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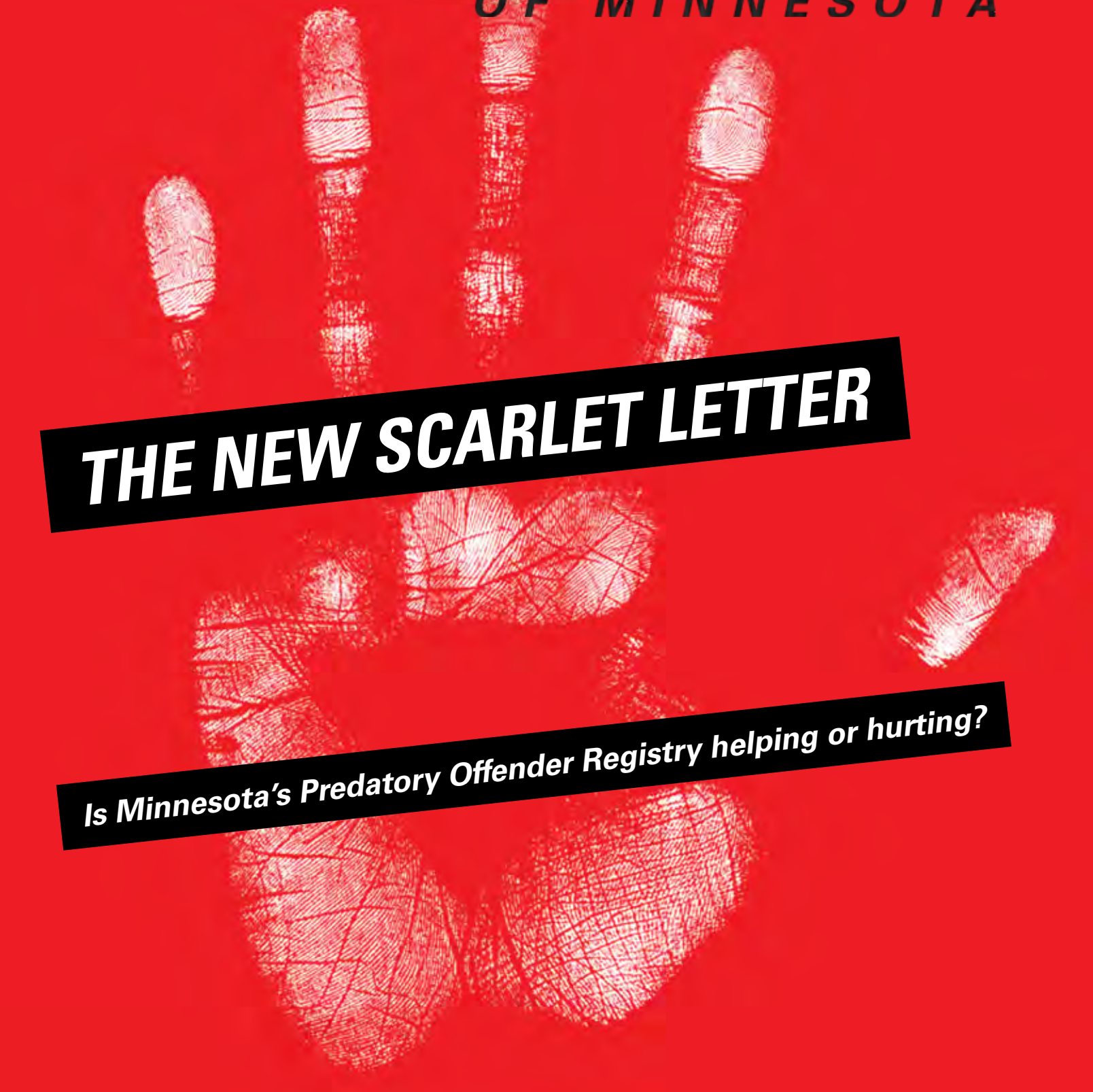
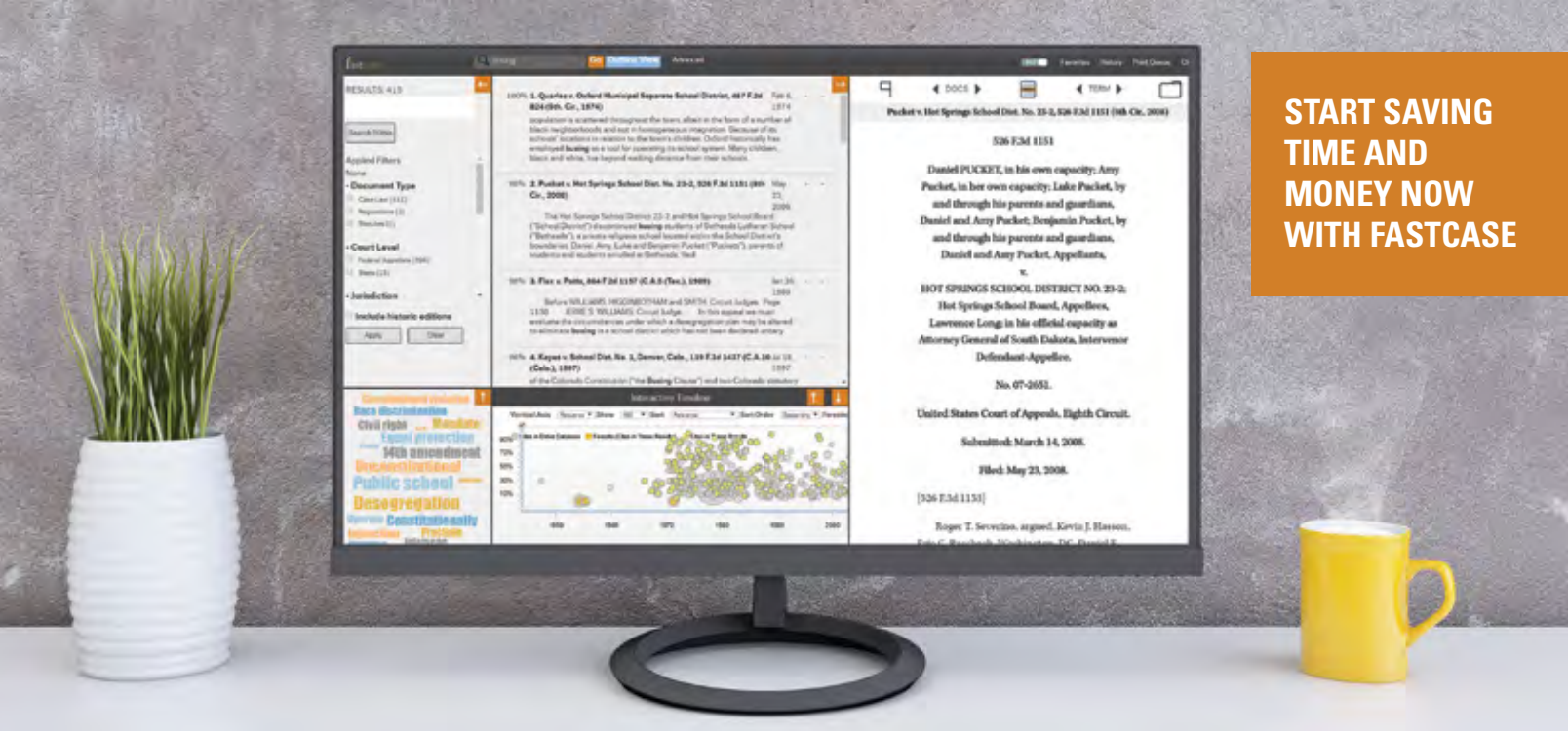
Bench&Bar OF MINNESOTA



THE NEW SCARLET LETTER

Is Minnesota's Predatory Offender Registry helping or hurting?



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THE NEW SCARLET LETTER

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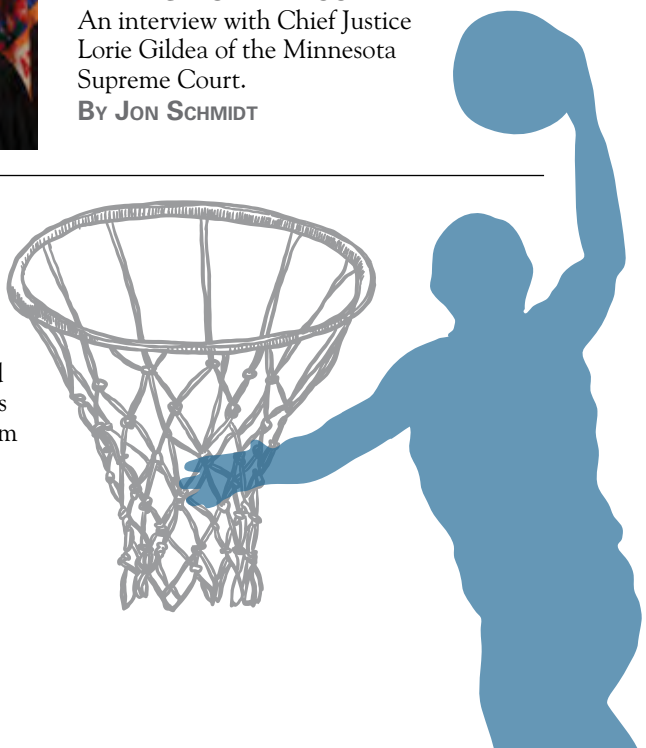

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WE'D LIKE TO HEAR FROM YOU: To query potential articles for Bench & Bar, or to pass along your comments on matters related to the profession, the MSBA, or this magazine, write to editor Steve Perry at sperry@mnbar.org or at the postal address above.

Pro Bono Publico

Bertrand Russell once marveled at "the peculiar sway that numbers have over reality." Numbers can be like lampposts, of course—sometimes used for light, other times for support. Here are some numbers that should concern us all. Put simply, we have a problem.

We have 295 state court trial judges. They handle an average of over 1,250,000 case filings each year. Our courts face a tsunami of self-represented litigants. They either cannot afford a lawyer or don't think they need one. Coupled with this is a vast disparity in representation—one side represented by counsel, the other not—especially in housing, family, and debt-related matters.

Our 260 civil legal aid staff lawyers handle 30,000 cases per year—closing over 46,000 total cases with the help of private *pro bono* lawyers. Our civil legal aid lawyers are the lowest paid of all public service lawyers. At the same time, some private firm lawyers and inside counsel are taking home record-setting compensation—no doubt coupled with record-setting individual and institutional generosity—and billing at record-setting hourly rates. This dynamic cannot be far from the minds of those of us who are trying to deal with these challenges, and who oversee our currently-self-regulated profession.

TOM NELSON is a partner at Stinson LLP (formerly Leonard, Street and Deinard). He is a past president of the Hennepin County Bar Association.

Despite noble and creative pilots and programs, our system of providing legal services isn't working. The numbers don't lie, and we can't let them just lie there.

So here is another number: "6.1." As in Rule 6.1. As in *Pro Bono Publico*. The Rule says: "Every lawyer has a professional responsibility to provide legal services to those unable to pay." "[A]t least 50 hours" per year. "In addition," the Rule says that we should "voluntarily contribute financial support to organizations that provide legal services to persons of limited means."

How much? Well, the 2005 Comments explain: "A lawyer may discharge the *pro bono* responsibility by providing financial support to organizations providing free legal services to persons of limited means… reasonably equivalent to the value of the hours of service that would have otherwise been provided."

Notably, the Comments point out that participation in *pro bono* service "can be one of the most rewarding experiences in the life of a lawyer." A welcome rung on the ladder to wellness.

Saying it doesn't make it so. So here are a few glimpses of what might be around the corner.

Mandatory *Pro Bono* Reporting?

Since the 1990s, the MSBA has supported some form of "mandatory reporting" of our *pro bono* hours and financial contributions. Our view has been rebuffed twice by the Minnesota Supreme Court. My view? The time has come. Remember, if you don't provide information to people, they'll make it up—and it won't be flattering. Think of it as yet another leadership opportunity for Minnesota. We were the first state to require mandatory CLE (and, by the way, its accompanying reporting of CLE credits). We wouldn't be the first to require mandatory reporting of *pro bono*, but this modest step would still put us in the vanguard. Reporting might even motivate us to produce better numbers to report, helping our public image.

If we resist reporting, we should be prepared to weather the storm of suspicion about whether we actually satisfy our duty as "public citizens," as called for by the Preamble to our rules. This goes to the question of *whether* we should do this, not *how*. On that front, there seems to be little disagreement—confidential (no need to "sound a trumpet"); easy; maybe like CLE, once every three years; with even a reported "zero" being a sufficient report. We should be able to figure out the *how* of reporting once we agree (or are told) about the *should*.

Context and Innovation

Heads up: There is a not-so-subtle discussion percolating about regulation—the idea being that self-regulation of the "practice" of lawyering might best be left to the lawyers, but that regulation of the "industry" that delivers legal services should involve others. We ignore this discussion at our peril.

Even corporate America is re-thinking itself these days. The recent statement from the Business Roundtable (made up of many of our current or wished-for clients) on the "Purpose of a Corporation" sets something of a new table—confirming a corporation's essential commitment to our communities at large. It wouldn't surprise me to see corporate executives and General Counsel issuing a new form of the "Call to Action," similar to the one that took hold in our Diversity and Inclusion discussions—meaning, a new call for lawyers to engage in *pro bono* legal services in order to be considered for new or continuing work.

Or consider this. What if firm leadership said to its significant billers: "You've had a great run and a great year with Company ABC. Go tell them this: Our firm would like to give 10% of this past year's collected billings to the civil legal aid organization of the company's choice in the company's community." Lawyerly tithing. It's being done by some.

None of which will solve everything, of course; but let's not make the perfect the enemy of the good. We can and should do more. ▲

Event: Wellbeing in the Legal Profession

On January 13, the MSBA, Hennepin County Bar Association, Ramsey County Bar Association, and Lawyers Concerned for Lawyers will be offering a half-day event, *Answering the Call: The Path to Wellbeing in the Legal Profession*, at the Science Museum of Minnesota in St. Paul. The CLE program features a candid discussion about the current state of attorney wellness, followed by a meditation and a reception. Justice David Lillehaug and the presidents of the three bar associations will kick off an afternoon of programming. Sessions include a keynote by US District Court Judge Donovan Frank, a panel discussion about stressors in the practice of law and their negative impact, and ED Talks on the ABCs of wellness, neuroscience of wellness, and lawyer competence and ethics. MSBA CEO Cheryl Dalby notes, "It is essential for the profession to work from within to create environments for attorneys to thrive in, to address the stress of practicing law, and to eliminate the stigma that can come from asking for support. We encourage all of our members to join us for this important discussion about the state of attorney wellness." Register by Jan. 9 at *mnbar.org/cle-events*.

North Star LAWYER

It's North Star Lawyer certification time again

Now is the time for all MSBA members who meet the program requirements to certify their 2019 pro bono service, including members who previously participated in the program. Please don't delay—the deadline for submitting your information is March 13, 2020. Full program information and the certification form can be found at *www.mnbar.org/NorthStar*.

The North Star Lawyers program recognizes MSBA members who provide essential volunteer legal services to Minnesota's low-income residents. It celebrates the work of members who meet or exceed 50 hours of pro bono service in a calendar year, as set forth in Rule 6.1(a), (b)(1) and (b)(2) of our state's Rules of Professional Conduct.

In 2018, 934 MSBA members were certified as North Star Lawyers. North Star Lawyers provided over 110,500 total volunteer hours of pro bono service with an estimated value of $27,600,000. The MSBA recognizes North Star Lawyers with paid advertisements, a listing on its website, and in press releases to news outlets statewide; they also receive a special electronic logo suitable for website, email, or other usage.

If you have questions about the North Star Lawyers program, please contact MSBA Public Service Director Steve Marchese (*smarchese@mnbars.org* or 612-278-6308).

BLE seeks comment on foreign-educated lawyer petition

The Minnesota Board of Law Examiners welcomes comments regarding whether the BLE should propose amendments to the Rules for Admission to the Bar allowing foreign-educated graduates a method to apply for admission in Minnesota. Deadline for comment and requests to present are due to BLE December 31, 2019. Visit *bit.ly/2XL8pe8* for more details

The MSBA's Rules of Professional Conduct Committee will be discussing this issue at their December meeting. In particular, the Board is interested in comments regarding:

- whether lawyers admitted and practicing in another U.S. jurisdiction should be permitted to sit for the bar in Minnesota (as is required by 10 U.S. jurisdictions);
- whether to require licensure in the foreign country in which the lawyer obtained their law degree (as is required by 16 U.S. jurisdictions);
- whether an educational equivalency determination should be made, and if so, how to accomplish that with the Board's limited resources (as is required by 18 U.S. jurisdictions); and
- what impact, if any, an LL.M. should have on the determination since there is no body that accredits LL.M. degrees (five U.S. jurisdictions consider completion of an LL.M. program sufficient to permit applicants to sit for the examination without meeting additional requirements).

MEET THE STAFF

Steve Marchese leads the MSBA's statewide pro bono efforts, provides professional support for the MSBA's Access to Justice Committee and related initiatives, and develops projects that increase member capacity to meet new and emerging legal needs, such as the Minnesota Unbundled Law Project. A New York native who has called Minnesota home since 2001, Steve joined the MSBA in 2009, is an avid classic car enthusiast and serves as an elected board member on the St. Paul School Board.

Minnesota American Indian Bar Association

23RD ANNUAL SCHOLARSHIP GOLF TOURNAMENT

The tournament was held on July 18, 2019 at The Meadows at Mystic Lake. All proceeds went to the MAIBA Scholarship Fund, which funds scholarships to American Indian law students attending law school in Minnesota.

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Your ethical duty of supervision

As 2019 comes to a close, I would like to focus on your ethical duties as a supervisor. Attorneys sometimes supervise other attorneys and frequently supervise non-attorney staff. While professional ethics certainly govern your personal behavior and choices, the rules also place upon you specific duties related to the ethical conduct of others. This is an important responsibility, and worth a review.

Who is covered?

Rule 5.1 sets the stage. The rule places specific responsibilities on principals in a legal organization, whether it's a law firm, legal services organization, law department, or government agency.[1] The rule covers not only a managing partner, but extends (depending on the form of the organization) to all members of a partnership or association and all shareholders. And don't be distracted by the rule's use of the term "law firm." By definition, the rule covers other forms of legal organizations beyond law firms.[2] Partners or managers are also not the only ones with obligations regarding the acts of others. The responsibilities also apply to anyone having direct supervisory authority over another lawyer.[3] Whether a lawyer has supervisory authority over another in a particular circumstances is often a question of fact.

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

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More broadly, Rule 5.3 extends the same responsibilities to nonlawyers who are employed, retained, or associated with the lawyer.[4] Nonlawyers are not bound by the ethics rules (nor subject to discipline by the Office of Lawyers Professional Responsibility), but partners, shareholders, managers, and direct supervisors are charged with the responsibility to ensure any nonlawyer with whom they associate acts in a manner compatible with the lawyer's ethics. This covers a broad range of people: Secretaries, paralegals, investigators, law clerks, document management providers, and other vendors that assist the lawyer in the rendition of legal services are all covered, whether they are employees, independent contractors, or third-party vendors.[5] If you have direct supervisory or managerial authority over another lawyer or nonlawyer personnel, you have an ethical obligation regarding those individuals, whether or not they are employed by your organization.

EXAMPLE:

An attorney failed to supervise or establish adequate measures to prevent his long-time office manager from stealing client and firm funds. The attorney received a lengthy suspension.

What is the responsibility?

The responsibility is tailored to the role. For those in a management or ownership role, the responsibility is to "make reasonable efforts to ensure that the [organization] has in effect measures giving reasonable assurance that all lawyers in the [organization] conform to the Rules of Professional Conduct."[6] Thus, the responsibility is to establish measures reasonably tailored to "assure" that the lawyers in the organization comply with the rules. With respect to nonlawyers, the responsibility of managers and owners is, similarly, to "make reasonable efforts to ensure that the [organization] has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligation of the lawyer."[7]

For direct supervisors, the responsibility is more direct: Make reasonable efforts to ensure that the lawyer's conduct complies with the ethics rules and the nonlawyer's conduct is compatible with the lawyer's ethics.[8] While one may rely generally on continuing legal education in professional ethics, particularly for lawyers, such education alone is insufficient to satisfy the managerial obligation to establish effective measures. Nor does it alleviate direct supervisory responsibilities.

How do you discharge this responsibility?

The text of the rule itself provides no guidance on how to discharge this responsibility but the comments to Rules 5.1 and 5.3 do, and they're worth a read. Because the measures will vary depending on size and the nature of practice, one size does not fit all. For most legal organizations, areas to address likely include:

- conflicts;
- deadlines and diligence;
- communication;
- accounting for client funds and property;
- protection of confidential information;
- marketing practices;
- contact with represented parties;
- security of technology;
- the unauthorized practice of law;
- lawyer impairment;
- reporting violations; and
- harassment and discrimination.

Policies and procedures should exist on these topics specific to lawyers and nonlawyers, as well as any other ethics topic relevant to your area of practice.[9] As with all effective compliance programs, effective measures do not stop with policies and procedures.

You need to include training for lawyers and nonlawyers, and an audit or review program to understand effectiveness. Only then, it seems to me, can you feel confident that you have "measures" in place to "assure" compliance, which is what the rule requires. I also recommend that you spend time thinking about the unique challenges in your environment or practice that affect supervision. For example, do many people work remotely or have flex schedules? Do your policies and procedures work if people are not physically present?

As the comments also note, you should think about the ethical atmosphere of the organization—the "tone at the top."[10] If you asked the lawyers and staff in your organization, would they say compliance with professional ethics is important and expected, and they know how to do their jobs in a compliant manner? Or are you relying on people to figure it out? Do you have competing polices or practices that are antithetical to compliance with the ethics rules? Do people know where to turn for answers when questions arise? Do you have confidential "up-the-ladder" reporting avenues where violations or close questions can be addressed? Are there meaningful consequences for noncompliance, depending on the seriousness of the issue, or is everyone just happy the Office of Lawyers Professional Responsibility didn't find out about it? If noncompliant conduct was found, did you look to see if there were others instances of noncompliance that point to a systemic issue, or did you just address the issue in isolation?

What will work best for your legal organization will depend on many factors, but asking yourself these questions will help you determine whether you have "measures" in place to "assure" compliance.

When is professional discipline imposed?

As the comment to Rule 5.1 makes clear, vicarious civil and criminal liability for the acts of others is beyond the scope of the ethics rules.[11] Nor are you strictly liable for the conduct of others. However, you can be professionally liable under these rules in basically three ways: (1) You are a covered attorney who did not have reasonable measures in place, or make reasonable efforts appropriate to your role, and misconduct occurred; (2) you order or, with knowledge of the conduct, ratify the misconduct; or (3) you are a covered attorney, you know of the misconduct at a time when consequences can be avoided or mitigated, and you fail to take remedial action.[12]

Lawyers have been disciplined recently under Rule 5.1 and Rule 5.3, both publicly and privately. For example, a solo attorney failed to put adequate measures in place to prohibit and detect the fact that her paralegal was forging her name on numerous pleadings and falsely notarizing affidavits of service in multiple cases.[13] The attorney received a public reprimand. In another case, an attorney failed to supervise or establish adequate measures to prevent his long-time office manager from stealing client and firm funds.[14] The attorney received a lengthy suspension. In both instances, trusted employees engaged in conduct wholly incompatible with the lawyer's professional responsibilities, and the lawyer was disciplined.

Finally, do not forget your obligation under Rule 8.3, MRPC. If you know that another lawyer has committed a violation of the rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer, you have an ethical obligation to report to this Office.

Conclusion

Because even the most trusted of personnel can engage in wrongdoing, the ethics rules focus on effective compliance measures—something you no doubt talk to your business clients about frequently. If you have good policies and procedures, train your lawyers and nonlawyers, and audit your organization's compliance with your policies and procedures, you will likely deter noncompliance in the first place or detect it before it poses a professional issue for you. As 2020 starts, resolve to review your organization's compliance with Rules 5.1 and 5.3, MRPC. Please call the ethics advisory line at 651-296-3952 if you have questions about your ethical responsibilities. ▲

Notes

[1] Rule 5.1(a), Minnesota Rules of Professional Conduct (MRPC).
[2] Rule 1.0(d), MRPC; Rule 5.1(a), Cmt. [1].
[3] Rule 5.1(b), MRPC.
[4] Rule 5.3(a) and 5.3(b), MRPC.
[5] Rule 5.3, MRPC, Cmt. [2] [3].
[6] Rule 5.1(a), MRPC.
[7] Rule 5.3(a), MRPC.
[8] Rule 5.1(b), MRPC; Rule 5.3(b), MRPC.
[9] For example, ABA Opinion 467 provides specific guidance to prosecutors on their Rule 5.1 and 5.3 obligations. *See* ABA Formal Opinion 467 (9/8/2014).
[10] Rule 5.1, MRPC, Cmt. [3].
[11] Rule 5.3, MRPC, Cmt. [6].
[12] Rule 5.1, MRPC, Cmt. [6]; Rule 5.1(c), MRPC; Rule 5.3(c), MRPC.
[13] *In re Naros*, 928 N.W.2d 915 (Minn. 2019).
[14] *In re Rosso*, 919 N.W.2d 477 (Minn. 2018).

Doxxing redux: The trouble with opting out

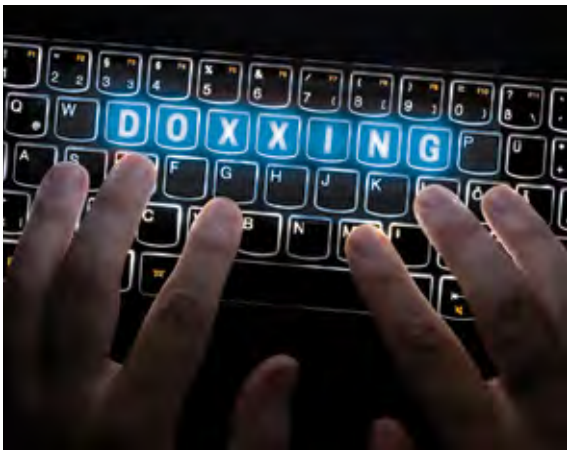
Back in the spring of 2017, I wrote an article on doxxing and the types of reseller websites that often make it possible ("Your personal data – or is it?" May/June 2017). Doxxing is generally understood as the buying, selling, gathering, or other sharing of personal information online, often with malicious intent. With this private information in hand, individuals can threaten, stalk, harass, or damage the reputations of others. Members of the legal community are at particular risk of having their information accessed and used without their knowledge or direct consent.

As I described in my first article on the topic, personally identifiable information (PII) reseller websites make obtaining this information pretty easy. By visiting one of numerous sites, a person can find a wide range of private information that includes an individual's address, phone number, criminal history, and employment situation, not to mention a slew of details about their spouse (past or present), children, and family members.

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.

I think most people would be surprised to learn the full scope of what's lurking about them on the web. In response to the risks, people are often encouraged to complete opt-out requests through these sites. I have previously provided a short listing. The problem with opting out? Well, there's more than one.

First, the sheer number of these sites makes it difficult if not impossible to fully monitor your personal information. It's one thing to continuously opt out of one, two, or three PII reseller websites. It's another thing entirely to pursue removing your information from a dozen or more sites, only to have new sites of which you're unaware pop up within a month. And if the information you're concerned about isn't on one of these sites, it could very well be available elsewhere.



Second, these websites typically make it as difficult as possible to remove your information. There are opt-out pages (the links to which frequently change) for many of these sites. But they often require lots of additional information from the user to remove their details. For example, the website Public Records 360 "will only process opt out requests received by online submission, or fax, and no request will be processed without complete information (i.e., name, address and date of birth)." Official identification such as a driver's license or passport is typically required; otherwise someone can send a notarized identification verification form.[1] Providing this information also poses a security risk, and users are often left wondering if it's worth the additional hassle and uncertainty.

Third, while some of these sites mention their turn-around time for removing your information once a request has been sent, others do not. In addition to monitoring a number of sites—the number of which changes continually as new sites are brought to our attention—users also have to follow up to make sure the requests that they have made are being honored. If a site doesn't give a turn-around time, users will have to continuously check up on whether their information has actually been taken down from the site. These issues are only a small fraction of the larger problems that arise in trying to control your online presence.

While PII reseller websites are important culprits in disseminating the types of information that make doxxing possible, it is also important to remember the variety of data brokers to whom we routinely hand over private information. Earlier this year, Vermont passed the country's first law seeking to manage "data brokers," those companies that routinely collect and store our info. According to the Office of the Vermont Attorney General, "The new law requires Data Brokers to register with the Secretary of State annually and maintain certain minimum data security standards."[2] The law requires that data breaches be reported, that certain data security standards be enacted, and that opt-out information be provided if applicable.[3] The types of data brokers that this law affects include websites like Spokeo, but they also include a wide range of larger and smaller data gatherers.

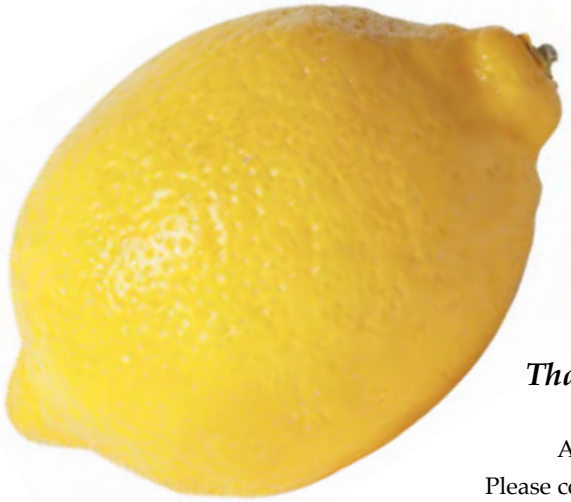
While securing compliance with laws like Vermont's may prove difficult in the long term, the growing pressure for their passage certainly highlights growing consumer demand for transparency and control of PII. Hopefully, a growing body of legislation will assist with the lack of clarity that characterizes the buying, selling, and availability of our data online. ▲

Notes

[1] *https://www.publicrecords360.com/optout.html*

[2] *https://ago.vermont.gov/blog/2018/12/13/attorney-generals-office-issues-guidance-on-data-broker-regulations/*

[3] *https://ago.vermont.gov/wp-content/uploads/2018/12/2018-12-11-VT-Data-Broker-Regulation-Guidance.pdf*



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Start now, law students: Narrow your legal interests early

It's not long into a legal career before new lawyers begin fielding questions from prospective and current law students. Why did you decide to go into law? How did you get interested in your field? What experiences do you find most valuable in your job? Many law students test the waters of various career paths and practice areas until well into their 2L and 3L years—or worse, until after graduation. If we probe them about their fields of interest, it is not uncommon to hear, "I don't know yet, maybe public service, or family law, but even compliance sounds interesting." If we have the opportunity to interject, we should highlight the multitude of benefits that arise from narrowing their legal interests as early as possible.

Develop a distinctive reputation

Between bar festivities, informal coffees, social gatherings, and legal internships, a typical law student holds hundreds of brief, but potentially memorable, conversations throughout the three arduous years of school. There is a world of difference between meeting an indistinguishable law student and the next white-collar criminal defense attorney or an aspiring IP lawyer.

SCOTT FULKS works with businesses, families, and individuals on a blend of employment-based and family-based immigration matters at Deckert & Van Loh, P.A. in Maple Grove, Minnesota. He uses his bilingual skills and cultural awareness to guide immigrants through an increasingly complex and unstable U.S. immigration system.

SCOTT@DECKERTVANLOH.COM

I made the decision early during my 1L year that—while personally open to a fortuitous shift—I would communicate my unwavering desire to practice immigration law to everyone I met. From federal judges to solo shops, my mantra was immigration. It wasn't long before I noticed that practicing attorneys began to associate me with the field of immigration and non-attorneys would have no shortage of questions to ask regarding this politically prominent practice. What most law students fail to recognize is that indecision regarding one's practice interest overlooks the fruit that a legal reputation yields and suggests a lack of passion necessary to survive the first years of practice.

> As opportunities arise, we should encourage current law students to become that person who first comes to mind among the local bar in a particular practice area.

Expertise will reap dividends later

There are numerous approaches a law student may take to set their semester schedule. Some could choose classes taught by a well-regarded professor or ones that pique an intellectual interest. Others may select classes that are conducive to a work schedule or are purportedly less demanding as stamina wanes. A more strategic choice may be to select courses that provide a framework of those legal concepts in a student's practice area of choice.

My law school, like many others, only offered one doctrinal class on immigration. That did not stop me from setting the best schedule to help me practice immigration law. I enjoyed two semesters of immigration clinic to advise asylum clients, tailored a business externship to intern at an employment-based immigration firm, enrolled in a crimmigration class at a neighboring law school that transferred credits, devoted my upper-level writing requirement to refugee law, and drafted opinions for immigration court judges during a judicial externship. A mentor externship requirement resulted in over 100 hours consulting with naturalization and DACA clients as a certified student attorney. There are myriad creative ways to tailor law school to acquire the initial expertise necessary to begin practice. Attorneys—either in casual conversation or at a hiring interview—can identify the students with burgeoning expertise in their chosen practice areas.

Become distinguishable to employers

If you spend enough time around local bar gatherings, faces become familiar and names grow recognizable. This is no different for law students and it bodes well when a firm seeks to hire a new associate. Not every law firm will open new positions to any and all applicants. Instead, managing attorneys will consult their staffs for recommendations and request resumes and interviews accordingly. As opportunities arise, we should encourage current law students to become that person who first comes to mind among the local bar in a particular practice area.

This aspiration doesn't require students to become social butterflies. I attended law school with a wife and three kids under seven; I had no time for that! But strategic contact with the right legal professionals will give aspiring associates the exposure they need to become memorable when the right person is hiring. I can attest that instead of submitting endless resumes as my 3L year ended, I received unsolicited invitations to interview. I had already decided a year before taking the bar that I would start my own immigration practice under an existing firm, but it became demonstrably clear that employers seek out those who are passionate and committed to a particular practice area.

Generate client interest before you pass the bar

As is frequently noted, what they don't teach you in law school is what often will sink you the quickest in legal practice. The development of a book of business is crucial to employer satisfaction, financial success, and career mobility. Yet most law students have their sights set on the semester's midterms, next summer's externship, and that coveted first job. A more ambitious outlook may accelerate the opportunity to grow a legal reputation.

My early decision began to gain traction quickly. By the time I reached my 3L year, I had capitalized on 18 months of trumpeting immigration inside and outside the legal community. Every month through the fall after graduation, at least one acquaintance would reach out wanting to know if I was licensed so that I could help them with their case. During the earlier months, I funneled them to established attorneys, who welcomed my referrals. After sitting for the bar, I informed them that it would only be a matter of weeks before I could examine their cases.

I realize this advice is likely to elicit skepticism. Prospective and current students may retort that they have not been exposed to enough practice areas to make a decision. Or they may say they are reticent to commit early to an area that they might grow to dislike. Fair responses—but let's remember that most legal fields are so expansive that a variety of sub-practices thrive within the same area. The day-to-day work experiences of an I-9 compliance lawyer, a removal defense attorney, and a sports immigration lawyer could hardly be more different. And in any case the first career choice is not indicative of where a graduate will be in five, 10, or 15 years. But an early decision to focus on one area of law can provide crucial advantages in getting off to a successful start in practice. ▲

'I found it natural to seek out appellate work'

AARON VAN OORT is a legal strategist, class action litigator, and appellate lawyer who co-chairs the appellate advocacy group of Faegre Baker Daniels LLP. A former law clerk for Justice Antonin Scalia and Judge Richard Posner, and a Fellow of the American Academy of Appellate Lawyers, Aaron is a voice for clients in trial and appellate courts throughout the country.

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Why did you go to law school?

I went to law school for two reasons. First, my mom's sister Pat Johnson was a lawyer in the Twin Cities, and I admired her greatly. Second, I thought that the courts had misconstrued the Free Exercise and Establishment Clauses of the First Amendment, and in my youthful exuberance (and, truth be told, arrogance) believed that surely I could do better.

What led you to focus your practice on appellate courts and class action work?

I had the great privilege of clerking for two of the legal giants of our time—Justice Scalia and Judge Posner. Having watched and learned from them, I found it natural to seek out appellate work, and clients thankfully were willing to hire me to do it. My interest in class actions dates back even further, to the summer after my 1L year. I had wanted to work for a law firm to make money, but no one wanted to hire me.

In retrospect, I'm grateful they didn't, because as a fallback I worked as a research assistant for Professor (and later Dean) Dan Fischel at the University of Chicago Law School. The assignment he gave me was to investigate the origins of the 1966 amendments to Federal Rule of Civil Procedure 23, which created the modern class action. That was the summer of 1997, and Rule 23 had not yet been amended to allow for interlocutory appeals (that would happen in 1998), so the law was undeveloped. I felt like I was getting in at the ground level and have avidly studied class-action practice ever since.

Can you tell us one thing you learned from Justice Scalia and from Judge Posner?

From Justice Scalia, I learned that, no matter how much sense your position makes, you're going to lose if you don't have authority. From Judge Posner, I learned that, no matter how good your authority is, you're going to lose if your position doesn't make sense. Justice Scalia was the foremost formalist of his time and Judge Posner the foremost pragmatist. In practice, every judge is effectively some combination of Justice Scalia and Judge Posner, so when my teams are preparing arguments, I'm constantly asking them: Do we have authority, and does our position make sense? There are no better questions to ask in developing arguments to present to a judge or panel of judges.

What are the most valuable aspects of your bar involvement?

What I've appreciated most about my bar involvement is the community it has introduced me to. I'm inclined to be a bit of an academic who sits in his office and reads and thinks and writes. Through the Appellate Section of the MSBA, however, I was introduced to the state's appellate bar and bench and became part of their collegial community. I'm grateful to the leaders who welcomed me into it.

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

I enjoy spending time with my wife, Tracy, and our four boys (ages 19, 17, 16, and 14) watching superhero movies, training our Great Dane puppy, eating really good barbecue, and traveling the U.S. and internationally. I also love football, both coaching my sons in the Mounds View youth program and watching the NFL (skol Vikings!). Finally, I read voraciously, from Vince Flynn and Lee Child novels to theology and apologetics, and I serve on the board of directors for Substance Church. ▲

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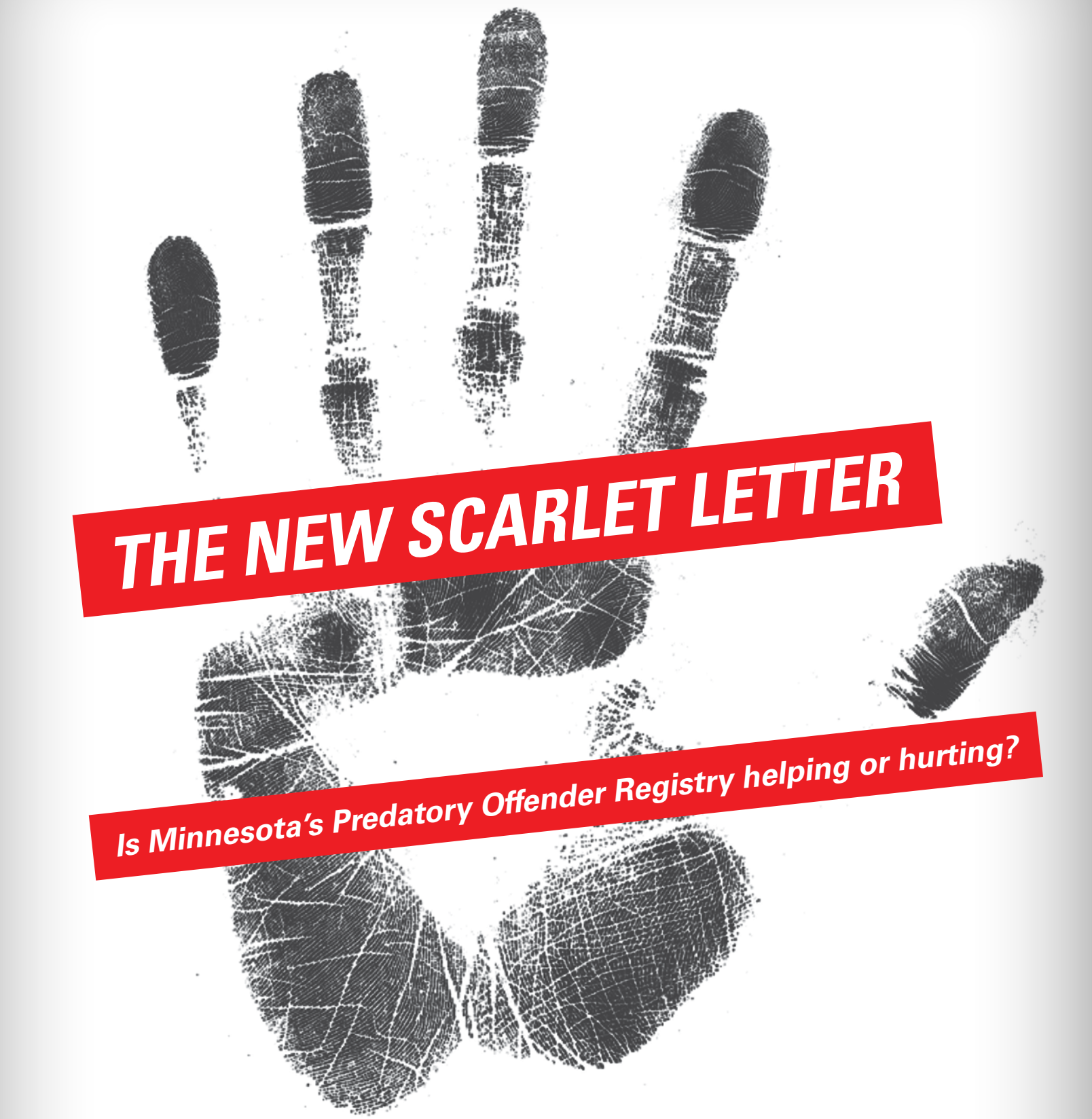


THE NEW SCARLET LETTER

Is Minnesota's Predatory Offender Registry helping or hurting?

Article and Photos by Stacy L. Bettison

"I'm a lot of things, but I'm not a rapist. And I'm not a child molester."

In 2001, when James[1] was 20 years old, he had sex with a 15-year-old girl at a party. He didn't know her age. He was convicted of fourth-degree criminal sexual conduct,[2] served 90 days in jail while awaiting adjudication, and pled guilty. He was sentenced to three years' probation.

Two years later, in 2003, he was convicted of possession of a firearm. He served 10 months in prison. Upon release he was required to register as a predatory offender and attend outpatient sex offender treatment.[3] "I was shocked," he remembers. "I didn't understand why. But I went."

As part of that process, he took a polygraph.[4] "I was asked about lots of different things," he says, "my sexual history, animals, my sister, and some other really bizarre stuff." The polygraph results caused his evaluators to classify him not as a sex offender requiring more treatment, but as an "opportunistic criminal." He was classified a Level 1 risk.[5] At that time, he was required to register until 2013.

In late 2009, with four years left to register, he was arrested and charged with possession of illegal weapons and drugs, and served nine years in state and federal prison. Upon his release in 2018, the clock reset, and he is required to register until 2028.[6]

James is just one of the 21,000+ people who make up Minnesota's Predatory Offender Registry. Even though his registerable offense happened 18 years ago and involved no allegations of violence, rape, or force, James is required to provide the following information to his probation officer for the next nine years:

> (1) primary address;
> (2) secondary addresses in Minnesota, including all addresses used for residential or recreational purposes;
> (3) addresses of all Minnesota property owned, leased, or rented by the person;
> (4) addresses of all locations where the person is employed;
> (5) addresses of all schools where the person is enrolled;
> (6) year, model, make, license plate number, and color of all motor vehicles owned or regularly driven by the person;
> (7) expiration year for the motor vehicle license plate tabs of all motor vehicles owned by the person; and
> (8) telephone numbers including work, school, and home and any cellular telephone service.[7]

If he fails to provide any of the information on time, or to update any of the information as required by the statute, he will go to prison for at least one year and one day and up to five years.[8] When he is released from prison, the 10-year registration cycle will begin again.[9]

Mission creep: Child predators and the roots of the registry

In 1991, the Minnesota Legislature enacted the state's first version of the sexual offender registry, and it focused on child abduction—requiring convicted sex and kidnapping offenders to register their current addresses at a probation office.[10]

Triggered in large part by Jacob Wetterling's abduction in October 1989, there was at the time a "legislative panic" and a fixation on "sexual predators."[11] The registration requirements passed in 1991 applied solely to persons convicted of a sexual crime against a minor:

> anyone sentenced to imprisonment following a conviction of kidnapping… criminal sexual conduct… solicitation of children to engage in sexual conduct, use of minors in a sexual performance or solicitation of children to practice prostitution and the offense was committed against a victim who was a minor.[12]

Recalling the early days of the search for Jacob and the investigation into his disappearance, Patty Wetterling recalls, "I was asked, 'What would have been helpful to find Jacob?' It would have been helpful to know who was in the area at that time that had a history of preying on children." Danny Heinrich, the man who confessed 27 years later to abducting and killing Jacob, would not have been in any database, however—he had never been convicted of a sex crime.

The registry was designed, as Wetterling recalls, to serve as a law enforcement tool. For the past many years Wetterling has questioned the ever-widening net the registry casts, especially for juveniles required to register. Her concern: that so many now on the registry are not the same as the man who abducted her son.

"The overwhelming belief at the time was that sexual predators were always going to reoffend," she notes. "There was no central repository of information about the suspects in Jacob's case. Unless a suspect had been charged with a federal offense, we had to go to every single jurisdiction to get information and criminal backgrounds, to find suspects and clear them. You don't have time for that when a child is kidnapped. Time is the enemy."

Fast forward 28 years, and today's registry applies to far more people for many more different crimes than it did in 1991. Since 1991, there have been 35 amendments to the registration law, making penalties for non-compliance harsher and adding more types of conduct requiring registration.

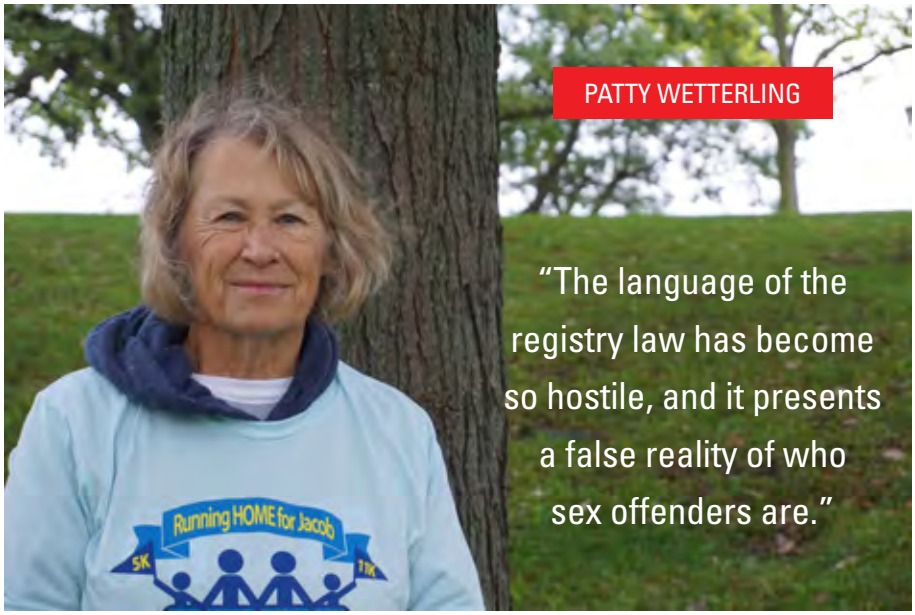
The Legislature made significant changes to the law in 2000 in response to Katie Poirier's abduction and murder. (The measure was known at the time as Katie's Law.) Richard Blom, a registered sex offender with several previous felonies at the time he kidnapped and murdered Poirier, was sentenced to life in prison. The Minnesota Legislature toughened the registration laws to improve the methods for tracking registrants.

The 2000 amendments imposed an additional 10 years of registration if a current registrant was convicted of another offense during the initial registration period[13] and increased the penalty for providing false information from gross misdemeanor to a felony with up to 5 years in prison.[14]

Changes to the law that year also added "crime against the person"—27 of them—as an offense that would trigger registration if the person had also previously committed an offense that currently required registration but didn't at the time the now-registerable offense was committed.[15] It further included the public disclosure of information about the offender when a person fell out of compliance with registration requirements.[16] And, importantly, it added a new subdivision specifying all the information a person must provide as part of registration (address of primary residence, secondary residence, addresses of all property owned, rented, or leased, address of employment, etc.).[17] 2000 was also the year the term "sex offender" was changed to "predatory offender."[18]

As a result, the number of registrants has steadily increased over time. In 2000, there were 12,000 registrants.[19] Data requested from the Bureau of Criminal Apprehension for this article indicates the number of registrants has increased every month for the past 10 years: in January 2009 there were 16,622 registrants; as of August 2019, there were 21,189 registrants. While no comparative budgets for the past 10 years were received, the cost to implement the registry in fiscal year 2019 was $1,074,896. Staff costs accounted for $821,724 of that total.

What has changed since 1991 outside the confines of the registry is a tidal wave of local communities across the state passing ordinances restricting where



predatory offenders can live. Ordinances vary in scope and they tend to prohibit sex offenders from living near parks, daycare facilities, playgrounds, schools, and other areas frequented by children.[20]

A false premise

The registry, in its current iteration, is based on one important assumption: People who commit sex crimes are significantly more likely than not to commit another sex crime. Courts have even adopted this assumption, noting that reoffend rates are "frightening and high."[21] Politicians, judges, and communities rest comfortably in this assumption; after all, "those on sex offender registries are seen as inveterate criminals who share essential character defects."[22]

Studies show, however, that this assumption is wrong. There's a body of research from the past 15 years concluding that sex offender recidivism rates are lower than was thought 30 years ago.[23] While the traditional belief has been that offenders were highly likely to reoffend and remained so their whole lives, "current research suggests that after a certain amount of time living offense-free, sex offenders are no more likely to commit a sex offense than anyone else being released for another crime," says Eric Janus, professor at Mitchell Hamline School of Law and one of the nation's leading experts on sexual violence law and policy. "When you talk about narrative, the false part is about recidivism; it's such a small piece of the problem with sexual violence."

"Of all the sex offenders who are released from prison," he continues, "the risk of them committing a new sex offense in the nine years following release from prison is less than 8 percent. In other words, 92 percent of offenders are not arrested for another sex offense within nine years.

"What's surprising to a lot of people is that only 7 percent of sex offense convictions in any given year had a previous sex offense conviction," says Janus.[24] "If you are worried about sexual offenses, and all you look at is recidivism, you are looking at the wrong thing—it's a small sliver of the problem."

What the current registry of 21,000 people does not address is this important fact: Over 90 percent of all sex crime convictions involve individuals never before convicted of a sex offense.[25]

A recent report from the Bureau of Justice Statistics (BJS) considering the recidivism rates of people convicted of sex crimes has been criticized as further perpetuating the false narrative of sex offenders in the way it couched the most recent findings regarding recidivism. While the study and its underlying data showed that people convicted of sex offenses are actually less likely than people convicted of other offenses to be rearrested or go back to prison,[26] the BJS press release was entitled "Released Sex Offenders Were Three Times As Likely as Other Released Prisoners to be Re-Arrested for a Sex Offense."[27]

"A lot of people are very upset about the way BJS sensationalized the data," says Janus. "'Three times more likely to commit a sex crime' than a non-sex offender released from prison is unsurprising, but it's misleading—and [it] directs attention away from the indisputably low rate of sexual recidivism for sex offenders."

Wendy Sawyer, a senior policy analyst with the Prison Policy Initiative, believes the BJS press release and how the report is positioned is "a good example of how our perception of sex offenses is distorted by alarmist framing, which in turn contributes to bad policy."[28] She writes:

> What the report doesn't say is that the same comparisons can be made for the other offense categories: People released from sentences for homicide were more than twice as likely to be rearrested for a homicide; those who served sentences for robbery were more than twice as likely to be rearrested for robbery; and those who served time for assault, property crimes, or drug offenses were also more likely (by 1.3-1.4 times) to be rearrested for similar offenses.[29]

What got lost in the headlines was data showing that people convicted of a sex crime were less likely to be arrested in general: 67 percent of prisoners released for sex offenses were arrested for any crime during the ensuing nine-year period, compared to 84 percent of other released prisoners.[30]

Who sex offenders really are

The fact is, most sex crimes are *not* committed by strangers. To the contrary, most sex crimes are committed by people who are familiar with their victim—a family member, intimate partner, coworker, classmate, or acquaintance.[31]

Veronica Surges, an assistant state public defender with the Minnesota Appellate Public Defender's Office, represents clients in appeals who have been convicted of sex and other crimes requiring registration. In Surges's view, the registry is not reflective of reality: "It's a tapestry of media reports, public fear, and laws. Media reports fuel people's fear, which politicians react to with harsher legislation, which promises re-election." She acknowledges that "there are people out there who do steal kids, but the registry has become so much bigger than that. The vast majority of registrants are not the Danny Heinrichs of the world."

"The language of the registry law has become so hostile, and it presents a false reality of who sex offenders are," says Patty Wetterling. The stigma, registry requirements, and risk of not complying with the complicated requirements "impacts everything that a human needs

to survive: stable housing, employment, community support, relationships—in effect, this takes that all away," she adds.[32]

Alissa Ackerman, an assistant professor of criminal justice at California State University at Fullerton, agrees: "Having hundreds of thousands of people on registries creates a narrative that we have hundreds of thousands of dangerous people who have committed sexual offenses and will do so again—but what we know is their recidivism rates are low. This narrative of 'stranger danger' takes us away from really thinking about and preventing the kinds of offenses (such as drugs, property, and other violent crimes) that are happening every day."

The registry, Ackerman says, "perpetuates registrants as the 'others,' pariahs, and [suggests] they are all dangerous. People who have committed sex offenses are not a monolith. Yet having hundreds of thousands of registrants creates a monolith." This in turn, says Ackerman, results in legislation that has little purpose: "There is no evidence that it's effective. Registries have been found to have no effect on forcible rape."[33]

Ackerman believes Minnesota's policy of creating risk levels upon release from incarceration (Level I, II, or III),[34] and only publicly disclosing Level III offender information, is better than the approach of states that disclose information on all registrants. She acknowledges that the information contained in private lists can be helpful to law enforcement to clear cases and rule out suspects, and that limiting public disclosure to only those deemed most likely to reoffend is a better policy.

Registries hurt youth registrants

Wetterling can cite many instances in which the registry is not working as intended when passed in 1991. One story she shares is a call she received from Ricky's[35] mom. Ricky was 16 years old when he attended a teen dance designated for ages 16 and older. He met a girl there. They had a few dates, and ultimately had sex. Soon thereafter she told him she was actually 14 years old. He broke off the relationship. She ended up running away from home. She was ultimately located and talked with law enforcement. Suddenly they were knocking on Ricky's door. Turns out she was 13, not 14.

"He was charged with criminal sexual conduct under his state's laws, kicked off the football team, expelled, required to register, and couldn't live with his grandma any longer because she lived next to a park," says Wetterling. "The original intention of the registry law was not to cover someone like Ricky. Ricky was a kid who had sex with his girlfriend. We've gotten so far away from what we wanted to do with [the] registry."

Wetterling's first year as a teacher was spent working with dropouts so they could get a GED and start down a better path. She saw then—and still believes—that people can change, and that they do better when given support and help.

Wetterling, by her own account, has been "very loud" about getting juveniles off the registry: "I believe putting kids on the registry is a life sentence. We cast such a big net, but so many are different than the man who killed Jacob. That man was a predator. He had multiple victims but had never been charged, so Heinrich would not have been on the sex offender registry while, ironically, Ricky is. There are so many on the registry for other things, like inappropriate touch—which is wrong and they need to stop, they need to get help—but it's not the same as sexual assault or kidnapping."

Recent research confirms that requiring children to register is creating lasting damage for those kids, and may even be creating more risk to others. Researchers at the Johns Hopkins Bloomberg School of Public Health found that children who were required to register as sex offenders "were at greater risk for harm, including suicide attempts and sexual assault, compared to a group of children who engaged in harmful or illegal sexual behavior but who were not required to register."[36] Other risks to children on registries include chronic mental health problems and being approached by an adult for sex.[37]

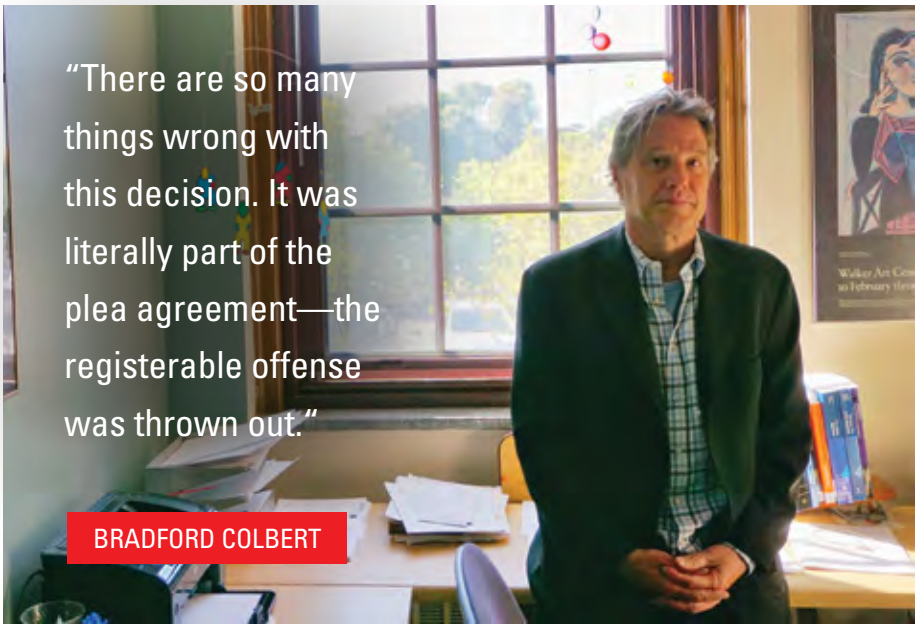
In an age when "sexting" among teens is commonplace, and access to porn is at the tip of kids' fingers on their phones, the risk to children of being accused of sex crimes and consequently landing on the registry is very real.

Wetterling will be serving on a new task force assembled by the Center for Missing and Exploited Children to look at child peer-on-peer sexual victimization. Her concern is that current sexual behavior among some children may lead to criminal charges. And the registry is not helping because it presents a false narrative and perpetuates misconceptions about anyone registered, be it a child or adult. "Lock them up and shoot them is what they'd really like to do," she says. "In many people's eyes, it's the worst of all crimes. But victims heal. And perpetrators can turn their lives around."

Minnesota case law: Casting a wider net

Case law arising from Minnesota courts has served to catch more people in the required-to-register net. Most concerning to practitioners is that a person need not be convicted of an enumerated offense in order to be required to register. They simply need to be charged with a registerable offense. If they are convicted or plead to an offense "arising out of the same set of circumstances" as the registerable offense, the person must register.[38]

But that rule was taken to a new level in "the worse imaginable case," according to Bradford Colbert, a visiting assistant professor of law who is implementing the



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Legal Assistance to Minnesota Prisoners Clinic at Mitchell Hamline Law School. He brought a civil lawsuit, *Thibodeaux v. Evans*, on behalf of his client, Michael Thibodeaux, to challenge a district court's decision that Thibodeaux was required to register as a predatory offender.[39]

In that case, Thibodeaux was charged as a juvenile on March 4, 1997 with fourth-degree criminal sexual conduct, a felony that requires registration. The court found probable cause for the charge, but later, on March 20, the state charged Thibodeaux with fifth-degree criminal sexual conduct—a gross misdemeanor that does not require registration. The charge was based on the same incident and contained the same probable cause statement but was filed as a new complaint. Thibodeaux pled guilty to fifth degree criminal sexual conduct, and the court dismissed the complaint with the fourth degree charge. The district court did not order Thibodeaux to register.

Eight months later, in December 1997, Thibodeaux was certified as an adult and convicted of fourth degree assault on a separate matter, not arising out of the same conduct as the juvenile-charged criminal sexual conduct. Following that conviction, the district court ordered him to register as a predatory offender based on the prior fifth degree criminal sexual assault adjudication.

Thibodeaux argued that his due process rights were violated and the BCA was estopped from requiring him to register because his 1997 plea agreement dismissed the fourth degree criminal sexual conduct charge. The appeals court disagreed. Citing the Minnesota Supreme Court's decision in *State v. Lopez*,[40] the appeals court noted that the "requirement to register for those who are 'merely charged with predatory offenses' was meant to 'ensure that true predatory offenders cannot plead out of the registration requirements.'"[41] The court of appeals went on to note that a defendant will be required to register based on a dismissed charge if the charge was supported by probable cause.[42]

"There are so many things wrong with this decision. It was literally part of the plea agreement—the registerable offense was thrown out. This case means that once it's charged by complaint, it's over," say Colbert.

This means there are very serious real-life consequences when prosecutors use their discretion to overcharge sex crimes in the first instance, based only on probable cause—a far less demanding legal standard than "beyond a reasonable doubt," which is required to convict. While it's easy for a prosecutor to amend the complaint and modify the charges, any defendant initially charged with a registerable offense will be on the registry for the next 10 years—simply because a prosecutor decided to charge it that way.

This also means, says Surges, that defense attorneys in such cases need to bring a motion to dismiss the complaint for lack of probable cause. Not only do they need to make the motion; they need to create a record. "Make the record," she emphasizes. "Make sure you get all parties to say, on the record, the complaint is dismissed for lack of probable cause. Explain why there was no probable cause to charge in the first place, and what new evidence supports that contention. That is what the Bureau of Criminal Apprehension will look at when determining whether registration is required."

Conclusion

Sex crimes must be taken very seriously. They affect the most vulnerable and private aspects of people, and especially of children. Yet both longstanding and significant research supports the proposition that the majority of sex crimes are committed by people who have some familiarity with their victim, and most sex crimes are *not* committed by those previously convicted of a sex crime.

Given the overwhelming body of research confirming that registries (as well as community notification and residency restrictions) have little impact on preventing sex crimes, we are left with very serious questions about the ultimate value of Minnesota's Predatory Offender Registry, given the potential long-term consequences to the over 21,000 Minnesotans who comprise the registry. Those most deeply affected by the requirements of the registry are, of course, those who need the most support as they integrate back into society to become productive, engaged, contributing citizens.

At the end of the day, the need for some kind of registry is contested by few. As with any complex system, the devil is in the details: scope, application, and penalties for failure to comply.

Even James, who must register for at least nine more years, doesn't take issue with the registry itself. "I think it's useful. There are people who should be monitored closely. By the same token, they should weed out those who don't need to be—and shouldn't be—monitored. It's covering way too many people." ▲

Notes

[1] This individual's name has been changed to protect his anonymity.

[2] *See* Minn. Stat. §609.345, Subd. 1(b) ("[T]he complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant . . . .").

[3] *See* Minn. Stat. §243.166, Subd. 1b(a)(1)(iii).

[4] *See* Minn. Stat. §609.3456.

[5] *See* Minn. Stat. §244.052, Subd. 3(e).

[6] *See* Minn. Stat. §243.166 subd. 6(c) (requiring registration until 10 years have elapsed since the person was last released from incarceration for conviction for a new offense or following a revocation of probation, supervised release, or conditional release for any offense).

[7] Minn. Stat. §243.166, Subd. 4a.

[8] *Id.* at Subd. 5(b).

[9] *Id.* at Subd. 6(c).

[10] Law of June 1, 1991, ch. 285, Sen. File No. 371 (amending Minn. Stat. §13.82) ("An act relating to crimes; child abduction; requiring certain convicted sex and kidnapping offenders to report a current address to probation officer following release from prison; requiring the publication of missing children bulletins; requiring training concerning the investigation of missing children cases; providing law enforcement officers access to medical and dental records of missing children; extending DNA analysis requirements to persons sentenced as patterned sex offenders….). Section 3 was added to Chapter 285 and codified as Minn. Stat. §243.166, "Registration of Sex Offenders."

[11] Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice and Procedure in Minnesota*, 29 Wm. Mitchell L. Rev. 5 (2003). Community notification is a significant component of our criminal justice system as it relates to people who have been convicted of sex crimes. Community notification, residency restrictions, and applicable federal laws are not discussed here. For a comprehensive overview of both Minnesota and federal legislation as well as critical considerations as to the efficacy of registry and notification laws, see Justin P. Rose, *Where Sex Offender Registration Laws Miss the Point: Why a Return to an Individualized Approach and a Restoration of Judicial Discretion Will Better Serve the Government Goals of Registration and Protect Individual Liberties from Unnecessary Encroachments*, 38 Mitchell Hamline L. J. of Pub. Pol'y & Prac., 2 (2017).

[12] *See supra* note 10.

[13] Law of June 3, 2000, ch. 311, House File No. 2688, Ch. 311, Art. 2, §7, Subd. 6(c) (2000).

[14] *Id.* at §6, Subd. 5.

[15] *Id.* at §11, Subd. 1-2.

[16] *Id.* at §8, Subd. 7(a).

[17] *Id.* at §5, Subd. 4a. The 2000 amendment resembles the current requirements of what information a person must provide. In 2019, the law was amended again, however; a person must now also provide the expiration year for the motor vehicle license plate tabs of all motor vehicles owned by the person and all telephone numbers including work, school, and home and any cellular telephone service. Law of May 30, 2019, ch. 5, Sen. File No. 8, Article 5, Sec. 6 (2019).

[18] Law of June 3, 2000, ch. 311, House File No. 2688, Ch. 311, Art. 2, §12 (2000). The statute now requires registry of individuals who are convicted, charged, or adjudicated delinquent for specific crimes: murder involving sexual component, kidnapping and false imprisonment, criminal sexual conduct, indecent exposure to minors, soliciting a minor to engage in sexual conduct, prostitution, or sexual performance. The registry includes registration of people who are civilly committed as Sexually Psychopathic Personalities or Sexually Dangerous Persons, Mentally Ill and Dangerous if found not guilty of predatory offense because of the Mentally Ill and Dangerous diagnosis. *See* Minn. Stat. §243.166, Subd. 1b.

[19] *Katie's Law Highlights Crime Package*, Minnesota Public Radio (1/10/2000) (interview with Rich Stanek, the chair of the House Crime Prevention Committee).

[20] *See e.g.*, City of Orono, City Ordinance Article V11, Sexual Predatory Residence Restrictions; *see also* Ass'n for the Treatment of Sexual Abusers Minnesota Chapter, *Residency Restrictions for Sexual Offenders in Minnesota: False Perceptions for Community Safety*, *https://mnatsa.org/wp-content/uploads/2017/05/MnATSA-Residency-Restrictions-April-2017.pdf* (listing Minnesota localities with residence restriction ordinances as of 2015) (last visited 9/11/2019). Importantly, a 2007 Minnesota Department of Correction study analyzing how residency restrictions impact recidivism rates concluded there was "very little support for the notion that residency restriction law would lower the incidence of sexual recidivism, particularly among child molesters." Minn. Dep't of Corrections, *Residential Proximity & Sex Offense Recidivism in Minnesota*, p. 24 (April 2007).

[21] *Smith v Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34, (2002)).

[22] Brief of Scholars Whose Work Includes Sex Offense Studies as Amici Curiae in Support of Petitioner, *Gundy v. United States*, 139 U.S. 2116 (No. 17-6086) (2019).

[23] *See* Karl Hanson et al., *Reductions in risk based on time offense free in the community: Once a sexual offender, not always a sexual offender*, 24 Psychol. Pub. Pol'y & L. 48 (2017); *see supra* note 22 (outlining research and data showing low recidivism rates for people convicted of sex crimes).

[24] Brian Collins, Minnesota Department of Corrections, Presentation at the 2017 MnATSA Conference presenting *Residency Restrictions, Sound public policy or tinfoil hats?* (4/21/2017) (7% of criminal sexual conduct convictions in Minnesota 2001-2015 had prior sex crime conviction; 93% of criminal sexual conduct convictions in same period had no prior conviction).

[25] *See id.* at 22; *see also*, *e.g.,* Jeffery Sandler, Naomi J. Freeman, Kelly M. Socia, *Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law*, 14 Psychol. Pub. Pol'y & L. 284, 297 (2008) (Data from New York State show that 95% of those arrested for sex crimes are first-time sex offenders).

[26] Special Report, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Recidivism of Sex Offenders Releases from State Prison: A 9-Year Follow-Up (2005-14) (May 2019).

[27] Press Release, Bureau of Justice Statistics, *Released Sex Offenders Were Three Times As Likely as Other Released Prisoners to be Re-Arrested for a Sex Offense* (5/30/2019) (last visited 9/14/2019).

[28] Wendy Sawyer, *BJS fuels myths about sex offense recidivism, contradicting its own new data*, *https://www.prisonpolicy.org/blog/2019/06/06/sexoffenses/* (6/6/2019) (last visited 9/15/2019).

[29] *Id.*

[30] *Id.*

[31] National Sexual Violence Resource Center, *People Who Commit Sexual Violence*, *https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_people-who-commit-sexual-violence_0.pdf* (last visited 9/15/2019); Minn. Dep't of Corrections, *Residential Proximity & Sex Offense Recidivism in Minnesota*, p. 24 (April 2007) ("Sex offenders are much more likely to victimize someone they know.")

[32] *See also* Center for Sex Offender Management, *Sex Offender Residence Restrictions*, *https://www.csom.org/pubs/ATSA%20Residence%20Restrictions.pdf* (last visited 9/11/2019) ("The unintended consequences of residence restrictions include transience, homelessness, and instability … [which] can lead to diminished access to specialized treatment and probationary supervision, employment and housing disruption, and separation from supportive an/or dependent family members.")

[33] "Forcible rape" is defined in the FBI's Uniform Crime Reporting (UCR) Program: "the carnal knowledge of a female forcibly and against her will. Attempts or assaults to commit rape by force or threat of force are also included; however, statutory rape (without force) and other sex offenses are excluded.' United State Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Forcible Rape, *https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/rapemain* (last visited 9/11/2019).

[34] Risk Level I is considered the least likely to re-offend and only local law enforcement and victims or witnesses are notified of the offenders release or relocation. Risk Level II is thought to pose a moderate risk of re-offense. In this case, local law enforcement and victims or witnesses are notified of the offenders' release or relocation, as well as any agencies that may serve a population at risk of victimization that are located near the offenders' home. Risk Level III is determined to be the most likely to re-offend. In this case, local law enforcement, victims or witnesses, and any agencies that serve a population at risk of victimization may be notified, as well as the general public. Civilly committed offenders are believed to pose a severe risk to him/herself and/or to the public. They can be committed instead of being released. *See generally* Minn. Stat. §244.052.

As of 1/1/2017, current risk levels percentages assigned to people convicted of sex crimes in Minnesota were: Level 1 – 56%; Level 2 – 29% and Level 3 – 15%. *See supra* note 22 at 16.

[35] This individual's name has been changed to protect his anonymity.

[36] Press Release, Moore Center for the Prevention of Child Sexual Abuse, Children on Sex Offender Registries at Greater Risk for Suicide Attempts, Study Suggests (12/6/2017).

[37] *Id.*

[38] *Boutin v. LeFluer*, 591 N.W.2d 711, 716 (Minn. 1999).

[39] 926 N.W. 2d 602 (Minn. Ct. App. 2019).

[40] 778 N.W.2d 700, 705 (Minn. 2010).

[41] *Thibodeaux*, 926 N.W. 2d at 606.

'WE ARE QUITE COLLEGIAL, AND THAT IS NOT BY ACCIDENT'

An interview with Chief Justice Lorie Gildea of the Minnesota Supreme Court

By Jon Schmidt

Chief Justice Lorie Skjerven Gildea has served as the Chief Justice of the Minnesota Supreme Court since 2010. Before becoming the Chief Justice, she was appointed to the Minnesota Supreme Court as an Associate Justice in 2006 by Governor Tim Pawlenty. Prior to her time on the Court, Chief Justice Gildea served as a judge in the 4th Judicial District in Hennepin County. Before joining the bench, she was a prosecutor in the Hennepin County Attorney's Office, an associate general counsel at the University of Minnesota, and in private practice at Arent Fox in Washington, D.C. She attended college at the University of Minnesota Morris, and law school at Georgetown University Law Center.

Chief Justice Gildea and I recently discussed her role as the head of Minnesota's Judicial Branch, her goals for the Judiciary, and what she enjoys doing with her (limited) free time.

JON SCHMIDT: In your role as the Chief Justice, you have worked closely with three different governors and several different legislative bodies. What have you found to be most challenging within that role? On the flip side, what has been the most fun?

CHIEF JUSTICE LORIE GILDEA: Getting to know the governor and legislative leaders is affirming. We are blessed in Minnesota with so many hardworking, civic-minded leaders who, at the end of the day, just want to do what they perceive to be the right thing for the people we all serve. And advocating for justice system funding reminds me of what I loved most about being a practicing lawyer—advocating for a client in whom I believed. Now, of course, it is not a client, but a cause for which I advocate. I will always be an advocate, and that is a role that I very much enjoy.

SCHMIDT: If you were given an unlimited amount of funds and resources, what would be your top three priorities for the Judicial Branch? What, if any, major changes would you institute?

CHIEF JUSTICE GILDEA: More money is not the answer to every question. Some of the problems we face in the Judicial Branch, such as rising caseload demands, could be solved if people behaved better toward one another. But because the question asks how we would utilize unlimited resources, let me lay out three broad goals.

First, we could ensure that we had the judges and court staff needed so that no Minnesotan would have to wait to access their court system, that every Minnesotan who wanted an attorney had one, and that every case involving children that needed a guardian *ad litem* had one.

Second, we could upgrade the physical safety and security of our 105 court facilities and enhance the Judicial Branch's cybersecurity. These are truly access-to-justice issues. Minnesotans deserve to feel safe when entering their local courthouses and to know their private and sensitive data is secure.

Finally, unlimited resources would enable us to better use technology to facilitate access to, and the administration of, justice. We have made great strides in this area over the past 10 to 15 years, but as technology continues to evolve and improve, it's important that our justice system continues to evolve with it.

SCHMIDT: Besides writing opinions, hearing oral arguments, and serving on committees, you are all over the state attending events, investitures, retirements, CLEs, etc. Do you ever sleep? If you ever have free time, what do you like to do? Somewhat related, let's say you've had a long and busy week. It's Friday night. What are you doing?

CHIEF JUSTICE GILDEA: I enjoy going to the barn and riding my horse. I also enjoy cheering for the Golden Gophers and have been known to yell at the officials from time to time.

SCHMIDT: You have taken the Court from a paper-based system to (largely) an electronic system. Do you think the courts—or at least the appellate courts—will get to a completely paperless system?

CHIEF JUSTICE GILDEA: The district courts in Minnesota have transitioned to the electronic world. Except for self-represented litigants, all other parties are required to file electronically. We are seeing many self-represented litigants already choosing to file electronically, and we are continuing to roll out new tools to make that process easier for those court users. That includes the fillable "smart" forms available on our public website, and Guide & File, a new application that uses web-based interviews to simplify the process of filling out and filing court forms.

On a related note, I understand that there are some district court judges who still insist on courtesy paper copies of briefs. I know this is a concern of many attorneys, and I'm hopeful that we can find a better way to give judges what they need, while not asking attorneys to provide paper copies of documents they have already e-filed. I'm proud to say that the vast majority of the chambers on the Supreme Court are largely paperless, and we no longer receive paper briefs in chambers. The Court of Appeals still has a way to go. I know it is frustrating for the appellate bar to live in both worlds.

SCHMIDT: The vast majority of people who will read this interview are attorneys. What can (or should) lawyers be doing to help improve the Judicial Branch?

CHIEF JUSTICE GILDEA: The Court is proud of the caliber of the bar in Minnesota, and we benefit from a good and productive bench-bar relationship. We are concerned, however, that in recent years the number of attorneys doing pro bono work is declining.

One measure of pro bono services is to look at the number of attorneys representing low-income clients through the pro bono programs our 11 civil legal services have organized across the state, such as Volunteer Lawyers Network and SMRLS [Southern Minnesota Regional Legal Services]. In 2014, there were 2,922 such attorneys. But in 2018, that number dropped to 2,471. Those numbers show a decline of more than 15 percent over five years in the number of pro bono attorneys actively volunteering. We have a significant gap between the need for legal help and legal help available to fill that need. Some of that gap could be filled if more attorneys took on pro bono matters.

SCHMIDT: In your tenure on the Court, are there oral arguments that stick out in your mind as particularly memorable? What about those arguments stick out to you (good or bad)?

CHIEF JUSTICE GILDEA: It is still a rare enough occurrence for the Court to have women representing both sides at oral arguments. When that happens, I notice it. Overall, I am much more likely to remember a particularly good oral argument than I am to remember negative ones. We had an argument within the last year that was quite memorable. The case involved a complicated statutory scheme. We had attorneys on each side who were very experienced in the subject matter and able to directly and clearly answer the Court's questions in a way that simplified the issues for decision.

An argument I remember as a negative experience involved an attorney (not an attorney from Minnesota) who seemed to almost yell at the Court, apparently believing that if he just talked louder we would stop interrupting him.

SCHMIDT: What is your favorite thing to do in Plummer, Minnesota? How about in Morris, Minnesota?

CHIEF JUSTICE GILDEA: The Court visited Plummer last fall as part of our high school visit to Lincoln High School in Thief River Falls. I took the Court to my dad's museum, the Tri-River Pioneer Museum. To be honest, it is not really my dad's museum, but he was instrumental in getting it built, donated many of the artifacts in the museum, and has the keys, so I think it is fair to call it my dad's museum.

When I was a student at the University of Minnesota Morris, one of my favorite things to do was spend time at Pomme De Terre Park walking, studying, and just enjoying nature.

SCHMIDT: Justices on the Minnesota Supreme Court have their disagreements in opinions, but, from an outsider's perspective, it remains an extremely collegial court. To what do you attribute this ability to disagree yet remain friendly, or even more, enjoy each other's company?

CHIEF JUSTICE GILDEA: We are quite collegial, and that is not by accident. The seven of us are heavily invested in making collegiality our reality. The cases we are called to decide are always difficult and often very close. We recognize the complexity of the task and the value in having six other people helping us resolve some of the most important legal questions presented in our state.

We also recognize that we are the face of the justice system in many ways. What we say and how we say it reflects not just on us and the Court, but on the justice system more broadly, and ultimately informs the people's trust and confidence in that system. The seven of us understand the fragility of the people's trust and are fully committed to doing whatever we can to be worthy of that trust.

SCHMIDT: What has been the biggest challenge you've faced as Chief Justice?

CHIEF JUSTICE GILDEA: The government shutdown in 2011 was the biggest challenge. Preparing the Judicial Branch so that we could continue to provide access to justice in the face of a shutdown and authorizing the Judicial Branch to go to court to get a court order to keep the courts open were some of the challenges we faced in 2011 that hopefully we will not have to confront again.

SCHMIDT: What is the most rewarding aspect of your job?

CHIEF JUSTICE GILDEA: All of it. I wake up every morning grateful for the opportunity to serve the people of my home state as their chief justice.

SCHMIDT: Do you have tips for practitioners for recognizing the differences between softball questions at oral argument versus questions that may be more of an attack on a position?

CHIEF JUSTICE GILDEA: I sometimes think attorneys spend too much time thinking about why we are asking a question instead of just answering the question. For the most part, we are asking because we *genuinely* want to know what you think, so just answer the question, and let us worry about the rest.

SCHMIDT: Can you describe aspects of your job as Chief Justice that may differ from those of the Associate Justices?

CHIEF JUSTICE GILDEA: The chief justice has the same responsibilities for deciding cases and writing opinions as the associate justices. In addition to those duties, state statute provides that "the chief justice shall exercise general supervisory powers over the courts in the state." Minn. Stat. §2.724, subd. 4 (2018). In essence, the chief justice is the chief executive officer of the Judicial Branch of our state government. The Branch operates in 105 locations across the state of Minnesota. We have 321 judges and approximately 2,600 court staff. Our annual budget is about $367 million. I chair the Minnesota Judicial Council, which is the 25-member policymaking body for the Branch. As the Minnesota Constitution directs, I serve on the Board of Pardons with the governor and the attorney general. Minn. Const. Art. V, sec. 7. I also serve on other committees and make appointments to statewide bodies as directed in state statute. By statute, I also have responsibilities in connection with recall petitions for county officials. Minn. Stat. §351.17 (2018).

SCHMIDT: Assuming you are in the majority of votes, what goes into your calculation when deciding which justice will author a particular opinion?

CHIEF JUSTICE GILDEA: Our cases are assigned randomly by our Supreme Court Commissioner's office before oral argument. If you are assigned the case, your chambers is responsible for preparing a bench memorandum to the Court recommending how the case should be decided. At conference, the justice to whom the case was randomly assigned presents the case, and if, at the conclusion of conference, that justice has a majority, that justice will write the opinion. If the justice to whom the case was randomly assigned does not have a majority and cannot write the view that did garner the majority vote, then it falls to me to assign the majority. My typical practice is to assign the case to the senior member of the Court who sided with the majority, unless that justice defers to a more junior justice.

SCHMIDT: Some quick fire questions for you: What is your favorite:

Movie? *The Philadelphia Story* and *North by Northwest*.
TV show? *Batman* (the one that was on in the 1960s).
Book? I have many favorites, but my most recent favorite is *The One Man*, by Andrew Gross.
Band? Plummer's high school marching band (when I was in it).
Song? Again, I have many favorites, but my most recent favorite is "Humble and Kind," by Tim McGraw.
Concert? Same story here, but my most recent favorite is Garth Brooks, US Bank Stadium, May 2019.
Food? Bacon cheeseburger, Maryland lump crab cakes, coconut shrimp (not all at the same time).
Dessert? All of them, but mostly frosting.
Place to eat? Nicollet Island Inn.
Place to travel? Lake Vermilion.

SCHMIDT: Can you reflect on the changes the courts have faced over the last 10 years? And challenges you see coming over the next 10 years?

CHIEF JUSTICE GILDEA: Major criminal case filings have increased by more than 20 percent over the last 10 years, including large increases in drug cases. These increases stress our ability to deliver timely access to justice.

While we have seen huge increases in our criminal docket, the number of civil cases filed in Minnesota's courts has dropped dramatically over the last 10 years. In 2009, almost 45,000 "major" civil cases—including contract, personal injury, commercial, and employment disputes—were filed in Minnesota, and last year that number dropped to below 31,000. If that decline means that there are fewer contract, employment, and commercial disputes, that's a good thing; but if that decline means that more and more such disputes are being resolved behind closed doors through the private justice system, that could be cause for concern. Based on work from the Civil Justice Reform Task Force, we instituted reforms in an effort to get civil cases through the court system more quickly and efficiently. We need to monitor the effectiveness of these reforms to ensure that people believe the courthouses are open to them for timely resolution of civil cases.

The changing demographics in Minnesota have created, and will continue to create, additional pressures on our court system, and require us to adapt to the changing needs of our court users. The retirement wave washing over the Judicial Branch is one example. Another example is the growing diversity of our court users. The number of cases needing a court interpreter has increased by 12 percent over the past 10 years. The provision of adequate interpreter services is an access-to-justice issue. In our current strategic plan, we are emphasizing greater utilization of remote interpreting as a way to meet this need.

Finally, the challenge created by the huge influx of cases involving children in need of protection/services will be with the Judicial Branch—and our broader justice and social service systems—for years to come.

SCHMIDT: If the Minnesota Supreme Court Historical Society were to someday write a summary of the Gildea Court, what would you hope to be the pinnacle achievement?

CHIEF JUSTICE GILDEA: I hope it will be said that my service in the Judicial Branch enhanced the trust and confidence that the people of Minnesota have in their justice system. ▲

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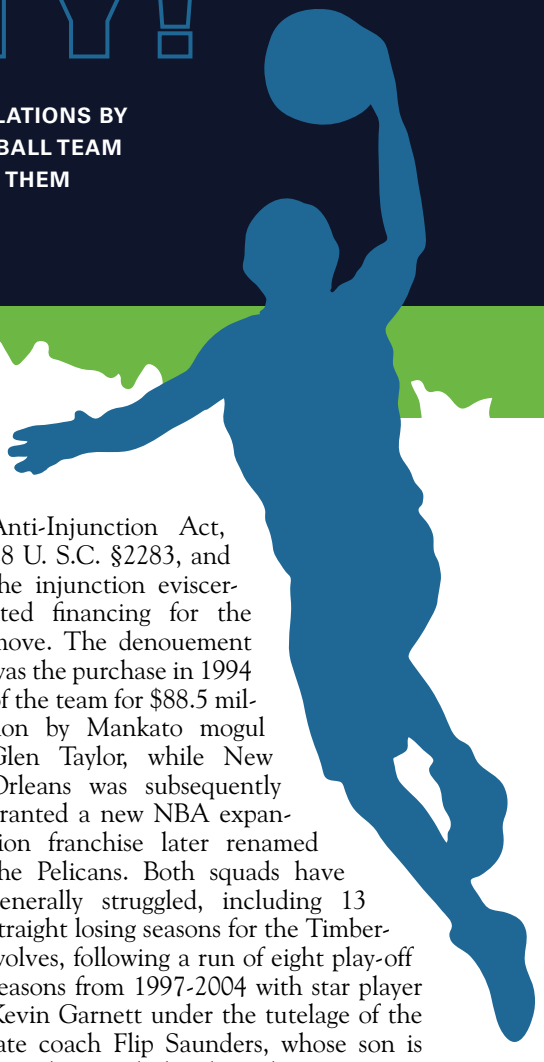
TIMBERWOLVES TURNING THIRTY!

MANY DECADES OF TRIALS AND TRIBULATIONS BY MINNESOTA'S PROFESSIONAL BASKETBALL TEAM AND OTHERS—ON THE COURTS AND IN THEM

By Marshall H. Tanick



As the Minnesota Timberwolves play their 30th season in the National Basketball Association (NBA) this fall, the team can look back at a long history of basketball-related litigation in this state.

The Timberwolves brought professional basketball back to Minnesota in 1989, following a history of championship teams, followed by a long drought and other travails. The season of its 30th birthday, along with the silver anniversary of its current ownership, provides an opportune occasion to look back at some of the litigation lore the sport has created in this state at both professional and amateur levels.

SQUAD SITES

Long before its first tipoff in the fall of 1989, the team was involved in litigation. The site of the Timberwolves' new home-to-be, Target Center, in the warehouse district in downtown Minneapolis, was at the center of a landlord-tenant dispute in ***Wong Kong Harm Wun Sun Assoc. v. Chin***.[1] The owner of the premises leased a building in 1986 for three years, requiring the owner to give the Timberwolves an option to purchase the property, which required that the owner terminate the lease with the tenant in midterm. A default eviction against the tenant was reversed by the court of appeals, reasoning that the tenant had satisfied the four conditions necessary to reopen a judgment under Rule 60 of the Minnesota Rules of Civil Procedure: a reasonable defense on the merits; reasonable excuse for the default; exercise of due diligence after notice of default; and absence of substantial prejudice to the other side.

The landlord and Timberwolves resolved their dispute and the Timberwolves ultimately purchased the property and razed it to construct the arena and adjoining health club, where the team has played since the franchise's inaugural season in the Metrodome.

But within a few years, the club was floundering on the court and at the box office, leading to an attempt to sell the team to a group in New Orleans after that city's NBA team, the Jazz, moved to Utah.

Dueling lawsuits sprang up here and in New Orleans regarding the prospective transfer. U. S. District Court Judge James Rosenbaum in downtown Minneapolis, a few blocks from the Target Center, enjoined the proposed move, which the 8th Circuit affirmed in ***National Basketball Ass'n. v. Minnesota Professional Basketball, Ltd. Partnership***.[2] The appellate court upheld the judge's injunction against implementing a parallel Louisiana state court ruling barring the federal lawsuit because it properly fell within the "litigation exception" of the Federal Anti-Injunction Act, 28 U. S.C. §2283, and the injunction eviscerated financing for the move. The denouement was the purchase in 1994 of the team for $88.5 million by Mankato mogul Glen Taylor, while New Orleans was subsequently granted a new NBA expansion franchise later renamed the Pelicans. Both squads have generally struggled, including 13 straight losing seasons for the Timberwolves, following a run of eight play-off seasons from 1997-2004 with star player Kevin Garnett under the tutelage of the late coach Flip Saunders, whose son is now the squad's head coach.

While the team has endured setbacks on the hardwood, the investment by Taylor, who also owns the *StarTribune* newspaper, has blossomed by 15 times in value into a team worth $1.3 billion, according to Forbes magazine.

PREDECESSOR PROBLEMS

The Timberwolves' predecessor professional basketball teams in Minnesota also encountered their share of litigation problems.

The Minneapolis Lakers—NBA champs five times in the smaller-scale league of 1948 to 1954—were sued by a minority shareholder seeking examination of the corporate records in ***Skutt v. Minneapolis Basketball Corp***.[3] The case reached the Minnesota Supreme Court in late 1961, not long after the team's owner, Bob Short, had moved the franchise to Los Angeles. The Supreme Court dismissed the appeal on grounds that a lower court order to examine the corporate books was interlocutory and not appealable.

The Lakers' departure for Los Angeles in 1960 left the state bereft of professional basketball until 1967, when the upstart American Basketball Association (ABA) placed a club known as the Minnesota Muskies in the Twin Cities. That team generated as much action in court as on the court. The Muskies, who played for one season, 1967-68, spawned a couple of major contract lawsuits in their brief existence, and their successor in the ABA, the Pipers, became enmeshed in yet another.

In ***Minnesota Muskies, Inc. v. Hudson***,[4] the Muskies team sought to spirit away former University of Minnesota Gopher basketball star Lou Hudson from the Atlanta Hawks of the rival NBA. By the time the matter reached court, the Muskies had completed their lone season in Minnesota and transferred to Miami, where they were known as the Miami Floridians. The federal district court in North Carolina, Hudson's home jurisdiction, rejected an attempt by the Floridians, f/k/a Muskies, to enjoin Hudson from playing for the Hawks on the grounds that the ABA team was guilty of "unclean hands" in inducing the ballplayer to leave his NBA squad while he still had a legal, if not "moral," obligation to the Hawks. The court excoriated the general manager of the Muskies for conduct "so tainted with unfairness and injustice as to justify a Court of equity in withholding relief."[5]

COACH CASES

Basketball coaches go from the hardwood courts to the judicial ones from time to time. The latest instance occurred this fall when the state Supreme Court allowed the former coach of the Woodbury High School girls' team to proceed with a defamation action against an ex-player's mother who made highly critical and disparaging statements about the conduct of the coach in ***McGuire v. Bowlin.***[6]

Reversing trial and appellate court rulings, the justices unanimously held that the coach, who also taught kindergarten, is not a "public official" or "public figure" for purposes of the heightened proof requirement of "actual malice," meaning knowing falsity or reckless disregard of the truth, required for those who fall into those categories under *New York Times Co. v. Sullivan*.[7] While recognizing that the Minnesota Court of Appeals has deemed public school teachers to be subject to the *Times* doctrine, the Court refused to follow that line of reasoning, which diverged from the majority of jurisdictions that have addressed this issue. Instead, it unanimously ruled that the coaching was not a "vital governmental function… [or] fundamental to democracy."

But it did uphold dismissal of claims against three other parents on qualified privilege grounds because the coach did not appeal from the appellate court ruling on that issue. As a result, the case was remanded for trial in Washington County with respect to the one remaining parent defendant.

A long-time boys' basketball coach at the now-defunct Marshall High School in Minneapolis was denied tenure when challenging the non-renewal of his coaching position. The state Supreme Court held that the teacher tenure law, Minn. Stat. §125.17, did not cover coaching, a decision conforming to the "unanimity" in other jurisdictions "denying tenure to coaches and other similar positions." Subsequent changes to the statute have slightly enlarged the rights of coaches in challenging terminations, but have not extended tenure to them. *E.g.* ***Stang v. Ind. Sch. Dist. No. 191***;[8] ***Hahn v. Ind. Sch. District No. 378***.[9]

COLLEGIATE CASES

Lou Hudson was not the only University of Minnesota basketball player to become embroiled in litigation. Another case arose in February 1972, when two star Gophers players, Ron Behagen and Corky Taylor, were suspended for their part in an infamous in-game altercation between the defending Big Ten Champion Gophers and Ohio State. In ***Behagen v. Intercollegiate Conference of Faculty Representatives***,[10] U.S. District Court Judge Earl R. Larson enjoined the players' suspensions on grounds that they were denied due process by not being given notices of the charges or a hearing. The players returned to the team but were unable to help it defend its conference title.

Five years later, another eligibility fracas involved the University's attempt to stop the NCAA from placing the basketball team on probation because the squad refused to abide by an NCAA directive to declare star center Mychal Thompson and two teammates ineligible due to receiving "extra benefits" in violation of the NCAA regulations. In ***Regents of the University of Minnesota v. The National Collegiate Athletic Association***,[11] the 8th Circuit reversed an injunction against the NCAA issued by Chief Judge Edward Devitt of the U.S. District Court here, reasoning that the NCAA had accorded due process to the university and the players in its fact-finding procedures, and the school was contractually obliged to abide by the NCAA probation.[12] As a result, Thompson and his teammates were required to sit out several games that season, costing the progam a chance to win the Big Ten title.

Another stellar Gopher basketball player, guard Mark Hall, ran into eligibility problems in the early 1980s and turned to the judicial arena for assistance. In ***Hall v. University of Minnesota***,[13] the player, who came here from Massachusetts, sued the university seeking to continue his schooling so he could retain his eligibility to play during his senior year. Saying the case raised "serious and troubling" questions regarding intercollegiate college sports, U.S. District Court Judge Miles Lord ordered the university to allow Hall to enter an appropriate scholastic program because he was enticed to come to the university from his home "to be a basketball player and not a scholar."[14]

A former prizefighter, the feisty jurist threw a judicial haymaker at the college athletic establishment, expressing an acidic view of the "tug of war" between academic achievement and athletic eligibility and ruling in favor of the player's interest in resuming intercollegiate basketball and enhancing his chances for a professional career. Hall returned to the team, but soon left the squad, which went on to win another Big Ten title without him. He never made it in professional basketball and later died in a cocaine-related incident.

INJURIES & INSURANCE

Although not generally regarded as a violent sport, basketball leaves its share of bumps and bruises on the participants. Occasionally, these injuries result in litigation, as in ***Interstate Fire & Casualty Co. v. Auto Owners Insurance Co.***, which arose out of a scuffle during a basketball game in a high school physical education class. One of two boys fighting for the basketball suffered serious injuries that left him a quadriplegic.[15]

The legal dispute concerned who was responsible for payment: the school's excess insurer or the insurer that issued the homeowner's policy covering the liability for the boy who caused the injuries. The Supreme Court held that the school's coverage was applicable because it more clearly intended to insure against accidents occurring on school property. The Court rejected an analysis based on which insurer was "closest-to-the-risk" and looked, instead, to the overall "insuring intent" of the respective policies, concluding that the school's excess coverage applied.

The scope of the duty of a liability insurer and school district to defend a teacher accused of sexual abuse was addressed in a basketball-related case in ***Horace Mann Insurance Company v. Independent School District No. 656***.[16] A member of a girls' high school basketball team brought a civil action against the assistant coach, alleging sexual misconduct. The school district's general liability insurer prevailed in a declaratory judgment action where the court found that the "intentional damages" exclusion in the policy precluded any obligation to defend or indemnify. The school district, on the other hand, was held to have "an absolute statutory duty" under Minn. Stat. 127.03, subd. 2 to defend the embattled teacher *but* was not required to indemnify him if he was found liable for misconduct.

Not all personal injury litigation arising from basketball in Minnesota occurs on the court or in the gymnasium. In ***Hamilton v. Independent School Dist. No. 114***, a student was injured when he fell on a sidewalk as a result of horseplay with a group of spectators as the group was leaving a high school basketball game in the north central community of Backus.[17] The appellate court reversed a grant of summary judgment by the Cass County trial court. It reasoned that disputed-act issues existed regarding the school district's duty to monitor and supervise student hijinks after the game.

A more unusual injury to a basketball player led to a determination of liability in ***Pumper v. Rochester Ind. School Dist. No. 535***, a case in which a participant in a youth basketball game tournament in a gymnasium at a public school in Rochester was knocked over while guarding an opponent who was driving toward the basket. As the defender fell, his left arm slid underneath the nearby bleachers adjoining the court, resulting in multiple fractures and permanent disability.[18] The appellate court affirmed a jury finding that the school district was negligent for failing "to maintain the gymnasium in a safe condition." The court rejected an assumption-of-risk defense and other issues raised by the school district.

CRIMINAL CONDUCT

Criminal conduct has also been litigated in several Minnesota basketball cases. Evidence and procedural rules were at issue in ***State v. Lee***,[19] which involved criminal sexual charges against University of Minnesota basketball player Mitchell Lee. The basketball player sought to suppress statements he made to a counselor about the incident, which occurred in a university dormitory. The Hennepin County District Court suppressed the statements, and the appellate court affirmed on grounds that the challenged statements did not seem likely to have "critical impact" on the trial, the victim was competent to testify, and her version of events was supported by other corroborating evidence. Lee was tried and acquitted, as he was in an earlier sexual assault case in Madison, Wisconsin, along with two teammates. But Lee was then kicked off the team after he showed up at a game with a celebratory haircut in the shape of a champagne glass following his second acquittal—which did not go over well with the team's coach, Jim Dutcher, or university officials and many other observers.

Gambling is a criminal offense often associated with basketball in Minnesota law, as reflected in two federal court cases arising out of the state. In ***Truchinski v. United States***,[20] the 8th Circuit upheld the conviction of a basketball bookmaker, rejecting the contention that the federal wagering law violated the right of free speech. And the means used to conduct basketball wagering was held subject to forfeiture under federal law in ***One 1961 Lincoln Continental Sedan v. United States***.[21] The court of appeals ruled that the gambler's car and the currency found in the car were properly seized since they were used in the illicit gambling operations. ▲

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Notes

[1] *Wong Kong Harm Wun Sun Assoc. v. Chin*, 1988 WL 33169 (Minn. App. 1988) (unpublished).
[2] *National Basketball Ass'n. v. Minnesota Professional Basketball, Ltd. Partnership*, 56 F.3d 866 (8th Cir. 1995).
[3] *Skutt v. Minneapolis Basketball Corp.*, 261 Minn. 577, 110 N.W.2d 495 (1961).
[4] *Minnesota Muskies, Inc. v. Hudson*, 294 F. Supp. 979 (M.D. N.C. 1969).
[5] 294 F.Supp at 990.
[6] *McGuire v. Bowlin*, 2019 WL 4180048 (Minn. 9/4/2019).
[7] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[8] *Stang v. Ind. Sch. Dist. No. 191*, 356 N.W.2d 82 (Minn. 1991).
[9] *Hahn v. Ind. Sch. District No. 378*, 386 N.W.2d 789 (Minn. App. 1986).
[10] *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F.Supp. 602 (D. Minn. 1972).
[11] *Regents of the University of Minnesota v. The National Collegiate Athletic Association*, 560 F.2d 352 (8th Cir. 1976).
[12] 422 F.Supp. 1158 (D. Minn. 1976).
[13] *Hall v. University of Minnesota*, 530 F.Supp. 104 (D. Minn. 1982).
[14] 530 F.Supp. at 104, 106.
[15] *Interstate Fire & Casualty Co. v. Auto Owners Insurance Co.*, 433 N.W.2d 82 (Minn. 1988).
[16] *Horace Mann Insurance Company v. Independent School District No. 656*, 355 N.W.2d 413 (Minn. 1984).
[17] *Hamilton v. Independent School Dist. No. 114*, 355 N.W.2d 182 (Minn. App. 1984).
[18] *Pumper v. Rochester Ind. School Dist. No. 535*, 1989 WL 17603 (Minn. Ct. App 1989) (unpublished).
[19] *State v. Lee*, 376 N.W.2d 259 (Minn. App. 1985).
[20] *Truchinski v. United States*, 393 F.2d 627 (8th Cir. 1963).
[21] *One 1961 Lincoln Continental Sedan v. United States*, 360 F.2d 467 (8th Cir. 1966).

Landmarks in the Law

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CRIMINAL LAW

JUDICIAL LAW

DWI: When challenging a test refusal conviction in postconviction proceedings, petitioner must allege and prove there was no warrant and no exception applies. Respondent was arrested for driving while under the influence of narcotics. He was read the implied consent advisory and refused urine and blood tests. Respondent ultimately pleaded guilty to first-degree test refusal. In his second postconviction petition, he argued that *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016) (establishing that the state may not criminalize refusal of a blood or urine test absent a search warrant or an applicable exception to the warrant requirement), rendered his conviction unconstitutional. His petition was denied. The court of appeals found that the district court erred in concluding it was respondent's burden to prove the absence of exigent circumstances.

The Supreme Court reverses the court of appeals, finding that the district court properly placed the burden of proof on respondent. The Court notes that in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018), the Court held that *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) (holding that blood test refusals could be criminalized only if police had a warrant or some other exception to the warrant requirement applied) applied retroactively. However, the Court did not specify in *Johnson* who had the burden of proving or disproving the applicability of a warrant requirement exception.

The postconviction statute and case law makes clear that the petitioner generally has the burden of proof in postconviction proceedings. The Court declines to "write a different rule here." However, because this rule requires the petitioner to prove two negatives (no warrant and no exception), the Court adopts a heightened pleading requirement for *Birchfield/Johnson* postconviction proceedings, to ensure fairness.

First, the petitioner must affirmatively allege that no warrant was issued and that no warrant exception was applicable. Then, if the state wishes to controvert the petitioner's allegations, it must do so in its responsive answer or motion, or the argument will be waived. The state must admit or deny the existence of a warrant and, if no warrant was issued, either admit the lack of an exception or state the specific exception relied on and the grounds for the state's reliance in sufficient detail to give petitioner adequate notice. The case is remanded to the district court to allow the parties to comply with this new pleading standard. ***Fagin v. State***, 933 N.W.2d 774 (Minn. 10/2/2019).

Sentencing: Upward departure based on victims' particular vulnerability allowed when victims forced at gunpoint to disrobe. During the robbery of a home with an accomplice, appellant's accomplice, who had a gun in hand, ordered the victims to take off their clothes and appellant placed a gun to the victims' heads and ordered them to unlock a safe. Appellant pleaded guilty to, among other crimes, aiding and abetting first-degree aggravated robbery. A bench trial was held to determining whether a sentencing departure was appropriate. At issue here is the district court's conclusion that an upward departure was justified based on the victims' particular vulnerability—that is, their nudity.

In this case of first impression, the court of appeals holds that nudity may be considered an aggravating factor for an upward departure. The sentencing guidelines provide a list of grounds for finding that a victim is particularly vulnerable, but that list is nonexclusive and has been expanded by the courts. Appellant argues that the upward departure was not warranted because his victims' nudity was not a substantial factor in the completion of the crime. However, neither the sentencing guidelines nor case law require that the victim's particular vulnerability play a substantial part in the commission of the crime to warrant

an upward departure on those grounds. Without deciding whether a substantial factor finding is required, the court determines that the facts of the case support such a finding. Thus, the court affirms the district court's grant of an upward departure.

The court finds, however, that the district court abused its discretion in imposing a greater than double upward departure, as there are not "circumstances so severe that this case is one of the extremely rare cases in which more than a double durational departure is justified." The case is reversed and remanded for resentencing. ***State v. Rabold***, A19-0278, 2019 WL 4924521 (Minn. Ct. App. 10/7/2019).

■ **1st Amendment: Minn. Stat. §609.27, subd. 1(4), is facially unconstitutional.** The district court dismissed the complaint against respondent, finding that the charging statute, Minn. Stat. §609.27, subd. 1(4), violated the 1st Amendment. Respondent was charged with attempted coercion after respondent allegedly threatened to release a video of his ex-girlfriend "talking about smoking marijuana" to the Department of Human Services and her employer.

First, the court of appeals finds that the plain language of section 609.27, subd. 1(4), is not ambiguous and restricts protected speech. Section 609.27, subd. 1, provides that "[w]hoever orally or in writing makes any of the following threats and thereby causes another against the other's will to do any act or forbear doing a lawful act is guilty of coercion… (4) a threat to expose a secret or deformity, publish a defamatory statement, or otherwise expose any person to disgrace or ridicule." The following terms are not defined: threat, secret, disgrace, deformity, or ridicule. The court looks to the obvious or common meanings of the words, and concludes section 609.27, subd. 1(4), criminalizes threats to expose something hidden, malformed, or defamatory that otherwise exposes any person to shame or contempt, and thereby cause another against their will to do any act or forbear a lawful act. The statute broadly criminalizes any threat to expose a secret or deformity that causes another against the other's will to do any act or forbear doing a lawful act. Thus, it reaches more than unprotected threats to extort or defame and also criminalizes a substantial amount of constitutionally protected speech.

Next, the court finds section 609.27, subd. 1(4), is not subject to a narrowing construction, nor can the unconstitutional language be severed, as both would require the court to rewrite the statute. Ultimately, the court finds section 609.27, subd. 1(4), is unconstitutional, as it is facially overbroad under the 1st Amendment. The district court is affirmed. ***State v. Jorgenson***, 934 N.W.2d 362 (Minn. Ct. App. 10/7/2019).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **FLSA; expert report improperly allowed.** A class action suit by truckers seeking compensation for unpaid wages that they earned during off-duty time while resting in their vehicles was vacated and remanded by the 8th Circuit. A jury award of nearly $800,000 in damages for the short rest break wages was improper because the trial court erroneously extended the deadline for disclosing expert reports that permitted plaintiffs to submit a new expert report to correct flaws in the original expert report discovered during discovery, which the court found to have been an abuse of discretion making remand necessary. A dissent would have allowed the award to stand on grounds that the extension of the time to submit an expert report constituted a "permissible exercise of discretion." ***Petrone v. Werner Enterprises, Inc.***, 940 F.3d 425 (8th Cir. 10/10/2019).

■ **Disability discrimination; combination claim actionable.** A sales associate who quit her job after a request for a leave of absence was denied is entitled to pursue a claim for failure to give a reasonable accommodation under the Americans With Disabilities Act (ADA), although a related retaliation claim does not survive. The 8th Circuit, partially reversing a ruling of the lower court, held that the "accommodation" claim should not have been dismissed by the trial court because the claimant repeatedly told her supervisor she wanted to take a leave of absence, even though she did not refer specifically to the ADA or use the word "accommodation." Because the employer was aware of the disability and the claimant's request for leave, the trial court erred in dismissing that claim. However, a claim of retaliation was not actionable, which warranted dismissal of that portion of the lawsuit, yielding a partial affirmance, coupled with a partial reversal and remand on the disability accommodation claim. ***Garrison v. Dolgencorp., LLC***, 939 F.3d 937 (8th Cir. 10/3/2019).

■ **Unemployment compensation; untimely appeal.** Reiterating the 20-day statutory deadline for appealing from an adverse unemployment benefits decision, the court of appeals upheld dismissal of an employee's appeal of denial of benefits. The 20-day statutory period is "absolute and unambiguous," and the court repeated a long series of case law warrants dismissal of the untimely claim. ***Toulouse v. Department of Employment & Economic Development***, 2019 WL 5304511 (Minn. Ct. App. 10/21/2019) (unpublished).

■ **Unemployment compensation; Social Security offset.** Social Security old age benefits received by an applicant for unemployment compensation were properly deducted from his benefits. The court of appeals upheld the set-off for those funds, affirming a ruling of a ULJ with DEED. ***In re Keefe***, 2019 WL 5543060 (Minn. Ct. App. 10/28/19) (unpublished).

LOOKING AHEAD

A high-profile case involving the standard for sex harassment claims due to hostile work environment under the Minnesota Human Rights Act was awaiting determination by the Minnesota Supreme Court. Last month, the Court heard the case of ***Kenneh v. Homeward Bound, Inc.,*** No. 18-0174, in which both the Hennepin County District Court and the Minnesota Court of Appeals rejected a request to abandon the long-standing "severe or pervasive" standard for sex harassment claims based on hostile work environment. The high court is considering whether Minnesota should depart from the standard for harassment under the state statute or, in the alternative, whether the claimant experienced any "severe or pervasive sexual harassment;" whether the employer took sufficient remedial action; and whether the employer should be subject to a heightened standard of liability under the employer's own internal policy concerning harassment and offensive behavior in the workplace.

While the Court could decide the case based on narrow evidentiary grounds, it could on the other hand re-evaluate the "severe and pervasive" standard or provide additional guidance regarding the behavior that falls within that classification.

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **DC Circuit rejects challenge to EPA's revised determination on GHG emission standards.** On 10/25/2019, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit rejected on procedural grounds a lawsuit by states and environmentalists challenging the Environmental Protection Agency's (EPA) 2018 determination that greenhouse gas (GHG) emission standards the agency had previously adopted for model year (MY) 2022 to 2025 motor vehicles were no longer appropriate. Specifically, the court held that EPA's determination was not final agency action and thus not reviewable by the court. However, the court emphasized that when and if EPA did take final action, it would need a substantial justification for its change of course from the original Obama-era determination.

By way of brief background, Section 202(a) of the federal Clean Air Act (CAA) requires EPA to "prescribe (and from time to time revise)" standards for "the emission of any air pollutant from... new motor vehicles or new motor vehicle engines," which "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7521(a). In December 2009, EPA determined that GHG emissions from motor vehicles met this "endangerment" standard, 74 Fed. Reg. 66,496 (Dec. 15, 2009). The finding led to the EPA, together with the National Highway Traffic Safety Administration (NHTSA), issuing a May 2010 final rule establishing GHG emission and corporate average fuel economy (CAFE) standards for new motor vehicles, which increased in stringency annually from model year (MY) 2012 to 2016. 75 Fed. Reg. 25,324 (5/7/010).

In 2012, EPA and NHTSA published the next set of GHG emission fuel economy standards, covering 2017 to 2025 MY vehicles. 77 Fed. Reg. 62,624 (10/15/2012). However, because NHTSA was statutorily limited to promulgating standards for a maximum of five model years, it issued CAFE standards for MY 2017 to 2021, but only announced non-binding standards for MY 2022 to 2025 based on NHTSA's judgment of what it would have set if it had statutory authority. NHTSA and EPA committed to undertake subsequent rulemaking to confirm the non-binding standards, and EPA adopted rules requiring the agency to make a final decision by 4/1/2018, on whether the model year 2022 to 2025 standards remained "appropriate" under Section 202(a). 40 C.F.R. §86.1818–12(h) (Section 12(h)). Following an extensive rulemaking effort—which included producing a 268-page Proposed Determination and accompanying 719-page Technical Support Document—EPA, on 1/12/2017, determined that the GHG standards established in 2012 for MY 2022 to 2025 remained "appropriate" and did not need to be revised.

Shortly after President Trump was sworn into office a mere eight days later, EPA changed course. The agency published, on 4/13/2018, a "Revised Determination" withdrawing the January 12 determination and concluding that the 2022 to 2025 standards were "not appropriate." 83 Fed. Reg. 16,077. Because it determined the current standards "may be too stringent," EPA proposed to conduct rulemaking to revise the standards "as appropriate." EPA emphasized that the "current standards remain in effect" and indicated that its "Revised Determination" was "not a final agency action."

The plaintiffs' lawsuit contended EPA failed to follow the procedural and substantive requirements imposed by Section 12(h) and that the Revised Determination was arbitrary and capricious. However, the court never addressed the merits of plaintiffs' claims; rather it agreed with EPA that the case should be dismissed for lack of jurisdiction because the Revised Determination was not "final action." The court held that EPA's Revised Determination did not meet the standard set forth in *Bennett v. Spear*, 520 U.S. 154, (1997) that a final agency action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." Here, the court held, EPA left in place the existing emission standards and did not bind itself to a particular outcome in the pending rulemaking for MY 2022 to 2025 CAFE standards; accordingly, no "rights or obligations" had yet been determined. The court also noted that although EPA had withdrawn its original determination, it had not withdrawn the extensive underlying factual findings. For this reason, the court warned, "if EPA ultimately changes the 2012 standards, it will need to provide a reasoned explanation for why it is disregarding facts and circumstances that underlay or were engendered by the 2022-2025 model year standards when they were set in 2012 and the additional record developed during the original mid-term evaluation process." (Quotations omitted.) ***California By and Through Brown v. Environmental Protection Agency***, ___ F.3d ___ (D.C. Cir. 2019).

■ **Asbestos abatement contractor receives 12 years in prison for violating Clean Air Act.** The United States District Court for the Western District of Wisconsin issued a judgment sentencing former asbestos abatement contractor Lloyd Robl of New Richmond, Wisconsin to two consecutive 72-month prison sentences for violating the Clean Air Act and federal wire fraud statutes. According to the 10/10/2018 indictment and a 9/12/2019 announcement regarding the case from the District's U.S. Attorney's office, Mr. Robl's offenses included, but were not limited to:

- falsely advertising in Wisconsin and Minnesota that he was licensed, insured, and bonded to do asbestos abatements when he was not;
- falsifying documents provided to customers, including insurance policy documents, Minnesota asbestos abatement licenses, air sampling results, and asbestos waste manifests;
- conducting asbestos abatements—including the removal of asbestos-containing pipe insulation from an 18-unit

apartment complex on Asbury Street in St. Paul—without current certification from the state of Minnesota;

• improperly disposing of asbestos-laden waste by burning the materials in burn piles or in 55-gallon drums at his Wisconsin home, thereby releasing asbestos into the ambient air, and spreading the ashes in the farm field behind his home; and

• hiring methamphetamine addicts to conduct asbestos removal jobs, paying them with methamphetamine, and failing to train them or provide respirators, suits, or cleaning materials.

At the sentencing hearing, according to the U.S. Attorney's office announcement, Judge William M. Conley noted that Mr. Robl "has a lack of any moral compass," and that "[h]is willful conduct caused harm to society and the environment, and countless others who will never be known." ***U.S. v. Robl***, No. 0758 3:18CR00136-001 (W.D. Wis. Filed 9/16/2019).

MN Court of Appeals rejects feedlot environmental review for failure to consider greenhouse gas emissions. On appeal, the Minnesota Center for Environmental Advocacy (MCEA) challenged the decisions by the Minnesota Pollution Control Agency (MPCA) in which the MPCA denied MCEA's request for a contested-case hearing on a national pollutant discharge elimination system (NPDES) feedlot permit and request for an environmental impact statement (EIS) regarding Daley Farms' proposed expansion of its dairy farm concentrated-animal-feeding operation.

The MCEA relied on four arguments, specifically that (1) the decision to deny an EIS for Daley Farms' expansion was based on an error of law, unsupported by substantial evidence, and arbitrary and capricious; (2) the decision to issue a modified NPDES permit was unsupported by substantial evidence; (3) the denial of a contested-case hearing was unsupported by substantial evidence; and (4) the decision to issue the NPDES permit prior to issuing a commissioner report was made upon unlawful procedure.

In its review, the court found that the MPCA failed to take a "hard look" at whether greenhouse-gas (GHG) emissions could have potential significant environmental effects in its determination that an EIS was unnecessary. The court was unpersuaded by the fact that the environmental assessment worksheet (EAW) form prepared by the Minnesota Environmental Quality Board for feedlot expansions did not request information on GHG emissions; MPCA's obligations under the Minnesota Environmental Policy Act, the court held, are "not limited to the EAW form." Therefore, its decision was arbitrary and capricious and was reversed and remanded to the MPCA for further proceedings. In making this finding, the court further found that because approval of a request to modify a NPDES permit requires a prior determination of whether an EIS is needed, the MPCA's approval of Daley Farms' request to modify its NPDES permit was reversed and remanded.

The court next found that the MCEA failed to establish a genuine issue of material fact in its request for a contested-case hearing. The court opined that MCEA's argument that Daley Farms' use of the applicable nitrogen-application-rate standards, as set by Minnesota Rule Part 7020.2225, subp. 3, was a challenge to the state regulation was a question of law, and therefore was not a genuine issue of material fact.

Finally, the court determined that there was no procedural error in MPCA's failure to issue a commissioner's report pursuant to Minnesota Rule Part 7001.0125, subp. 2. The court reasoned that the rule MCEA relied upon was inapplicable because the rule's history demonstrates that it was intended to provide a now-disbanded MPCA decisional body, the Citizens' Board, with information related to decision-making. The court reasoned that even if the rule were applicable, the MCEA failed to provide evidence that it had been violated.

All other objections raised by the MCEA were rejected by the court. ***In re A Contested Case Hearing Request & Modification of a Notice of Coverage Under Individual Nat'l Pollution Discharge Elimination Sys. Feedlot Permit No. Mn0067652***, Nos. A19-0207, A19-0209, 2019 Minn. App. Unpub. LEXIS 976 (Minn. Ct. App. 10/14/2019).

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FAMILY LAW

JUDICIAL LAW

Domestic abuse presumption applies only to awards of joint custody and does not operate against an abusive party. The parties began a "toxic" and conflict-prone relationship in 2010 before mother gave birth to a daughter in 2014. Shortly after the child's first birthday, father petitioned for custody and parenting time as well as an order for protection (OFP) against mother. After a hearing, the district court found mother had committed domestic abuse against father, and issued an OFP granting father temporary sole legal and physical custody of their daughter. However, the court declined to issue an OFP on behalf of the child.

The parties tried the custody and parenting time case approximately a year and a half later. Father testified to suffering extensive physical abuse from mother, introduced 90 exhibits, and called eight additional witnesses. Mother's case in chief consisted of her answering a handful of questions about her ability to communicate with father and a co-parenting class she had taken. Mother called no other witnesses and offered no exhibits. An appointed guardian *ad litem* recommended the parties share joint legal and joint physical custody, notwithstanding the history of abuse. Based on the evidence at trial, the district court concluded that, despite mother's having committed acts of domestic abuse, father "has superior power and control

over Mother," and considered mother's actions "in the context of how powerless she felt in the relationship." Accordingly, the district court awarded the parties joint physical custody and granted mother sole legal custody.

Father appealed, arguing the court misapplied the presumption against joint custody in cases involving domestic abuse by granting legal custody to the abusive party and awarding the parties joint physical custody. The court of appeals affirmed and the Supreme Court granted review.

Writing for a unanimous court, Justice Chutich rejected father's arguments and affirmed the decisions below. First, the Supreme Court concluded the presumption against joint legal custody in Minn. Stat. §518.17 does not automatically favor the victim of abuse. Instead, the presumption prioritizes a custody arrangement (sole custody) rather than a particular custodian. The presumption is thus "intended to enable the district court to conduct a nuanced consideration of the child's needs," rather than being "mechanically applied against a parent who has committed domestic abuse." Second, the Supreme Court affirmed the award of sole legal and joint physical custody, holding that the lower court appropriately weighed the nature, implications, and context of mother's abusive behavior as part of its overall consideration of best interests. ***Thornton v. Bosquez***, 933 N.W.2d 781 (Minn. 2019).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Amendment of scheduling order; no good cause; abuse of discretion.** Where a district court granted the plaintiffs' motion to amend the scheduling order to allow modification of expert reports despite finding no good cause to support the proposed amendment, the 8th Circuit, applying a "clear and prejudicial abuse of discretion" standard of review, found that the district court had abused its discretion in modifying the scheduling order because it "bypass[ed] the mandatory good cause standard" of Fed. R. Civ. P. 16(b)(4). Judge Colloton dissented, arguing that the district court's order was "a permissible exercise of discretion." ***Petrone v. Werner Enterprises, Inc.***, 940 F.3d 425 (8th Cir. 2019).

■ **Nationwide class certification reversed.** The 8th Circuit reversed a district court's certification of a nationwide class action on claims brought under a Missouri deceptive trade practices act, finding that the claims brought by the non-Missouri plaintiffs did not fall within the scope of the Missouri statute, and also found that the district court had not engaged in the necessary "individualized choice-of-law analysis" on plaintiffs' other claims. ***Hale v. Emerson Elec. Co.***, ___ F.3d ___ (8th Cir. 2019).

■ **Arbitration; substantive unconscionability cured on appeal.** In an action brought again a Twin Cities law firm and others by the law firm's former Arkansas client, where the district court denied the law firm's motion to compel arbitration, the 8th Circuit held that any possible unconscionability in an arbitration agreement between the law firm and its former client which required that the arbitration take place in Washington, D.C., was cured when the law firm made a post-hoc offer to cover the plaintiff's share of arbitration costs. ***Plummer v. McSweeney***, ___ F.3d ___ (8th Cir. 2019).

■ **Intervention; violation of attorney's eyes only protective order; sanctions.** Considering a third-party witness's motion to intervene for the limited purpose of seeking a contempt order against the defendants and their counsel for violating an attorney's-eyes-only protective order, Magistrate Judge Menendez granted the motion to intervene and denied the request for a contempt order as "unnecessary," but sanctioned defendants and their counsel for their multiple violations of the protective order by awarding attorney's fees and expenses and requiring defendants' local counsel to take an "active role" in the litigation. ***Management Registry Inc. v. A.W. Cos.***, 2019 WL 5388488 (D. Minn. 10/22/2019).

Less than three weeks later, Magistrate Judge Menendez awarded the third-party witness more than $12,500 in attorney's fees and expenses pursuant to Fed. R. Civ. P. 37(b)(2), rejecting the argument that the 32.8 hours the witness's attorney spent working on the matter were excessive. ***Management Registry Inc. v. A.W. Cos.***, 2019 WL 5868225 (D. Minn. 11/11/2019).

■ **Discovery violations; sanctions; Fed. R. Civ. P. 37(b); inherent powers.** Where the plaintiff intentionally withheld relevant documents from his document productions, Magistrate Judge Menendez sanctioned him under Fed. R. Civ. P. 37(b) and inherent powers by awarding attorney's fees and costs associated with the motion to compel and the additional depositions resulting from the plaintiff's incomplete disclosures, and also recommended that defendant be permitted to cross-examine the plaintiff at trial regarding his discovery failures. ***Darmer v. State Farm Fire & Cas. Co.***, 2019 WL 5541411 (D. Minn. 10/28/2019).

■ **Diversity jurisdiction; change of domicile; motion to remand denied.** Where the corporate defendant removed the action based on a diversity of citizenship and the plaintiff moved to remand, arguing that the defendant's principal place of business was in Minnesota, Chief Judge Tunheim found that the defendant's "nerve center" had moved to Delaware one month before the action was commenced, and therefore denied the motion to remand. ***Adouk v. FilmTec Corp.***, 2019 WL 4917127 (D. Minn. 10/4/2019).

■ **Interrogatories; counting subparts.** Sustaining the defendants' objections to numerous interrogatories, Magistrate Judge Wright found that "interrogatory subparts are to be counted as part of one interrogatory... if they are logically or factually subsumed within and necessarily related to the primary question," and found that an interrogatory asking the defendants to summarize the basis for each of the 50-plus factual denials in their answer counted as more than 50 separate interrogatories. ***Alexander v. 1328 Uptown, Inc.***, 2019 WL 4929931 (D. Minn. 10/7/2019).

■ **Motion to strike jury demand treated as non-dispositive.** Surveying the "little authority" on point, Magistrate Jude Schultz rejected the plaintiff's contention that a motion to strike a jury demand was a dispositive matter to be heard by the district judge, and instead concluded that the motion was a non-dispositive pretrial matter. ***Fair Isaac Corp. v. Federal Ins. Co.***, 2019 WL 5057865 (D. Minn. 10/9/2019).

■ **First-filed rule; parallel state and federal proceedings; *Colorado* River abstention.** Finding that the first-filed doctrine was not applicable to parallel state and federal proceedings, Judge Nelson nevertheless relied on *Colorado River* abstention and stayed the second-filed federal action pending resolution of the earlier-filed New York proceeding. ***NDGS, LLC v. Radium2 Capital, Inc.***, 2019 WL 5065187 (D. Minn. 10/9/2019).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Patent: Declaratory action of patent application agreements not same as declaratory action of patent ownership. Judge Magnuson recently denied defendants' motion to dismiss. Maxim Defense Industries, LLC sued Jake Kunsky and Unconventional Equipment Solutions, LLC alleging misuse of data and unauthorized credit-card purchases following Mr. Kunsky's termination of employment. Maxim brought an action for a declaratory judgment regarding three patent application agreements. Defendants moved to dismiss the action arguing that because no patents had yet issued, the dispute was not ripe for resolution. The court found that although defendants were right that any underlying patent ownership claim was not ripe, Maxim's claim was not related to patent ownership. Maxim sought resolution of the validity of the agreements assigning patent application ownership, not patent ownership itself. ***Maxim Def. Indus., LLC v. Kunsky***, No. 19-1225 (PAM/LIB), 2019 U.S. Dist. LEXIS 176289 (D. Minn. 10/10/2019).

Claim term not indefinite where person of ordinary skill would have no difficulty determining the bounds of the claim. Judge Schiltz recently granted Vascular Solutions LLC's motion for summary judgment that the asserted claims were not indefinite. Vascular Solutions and QXMédical, LLC manufacture and sell guide extension catheters, which are used by a heart surgeon to deliver a balloon or stent into a blocked coronary artery. In April 2017, Vascular Solutions accused QXMédical of patent infringement. QXMédical filed a declaratory action that its boosting catheter did not infringe any of Vascular Solutions' patents and that Vascular Solutions' patents were invalid. Vascular Solutions counterclaimed for patent infringement. QXMédical alleged each of the claims was invalid because the claim term "substantially rigid" was indefinite. A claim is invalid for indefiniteness if its language, when read in light of the patent's specification and the prosecution history, fails to inform, with reasonable certainty, those skilled in the art about the scope of the invention. In its *Markman* order, the court construed the term to mean "rigid enough to allow the device to be advanced within the guide catheter." QXMédical argued the term was indefinite based on the court's construction because a portion of a guide extension catheter could be both "substantially rigid" and "flexible." The court rejected QXMédical's challenge finding nothing in any of the patents said that a segment of the device could not be both "substantially rigid" and "flexible." As the experts on both sides agreed that a person of ordinary skill would have no difficulty determining whether a substantially rigid pushrod is "more rigid" than a flexible tip portion, QXMédical's argument failed, and summary judgment was proper. ***QX-Médical, LLC v. Vascular Sols., LLC***, No. 17-cv-1969 (PJS/TNL), 2019 U.S. Dist. LEXIS 171088 (D. Minn. 10/2/2019).

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TAX LAW

JUDICIAL LAW

Florida professor a Minnesota resident for state income tax purposes. In 2010, Dileep Rao agreed to a five-year contract appointment as a non-tenure-track clinical professor by Florida International University. The university offered to pay for Dr. Rao's relocation expenses, but Dr. Rao declined and commuted between Minnesota and Miami. In January 2014, Dr. Rao rented an apartment in Miami, in hopes of being appointed director of entrepreneurship at the university. Between January 2014 and July 2015, Dr. Rao frequently returned to Minnesota, where his wife continued to live. While in Miami, Dr. Rao obtained a Florida driver's license, frequented a local physician, and opened a bank account in Florida with a national bank. Dr. Rao's passport continued to display his Minnesota address, the Raos' cars remained in Minnesota, and they maintained a permanent residence in Minnesota. In April 2015, Dr. Rao's contract was renewed with the university for three years. In June 2015, Dr. Rao decided to let the lease lapse on his rented apartment and continue commuting between Minnesota and Miami. Dr. Rao intended to make Florida his domicile contingent on appointment to director of entrepreneurship. The appointment did not happen and Dr. Rao's domicile remained in Minnesota. On their 2014 and 2015 Minnesota income tax returns, the Raos declared Dr. Rao to be a Florida resident and, therefore, did not pay Minnesota income tax on his Florida earnings. The commissioner disagreed and assessed the Raos as though Dr. Rao was a Minnesota resident in both 2014 and 2015. The Raos appealed.

Minnesota taxes its residents on all of the resident's income, regardless of where it was earned. In this case, the court rejected the contention that Dr. Rao's Florida income was not subject to Minnesota tax because he spent fewer than 183 days in Minnesota during each year. *See* Minn. Stat. §290.01, subd. 7(b) (2018). Any individual domiciled in Minnesota is considered a resident, however, regardless of the number of days spent in Minnesota. Minn. Stat. §290.01, subd. 7(a) (2018). ***Rao v. Comm'r***, 2019 WL 4648566 (Minn. Tax Court 9/18/19).

Third-party assessor's data is nonpublic; petitioner permitted to access data used by appraiser. In this property tax dispute, taxpayer 1300 Nicollet served Hennepin County with written discovery requesting tenancy, income, and expense information that other downtown hotels had recently submitted to the assessor. The county opposed 1300 Nicollet's motion on the ground that responding would

place an undue burden on the county with the task of redacting all third-party assessor's data. Intervenors also opposed the motion, stating that dissemination of their protected data to a competitor would cause them substantial harm.

The information 1300 Nicollet sought is denominated "assessor's data" and is classified as private or nonpublic by the Minnesota Government Data Practices Act. The county possesses intervenors' third-party assessor's data as a result of Minn. Stat. §278.05, which requires any person contesting the valuation of income-producing property to provide the assessor with: 1) a year-end financial statement for the year prior to the assessment date; 2) a year-end financial statement for the year of the assessment date; 3) a rent roll on or near the assessment date listing the tenant name, lease start and end dates, base rent, square footage leased, and vacant space; 4) identification of all lease agreements not disclosed on a rent roll in the response to clause 3, listing the tenant name, lease start and end dates, base rent, and square footage leased; 5) net rentable square footage of the building or buildings; and 6) anticipated income and expenses in the form of a proposed budget for the year subsequent to the year of the assessment date.

The court explained that the Legislature has protected from public disclosure some of the information required in Minn. Stat. §278.05. In particular, Section 13.51 of the MGDPA states that data collected from individuals or businesses are classified as private or nonpublic. The intervenors asserted that based on Minn. Stat. §13.51, subd. 2(a)-(f), the court should not compel the county to disclose their third-party assessor's data.

In a lengthy opinion, and using the two-part statutory test in Minn. Stat. §13.03, subd. 6, the court denied 1300 Nicollet's motion to compel discovery, but ordered the county to provide 1300 Nicollet with any information, including third-party assessor's data, concerning downtown Minneapolis hotel properties which the county provided to its appraiser, and on which its appraiser relied in preparing his appraisal report for the county. ***1300 Nicollet v. Hennepin Co.***, 2019 WL 4648556 (Minn. Tax Court 9/18/19).

■ **Taxpayer must have "qualifying person" to claim tax benefits.** Working families are entitled to various credits and exemptions under Minnesota law. A taxpayer is allowed a dependency exemption for each "qualifying child" as defined in I.R.C. §152. *See* Minn. Stat. §290.01, subd. 19 (2018). A qualifying child, in relevant part, is defined as "a child of the taxpayer or a descendant of such a child," I.R.C. §152(c)(1)(A), (c)(2)(A), and "who has the same principal place of abode as the taxpayer for more than one-half of such taxable year," *id.* §152(c)(1)(B). If more than one parent can claim a child as a qualifying child, then only "the parent with whom the child resided for the longest period of time during the taxable year" is allowed to claim that child. *Id.* §152(c)(4)(B)(i).

To claim a child under the Minnesota Working Family Credit, the child must be a "qualifying child" under the federal Earned Income Tax Credit (EITC). Minn. Stat. §290.0671, subd. 1(a) (2018). Similarly, to claim Minnesota's dependent care credit, or child care credit, the taxpayer must have a "qualifying individual" under the federal Dependent Care Credit. *See* Minn. Stat. §290.067, subd. 1(a) (2018). A qualifying individual includes a qualifying child under the age of 13. I.R.C. §21(b)(1)(A). Finally, head of household filing status has three requirements in Minnesota: (1) the claimant must be unmarried on the last day of the tax year; (2) the claimant must pay more than half the cost of maintaining the household during the tax year; and (3) a qualifying person must live with the claimant for more than half the year. I.R.C. §2(b)(1) (2012).

Shawn Cermak is the father of a six-year-old and a four-year-old. For tax years 2016 and 2017, Cermak was not entitled to a dependency exemption, a dependent care credit, or an increased working family credit for his now four-year-old child. For tax year 2017, Cermak was not entitled to a dependency exemption or an increased working family credit for his now six-year-old child. Additionally, in 2017, Mr. Cermak had no qualifying children and was not entitled to file as head of household.

For 2016, the commissioner determined that Mr. Cermak could claim his six-year-old child as a qualifying child, but not his four-year-old child. For 2017, the commissioner determined that Cermak could claim neither child as a qualifying child. Accordingly, the commissioner recalculated Cermak's state tax liability, which reduced his claimed refund for each tax year. Cermak timely appealed the commissioner's orders and the issue went to trial. The court heard evidence at trial regarding whether the children had "the same principal place of abode" as Cermak for more than half of 2016 and 2017, and on whether any other person had a superior right to claim them as qualifying children.

The court concluded that in 2016, Cermak's four-year-old child resided with her mother for the longest period of time during the year, and in 2017, spent every night with her mother. The court further concluded that in 2017, Cermak's six-year-old child did not have the same principal place of abode as Cermak for more than half of the year. Because neither child of Mr. Cermak is a qualifying person, Mr. Cermak cannot claim head of household. The court affirmed the commissioner's orders. ***Cermak v Comm'r***, 2019 WL 5495873 (Minn. Tax Court 10/16/19).

■ **Petition to amend denied in multimillion-dollar dispute.** In a dispute involving a married taxpaying couple, Mrs. and Mr. Whitesell, and a nearly $11 million judgment, the tax court denied the couple leave to amend their complaint.

During the relevant periods, Mr. Whitesell owned a 100% interest in three S corporations: WIC, Whitesell Corp., and NLW Holdings, LLC. In 2005, one of the corporations filed a lawsuit against William A. Whitaker and other defendants. The lawsuit alleged trade secret violations and was filed in state court in Michigan. Whitaker counterclaimed, asserting that the suit against him was filed for the purpose of preventing competition. In 2008, following a jury trial, the Michigan trial court entered judgment in Whitaker's favor for $9,266,685. Over the next few tax years WIC deducted over $10 million for the judgment and interest. Simultaneously, WIC appealed the judgment. In 2011, the Michigan Court of Appeals reversed and remanded. WIC (and taxpayer couple) did not report income relating to this reversal on their 2011 or 2012 tax return.

In 2012, the IRS mailed a deficiency notice, making a $10,982,856 adjustment ($9,266,685 plus interest) to WIC's income for 2011. Whitesell filed an original and an amended petition in 2015 stating that the IRS did not properly assess the taxes. In neither of those petitions did the taxpayers disagree with the amount, or the year to which the income related. However, in 2018, Whitesell filed an amendment to the amended petition asserting that the income related to 2013, when the Michigan case settled, could not be taxed because it exceeded the three-year statute of limitations.

To determine whether an amendment should be allowed, the court examined the circumstances in the case. The court considered whether an excuse for the delay exists and whether the opposing party would suffer unfair surprise, disadvantage, or prejudice if the motion to amend were granted. Whitesell did not plead their theory regarding the income related to 2013 until their 2018 motion. The couple argued that their reason for doing so was that they were "overwhelmed by the Tax Court process, including procedural matters." Because Whitesell sought legal advice throughout the suit, the court was not persuaded that the Whitesells' *pro se* status excuses their delay in raising the argument. Furthermore, until 2018, the IRS was unaware of the Whitesells' argument that the proper year for income inclusion is 2013. The IRS was unfairly surprised. Had WIC asserted 2013 as the correct tax year in their 2016 response, the IRS would not have missed the three-year period for assessing tax. The IRS has been unfairly prejudiced. The court concluded that justice does not require that the taxpayer be permitted to file their amendment to their amended petition and therefore the court denied the Whitesells' motion. ***Whitesell v. Comm'r***, T.C.M. (RIA) 2019-126 (T.C. 2019).

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TORTS & INSURANCE

JUDICIAL LAW

■ **Statute of limitations; "some damage" rule of accrual.** In 2009, decedent negotiated a purchase agreement to sell certain real property located in Vadnais Heights to Community Facilities Partnership of Vadnais Heights, LLC (CFP) for $2.5 million cash at closing and a nonrecourse 30-year note issued by the City of Vadnais Heights payable semi-annually. After decedent died, defendant bank was appointed as a co-special administrator of the estate to supervise and oversee the closing on the sale of the land to CFP. The agreement stated: (1) prior to closing, an independent CPA firm or financial professional shall forecast enough net operating income from the facility would be collected to pay off the note; (2) at closing the buyer was required to master lease the project to the city in an amount sufficient to pay off the note; and (3) CFP was required to provide a five-year compiled financial forecast prepared by an independent CPA firm showing sufficient net operating income. The transaction closed in 2010. But in August 2012, plaintiffs failed to receive payments due to the failure of the facility to obtain sufficient income. In 2017, plaintiffs filed suit against the bank alleging breach of fiduciary duty for failure to ensure compliance with the three closing conditions in 2010. The district court granted the bank's motion to dismiss pursuant to the six-year statute of limitations. The court of appeals affirmed.

The Minnesota Supreme Court reversed and remanded. The Court began by noting that "a motion to dismiss should be granted" under the statute of limitations "only when it is clear from the stated allegations in the complaint that the statute of limitations has run." The Court noted that it "will not make inferential leaps in favor of the defendant to conclude that a lawsuit is time-barred." Looking at the allegations in the complaint, the Court acknowledged that all of the alleged wrongful conduct occurred in 2010. However, the Court held that the suit was timely because the complaint did not allege "some damage" occurred until the first payment was missed in August 2012. The Court reasoned that "some damage" may occur "either by financial liability or the loss of a legal right." In this case, the

Court found that the complaint did not allege the "loss of a legal right," stating: "The whole point of the transaction was precisely to exchange ownership of the property for money. Stated another way, the parties may dispute whether [defendant's] alleged breaches caused [plaintiffs] to part with their legal right to ownership of the property for too little money, but that type of economic harm falls in the financial liability category." The Court went on to hold that *the complaint did not allege* plaintiffs suffered financial harm until August 2012. As a result, any theoretical damages suffered prior to that time were speculative, and dismissal of the complaint was improper.

Justice Hudson filed a dissenting opinion, which was joined by Chief Justice Gildea. The dissent would have held that dismissal was proper because the "deal both financially harmed the [plaintiffs] and caused them to lose a legal right in 2010." ***Hansen v. U.S. Bank Nat'l Ass'n***, No. A17-1608 (Minn. 9/25/2019). *https://mn.gov/law-library-stat/archive/supct/2019/OPA171608-092519.pdf*

■ **Collateral source statute; discounts negotiated under Minnesota's Prepaid Medical Assistance Plan.** After plaintiff's car struck a school bus that failed to yield at an intersection, plaintiff brought a suit against defendant bus driver and the owner of the bus. Plaintiff was a medical-assistance enrollee, and her medical expenses were covered by two managed-care organizations that contracted with Minnesota's Prepaid Medical Assistance Plan under Minnesota's Medicaid program. After trial, the jury awarded plaintiff damages, but the district court deducted from the award the amount of discounts negotiated by plaintiff's managed-care organizations. The court of appeals reversed, holding that the discounts were excepted from offset because they were "payments made pursuant to the United States Social Security Act."

The Minnesota Supreme Court affirmed the decision of the court of appeals. The Court initially noted that the parties conceded that "negotiated discounts… are considered to be 'payments' under the collateral-source statute" and that Minnesota's Medical Assistance program is a part of the Social Security Act. Instead, defendant argued that "pursuant to" "should be defined narrowly" and that "nothing in the Social Security Act or its regulations contemplates the discounts or specifically authorizes managed-care organizations to negotiate them." The Court rejected this argument, noting that the phrase "pursuant to" in the statute "is followed by broad reference to a statute that is itself of exceedingly wide breadth: the United States Social Security Act." The Court held that because "the reference is to an expansive Act, the proper analysis is not a restrictive one… but whether the… payments [were] made 'under,' 'in accordance with,' 'in compliance with' or in 'carrying out' the Social Security Act," and the Court held that they were.

Chief Justice Gildea filed a dissenting opinion, which was joined by Justice Anderson. The dissent argued that the collateral source statute should have been interpreted only according to its plain meaning. Because the Court had previously held that "pursuant to" meant "required," and the Social Security Act did not require the managed-care organizations to negotiate discounts, the dissent would have affirmed the decision of the district court. ***Getz v. Peace***, No. A18-0121 (Minn. 10/16/2019). *https://mn.gov/law-library-stat/archive/supct/2019/OPA180121-101619.pdf*

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People&Practice | IN MEMORIAM

Raymond A. Haik passed on November 9. He was witness to and participant in early political initiatives for protecting and restoring Minnesota's natural resources, beginning with efforts to protect wetlands as an MN Assistant Attorney General and extending through passage of the Clean Water Act. Together with his law partners, he founded and built the nationally recognized law firm of Popham, Haik, Schnobrich, Kaufman & Doty.

John D. Healy, Jr., age 84 of St. Paul, died on October 14. He was a partner at the Oppenheimer Law Firm in St. Paul for 35 years and a past president of the Ramsey County Bar Association.

David Benjamin Ketroser, M.D., J.D., age 67, of Minneapolis, died on Thursday, November 7. He attended Stanford University and the University of Minnesota, where he earned his medical degree, specializing in neurology. He later earned his law degree at William Mitchell School of Law. He was a licensed accessibility expert and was close to finishing a Master's Degree in Bioethics from the U of M.

Lawrence "Larry" Marofsky, age 74, of Plymouth died peacefully in his home on November 1. Marofsky grew up in St. Paul and became a highly respected real estate attorney with offices in Brooklyn Center. He argued, and won, several cases in front of the Minnesota Supreme Court and took pride in fighting for his clients' best interests.

Noel P. Muller of Minneapolis died on October 18. In 1963, Noel graduated from the University of Minnesota Law School, embarking on a legal career that spanned five decades.

U.S. Magistrate Judge Steven E. Rau died on November 8 after battling gastric cancer. He was 63. Rau was first appointed to his position in the District of Minnesota in January 2011 and then reappointed to a second eight-year term in November 2018. Before his appointment, he served as a partner with Flynn, Gaskins & Bennett LLP (now known as Gaskins Bennett & Birrell LLP), and Lindquist and Vennum LLP (now known as Ballard Spahr LLP).

James Ronald Steilen, age 70 of Plymouth, passed away on October 18. In 1974 he graduated from Harvard Law School and began a distinguished career as an attorney, first with the Minneapolis law firm of Popham Haik Schnobrich, Kaufman & Doty, and then with Briggs and Morgan.

Barbara Louise Tolkkinen, age 52, of Minnetonka died on October 26. She graduated from Hamline School of Law, earned an MBA, and worked for a small law firm and for West Publishing.

Cody Bauer, Maya Digre, and Alex Rubenstein joined HKM as associates. Bauer will be focusing his practice on product liability, transportation litigation, commercial litigation, and insurance-related litigation. Digre will be focusing her practice on toxic torts, insurance-related litigation, and product liability defense. Rubenstein will be practicing in the areas of commercial, insurance-related, and employment litigation.

Fredrikson & Byron announced the addition of multiple attorneys to the firm's Minneapolis office: Lukas S. Boehning (Employment & Labor); Tash S. Bottum (Mergers & Acquisitions); Olivia E. Cares (Energy); Rachel Leitschuck Dougherty (Litigation); Erin M. Edgerton (Employment & Labor); Kayla C. Hoel (Immigration); Jacob D. Levine (Mergers & Acquisitions); David M. Streier (Energy and Real Estate); and Charles J. Urena (Energy Group). The firm also elected Sean P. Kearney to the board of directors and re-elected Kevin P. Goodno, Ann M. Ladd, and James H. Snelson.


BREKKE


WILLEMS

Maria P. Brekke and Kyle S. Willems have become associates of Bassford Remele. Brekke focuses her practice in the areas of commercial litigation, appellate law, products liability, and trust and estates litigation. Willems focuses his practice in construction, real estate, product liability, fire/explosion, general liability, and tort litigation.


GISLASON


REYES

Barbara J. Gislason and the Hon. Peter M. Reyes, Jr., who serves on the Minnesota Court of Appeals, were presenters at the 63rd Congress of the *Union Internationale des Avocats* (UIA) in Luxembourg on November 8. In the UIA, Gislason has served as the president of the Biotechnology Law Commission and president of the U.S. National Committee. She is now the deputy editor of the UIA's flagship publication. This was Judge Reyes' second time speaking at a UIA Congress.


KIESELBACH

Tom Kieselbach of Cousineau, Waldhauser, & Kieselbach PA, was elected president of the National Workers' Compensation Defense Network. Kieselbach will be serving a one-year term.


SHAFER


GEHAN

Charlie Shafer has joined Collins, Buckley, Sauntry & Haugh, PLLP as an associate. He will practice in the area of civil litigation. In addition, Mark H. Gehan, a civil litigator at the firm, has been elected to partnership.


SHEA


DESAI

Jeff Shea and Sarvesh Desai have joined Henson Efron with the business law group. Shea has over 30 years of real estate law experience. Desai has been practicing law since 2014 and concentrates on general business, mergers and acquisitions, intellectual property, and securities.

Alec Beck has joined Barnes & Thornburg as a partner in the labor and employment department. Beck brings over 30 years of labor and employment experience.

Stinson LLP announced the addition of seven new associates in the Minneapolis office: Emily Asp, Ann Marie Buethe, Logan Kugler, Kacie Phillips, Joshua Poertner, Zach Sheahan, and Jessica Wheeler.

Fitch, Johnson, Larson & Held, PA announced the addition of five new attorneys who will be practicing in the areas of workers' compensation and insurance defense: Ashely L. Tune, Lisa C. Radintz, Nora J. Steinhagen, Benjamin J. Kramer, and Hannah J. Mohs.


WILLIAMS

Stuart Williams, a public member of the Minnesota Board of Pharmacy, has been elected as board president for 2020. Williams, a lawyer with Henson Efron, also continues to serve as a public member of the Minnesota Board of Medical Practice.


MURPHY

Ryan T. Murphy, an attorney at Fredrikson & Byron, has been invited to become a fellow of the American College of Bankruptcy, recognizing him for his work, public service, contributions to the administration of justice, and integrity.


SHEAHAN

Devlan Sheahan has joined Moss & Barnett with the firm's construction law team, assisting businesses and individuals in construction disputes and litigation.


DAVIS

Madeline Davis joined Erickson, Zierke, Kuderer & Madsen, PA as a new attorney. She is a 2019 graduate of Mitchell Hamline School of Law. Davis joined the firm as a law clerk in 2018 and practices in the areas of business litigation, construction law, and insurance coverage.

Heidi Bassett, Alex Mueller, and Katherine Herman joined Hellmuth & Johnson. Bassett is a litigation and appellate attorney, specializing in banking, business, real estate, and construction. Bassett obtained her JD from the University of St. Thomas. Mueller's practice is concentrated on copyright, trademark, and media law. Herman represents various clients in a broad range of litigated disputes and advising matters. Herman and Mueller obtained their JD from Mitchell Hamline.

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ATTORNEY WANTED

ATTORNEY WANTED – Eagan. Blue Cross Blue Shield of MN seeks an attorney with a degree in law and admission to the state bar and two years of related work experience in: Matters related to Minnesota government programs including Medicaid (Medical Assistance) and MinnesotaCare and health plan statutory and regulatory requirements in Minnesota and interaction with federal law including CMS requirements. Matters related to the Medicare program and requirements applicable to health plans including regulations and other guidance documents. Submit letter and resume to: Diane.Andresen@bluecrossmn.com

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EMPLOYEE BENEFITS (ERISA) Associate Attorney. Stinson LLP is seeking an experienced Associate with three or more years of experience in Employee Benefits (ERISA) to join our Kansas City or Minneapolis office. Stinson is a national law firm with one of the largest Employee Benefit practices in the Midwest. The position offers the ability to join a well-established, growing and highly sophisticated employee benefits practice with attorneys who represent clients in a wide range of industries. The position offers substantial opportunities to work with the firm's corporate finance, financial institutions and general business practice groups, and play a key role in merger and acquisitions and Employee Stock Ownership Plans (ESOPs). The ideal candidate will have the following attributes: three or more years of benefits and compensation experience in a law firm, a consulting firm, or as in-house counsel, excellent legal research, writing and analytical skills; a background in one or more of qualified and non-qualified retirement plans, ESOPs, or health and welfare plans, including ERISA, ACA, HIPAA, and IRC Section 409A experience; and outstanding academic credentials. Pay is competitive for the region. Relocation assistance is available. To apply, visit: https://bit.ly/2koekGN. When applying, please provide a cover letter, resume, law school transcript and writing sample. For questions, contact: recruiting@stinson.com. Stinson LLP is an EEO employer. We offer a competitive compensation and benefits package. We conduct criminal background checks of all individuals offer employment. For more information about Stinson, visit www.stinson.com and the NALP Directory of Legal Employers, www.nalpdirectory.com.

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ROCHESTER, Minnesota. Restovich Braun & Associates is seeking a qualified attorney to practice in several areas of law, including but not limited to: civil litigation, personal injury and family law. Candidate must possess excellent writing and oral skills, in addition to communication skills, as he/she will be working with clients daily. Candidate will be offered excellent compensation and benefits. Please send resumes to: Restovich Braun & Associates, 117 East Center Street, Rochester, Minnesota 55904 or via email to: diane@restovichlaw.com.

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