion, however,

"the relationship between a pastor and his congregation is not typically viewed as commercial, which makes the line between gifts and compensation blurrier than in less sacred places." Despite this line-drawing difficulty, the tax court reasoned that because the donations "were made by congregants who meant to keep Reverend Brown preaching where he is" and there was a congregation-wide expectation to make such payments in a routinized, highly structured program, the payments were income, and could not be excluded as gifts. Also important to the court's holding was the ratio of "gifts" to reported "salary." In this instance, the clergy member reported a "salary" of about $25,000 but "gifts" of nearly $60,000. Quoting language from an earlier clergy-gift case, the court "struggle[d] to see how such large sums of money can be gifts, …'[w]hen comparatively so much money flows to a person from people for whom he provides services (even intangible ones), and to whom he expects to provide services in the future, we find it to be income and not gifts.'" ***Brown v. Comm'r***, T.C.M. (RIA) 2019-069 (T.C. 2019) (quoting *Felton v. Comm'r*, T.C. Memo. 2018-168).

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TORTS & INSURANCE

JUDICIAL LAW

Insurance: First-party bad faith. Plaintiff was injured in an automobile collision, sustaining a whiplash injury that resulted in daily headaches. Plaintiff was not at fault and was covered by an underinsured-motorist (UIM) policy issued by defendant insurer. After exhausting other treatments, plaintiff began receiving periodic Botox injections, which reduced her daily headaches by 50%. Plaintiff's treating neurologist believed that the injuries were permanent and that plaintiff would need Botox injections every three to four months to manage her chronic headaches. A second neurologist concurred in the treatment plan. Plaintiff then notified defendant insurer that her past and future medical expenses would likely exceed the limits of the at-fault driver's insurance, and that she would likely seek UIM coverage. Later, plaintiff sent defendant a detailed written settlement demand that requested payment of her UIM policy limits, which enclosed extensive copies of her medical records. Defendant assigned a claims adjuster to plaintiff's claim and made several requests for medical documentation over the next 11 months but did not accept or deny the UIM coverage demand. Approximately 19 months after her initial submission, plaintiff sent defendant a letter seeking an update on the status of the claim and repeated her request for the UIM policy limits. Defendant did not respond.

Plaintiff then filed suit seeking to recover UIM benefits. The jury returned a unanimous verdict awarding damages of over $1.4 million, including more than $900,000 for past and future medical expenses. As a result, defendant paid the policy limits of $250,000. The district court then granted Peterson leave to amend her complaint to add a bad-faith claim pursuant to Minn. Stat. § 604.18. After a bench trial, the district court found that plaintiff proved her claim by showing that defendant lacked a reasonable basis to deny her claim and that defendant either knew of, or acted with reckless disregard of, the lack of a reasonable basis for denying the claim. The district court awarded $100,000 plus $97,940.50 in attorney fees.

The Minnesota Court of Appeals affirmed. The court began by finding the phrase "absence of a reasonable basis" for denying the benefits of the insurance policy found in Minn. Stat. § 604.18, subd. 2(a)(1) to be ambiguous as the parties identified more than one reasonable interpretation. So the court looked to legislative history surrounding the statute, finding that the Legislature attempted to adopt the "*Anderson* standard" that is found in Wisconsin. As a result, the court held that "pursuant to Minn. Stat. §604.18, subd. 2(a), an insurer must conduct a reasonable investigation and fairly evaluate the results to have a reasonable basis for denying an insured's first-party insurance-benefits claim." The court went on to note: "If, after a reasonable investigation and fair evaluation, a claim is fairly debatable, an insurer does not act in bad faith by denying the claim." Because the district court applied the correct standard and sufficient evidence supported the judgment, it was affirmed. ***Peterson v. W. Nat'l Ins. Co.***, No. A18-1081 (Minn. Ct. App. 6/3/2019). *https://mn.gov/law-library-stat/archive/ctappub/2019/OPa181081-060319.pdf*

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MASTELLAR

Alex Mastellar has been elected shareholder of Rinke Noonan. Mastellar concentrates his practice in agricultural, environmental, and construction litigation.


BERQUIST

Evan Berquist has been promoted from associate to member of the firm at Cozen O'Connor. Berquist is a business attorney and advises clients on a wide range of transactional matters, with a focus on mergers and acquisitions.


OCAMPO

Edgar R. Ocampo has joined Fredrikson & Byron as an associate in the employment & labor, litigation, and workers' compensation & OSHA groups. Prior to joining the firm, he managed and consulted in the hospitality industry for 15 years and served in the United States Marine Corps.


KORSMAN

Daniel J. Korsman was made a partner at Boulay, PLLP. Korsman provides valuation and financial transactional support services.


STELLPFLUG

The Minnesota Supreme Court has appointed Janet G. Stellpflug to serve on the State Board of Legal Certification. Stellpflug is a partner with the law firm DeWitt LLP. The State Board of Legal Certification oversees the process by which lawyers obtain legal certification. Since 1993, Janet has been certified as a Civil Trial Specialist by the Minnesota State Bar Association.


BIRD

Danielle Bird has joined Bird, Jacobsen & Stevens, PC. Bird will focus her practice on workers' compensation and civil litigation and will be based primarily out of the firm's new Bloomington office.

Ronald J. Schutz has been elected chair of the executive board at Robins Kaplan LLP and Anne Lockner has been chosen by her partners to serve as one of the board's seven elected members. Schutz is a 21-year member of the firm's executive board and a fellow of the American College of Trial Lawyers. Lockner is a partner in the firm's business litigation group.


TCHIDA


THOMPSON


BOYLE


AUNE DEACH


GLIEDMAN


WALDRON

Bryant D. Tchida and Nathan J. Thompson have joined Moss & Barnett, A Professional Association. Tchida joins the litigation, financial services, and business law teams. Thompson joins the business law, closely held businesses, mergers and acquisitions, securities, and wealth preservation and estate planning teams. The firm also announced that John P. Boyle and Jana Aune Deach were elected to three-year terms as member of the board of directors and Beth A. Gliedman and Jeffrey S. Waldron were elected shareholders of the firm.

Soren Paul Petrek, David Buelow, and Thomas R. Anderson III announced their new firm Bridge Litigators, offering defense, family, and personal injury legal services. Together they have decades of experience in all aspects of criminal and civil litigation.

Jeremy D. Sosna has joined Littler as a shareholder in its Minneapolis office. He first practiced as an attorney at Littler from 1998 to 2003. In addition to his litigation experience, he counsels clients on employment law.


HARTRANFT

Matt Hartranft has joined Lommen Abdo, focusing his practice on corporate law.

In Memoriam

Thomas J. Lyons passed away on May 27, 2019 at the age of 78. He was a past president of the Minnesota Trial Lawyers Association and founder of the Minnesota chapter of the Inns of Court. He practiced consumer law with his son and was an advocate for the poor, the weak, and the disenfranchised.

James P. Nelson passed away May 17, 2019. He practiced law in St. Paul for his entire professional life. He served on his church council and the Mahtomedi School Board as well as many other charitable events. He did pro bono legal work for very worthy causes.

Judge Thomas M. Murphy of West St. Paul passed away on June 11, 2019 at age 84. He practiced law in West St. Paul until 1985, when he was appointed to be a judge of the 1st Judicial District Court.

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WE CURRENTLY have an opportunity available for an experienced Counsel to join our Corporate Legal team at our Corporate Headquarters located at 605 Highway 169 North, Plymouth, MN. This position is responsible for the management of routine and complex non-claim legal issues, including policy drafting as well as providing legal advice, representation and research. Bar admission required and 6+ years of legal experience with six or more years specializing in the analysis of commercial property or casualty insurance products. Experience in drafting property and casualty insurance coverage forms preferred. Private practice experience with coverage litigation preferred. Travel may be required - less than 20%. For a complete job description and to apply: www.onebeacon.com/careers - Refer to Job #975BR

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HENNEPIN COUNTY District Court is pleased to announce the opening of a Judicial Referee position in our Family Court. This is a full-time opportunity for a MN-licensed attorney with at least five years of experience as a practicing Attorney or Judicial Officer. To review the full description and to apply, please follow the Career Opportunities link on the Minnesota Judicial Branch's website: www.mncourts.gov/careers

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ESTATE PLANNING Attorney. Rinke Noonan, a comprehensive law firm of about 30 attorneys, located in St. Cloud, Minnesota, is seeking an estate planning attorney to join our sophisticated estate planning department. The successful candidate will have immediate client contact and responsibility in a supportive, collaborative environment. The position will entail general estate planning, business succession planning, and incorporate elements of real estate and business law, as well as general tax planning. Apply at https://www.rinke-noonan.com/careers/. Your inquiry will be held completely confidential.

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

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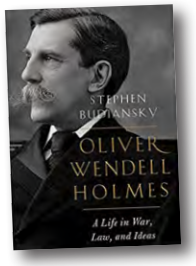
Stephen Budiansky
Oliver Wendell Holmes: A Life in War, Law, and Ideas

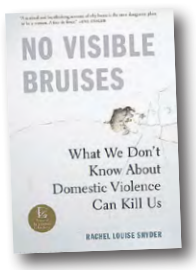


(W.W. Norton & Company, $29.95)

Oliver Wendell Holmes twice escaped death as a young Union officer in the Civil War when musket balls missed his heart and spinal cord by a fraction of an inch at the Battles of Ball's Bluff and Antietam. He lived ever after with unwavering moral courage, unremitting scorn for dogma, and an insatiable intellectual curiosity. Named to the Supreme Court by Theodore Roosevelt at age 61, he served for nearly three decades, writing a series of famous, eloquent, and often dissenting opinions that would prove prophetic in securing freedom of speech, protecting the rights of criminal defendants, and ending the Court's reactionary resistance to social and economic reforms. Drawing on many previously unpublished letters and records, Stephen Budiansky's definitive biography offers the fullest portrait yet of this pivotal American figure.

Rachel Louise Snyder
No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us

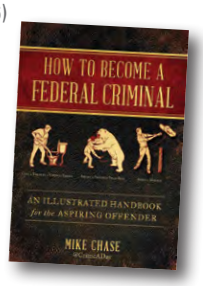
(Bloomsbury Publishing, $28)



An award-winning journalist's intimate investigation of the true scope of domestic violence, revealing how the roots of America's most pressing social crises are buried in abuse that happens behind closed doors. In America, domestic violence accounts for 15 percent of all violent crime, and yet it remains locked in silence. In *No Visible Bruises*, journalist Rachel Louise Snyder frames an urgent and immersive account of the scale of domestic violence in our country around key stories that explode the common myths—that if things were bad enough, victims would just leave; that a violent person cannot become nonviolent; that shelter is an adequate response; and, most insidiously, that violence inside the home is a private matter, sealed from the public sphere and disconnected from other forms of violence.

Mike Chase
How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender

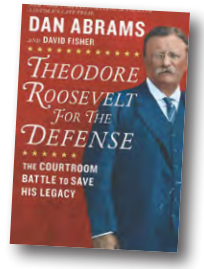
(Atria Books, $26)



A hilarious, entertaining, and illuminating compendium of the most bizarre ways you might become a federal criminal in America—from mailing a mongoose to selling Swiss cheese without enough holes—written and illustrated by the creator of the wildly popular @CrimeADay Twitter account. Have you ever clogged a toilet in a national forest? That could get you six months in federal prison. Written a letter to a pirate? You might be looking at three years in the slammer. Leaving the country with too many nickels, drinking a beer on a bicycle in a national park, or importing a pregnant polar bear are all very real crimes, and this riotously funny, ridiculously entertaining, and fully illustrated book shows how just about anyone can become—or may already be—a federal criminal.

Dan Abrams and David Fisher
Theodore Roosevelt for the Defense: The Courtroom Battle to Save His Legacy

(Hanover Square Press, $27.99)

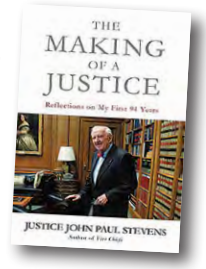


"No more dramatic courtroom scene has ever been enacted," reported the *Syracuse* Herald on May 22, 1915 as it covered "the greatest libel suit in history," a battle fought between former President Theodore Roosevelt and the leader of the Republican party. Roosevelt, the boisterous and mostly beloved legendary American hero, had accused his former friend and ally turned rival, William Barnes, of political corruption. The furious Barnes responded by suing Roosevelt for an enormous sum that could have financially devastated him. The spectacle of Roosevelt defending himself in a lawsuit captured the imagination of the nation, and more than 50 newspapers sent reporters to cover the trial. Accounts from inside and outside the courtroom combined with excerpts from the trial transcript give us Roosevelt in his own words and serve as the heart of *Theodore Roosevelt for the Defense*.

Justice John Paul Stevens
The Making of a Justice: Reflections on My First 94 Years

(Little, Brown and Company, $35)

When Justice John Paul Stevens retired from the Supreme Court of the United States in 2010, he left a legacy of service unequaled in the history of the Court. During his 34-year tenure, Justice Stevens was a prolific writer, authoring in total more than 1000 opinions. In this book, John Paul Stevens recounts his extraordinary life, offering an intimate and illuminating account of his service on the nation's highest court.



With stories of growing up in Chicago, his work as a naval traffic analyst at Pearl Harbor during World War II, and his early days in private practice, as well as a behind-the-scenes look at some of the most important Supreme Court decisions over the last four decades, *The Making of a Justice* offers a warm and fascinating account of Justice Stevens' unique and transformative American life. This comprehensive memoir is a must read for those trying to better understand our country and the Constitution.

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WEDNESDAY, AUGUST 28
Introduction to Legal Research
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