OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER 1
JANUARY 2019
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ON THE COVER

A new era in bar staffing and member service

By now many of you know that the bar association staff has a new leader. Cheryl Dalby has agreed to take on the new role of chief executive officer in guiding a single staff that will serve the MSBA, HCBA, and RCBA. Cheryl, who has been the executive director of the RCBA for 18 years, quickly began to focus on her new role, working closely with current MSBA Executive Director Tim Groshens and current HCBA Executive Director Susie Brown to ensure a smooth transition on January 2, 2019. As the staffs are combined, the goal is to put the right people with the right skills in the right jobs to best serve all three organizations.

Discussions on this single staff model started five years ago. The decision to move forward with the plan was made by all three organizations in 2018. The three boards set up a body called the Joint Coordinating Committee to select a leader to serve all three organizations. The nine members of the JCC included three members each from the MSBA, HCBA, and RCBA boards. Each person had equal voting power. The boards directed the JCC to set up the search and the interview process and make a recommendation to each board. The final decision was up to the three boards.

PAUL GODFREY is the Managing Attorney for the Twin Cities Branch Legal Office for Farmers Insurance. He is a trial attorney. He has tried more than 40 cases to jury verdict, with issues ranging from claims for whiplash to claims for wrongful death.

The JCC hired a consulting firm, Cincinnatus, to assist with the search and interview process. Cincinnatus advertised the position nationwide. We attracted 39 applicants. The JCC chose 10 people for a first interview with Cincinnatus and called back four individuals for a second interview. The second interviews were conducted by the entire JCC on October 25, 2018. After the interviews, the JCC decided to recommend Cheryl Dalby to be the new leader of the combined staff.

CHERYL DALBY
Chief Executive Officer

As soon as she was recommended, Cheryl reached out to Susie Brown to discuss a new role for Susie. Cheryl and Susie have agreed on a position for Susie in the new structure. Between November 12, 2018 and November 19, 2018, all three boards met and approved Cheryl as the new CEO of the combined staff that will be serving MSBA, HCBA and RCBA.

With this new model in place, the combined staff will be in a good position to provide services to the members of all three organizations. Recently, in an interview with Minnesota Lawyer, Cheryl pointed out that the new structure should lead to cost savings. But, she said, "Our main goal is to increase collaboration and increase our value to members. The practice of law is changing so rapidly, and we think that by making the bar association as focused and efficient as possible, we can help members weather those changes or embrace those changes, and we are in a much better position to do that if we have a more specialized staff, less duplication, more efficiency."

I wanted everyone to be aware of this new staff structure. I believe it will allow our staff to provide us with better service. If I am right, let me know. If I am wrong, let me know and we can work to improve the service.

In her application letter, Cheryl pointed out that she grew up in northern Minnesota and understands the need to make sure our bar association services are available to every member. I am confident Cheryl will make sure all of our members receive great service. ▲

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MSBA

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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.

The 2019 Minnesota legislative session begins on January 8.

MSBA sets 2019 lobbying priorities

The MSBA Council has selected a robust list of lobbying priorities for the 2019 Minnesota legislative session. The MSBA will prioritize securing adequate funding for the courts, public defenders, and civil legal services.

In an effort to remedy the continuing shortage of attorneys in some areas of greater Minnesota, the MSBA will seek state funding for student loan repayment assistance for lawyers who commit to private practice serving residents of rural areas. It will also address barriers to justice for low-income tenants by seeking new legislation guaranteeing a civil right to appointed counsel in public housing eviction actions alleging breach of lease.

Responding to a case decided in 2015, the MSBA will support legislation to clarify that original jurisdiction over all public procurement protests rests with the district courts.

Finally, the MSBA will support three changes regarding taxation: (1) revisions to Minn. Stat. §271.01 to simplify service requirements for property tax petitions; (2) an amendment to Minn. Stat. §273.124 to provide that agricultural land owned by trusts created by spouses for estate planning purposes will receive the same property tax classification that would apply if the spouses owned the land directly; and (3) revisions to Minn. Stat. §291.03 to treat small business and family farm property that is owned between spouses as "qualified small business property" or "qualified farm property," respectively, and therefore exempt up to a certain value from the Minnesota estate tax.

2nd annual One Profession event coming to Duluth

Last year the 6th Judicial District hosted the very first One Profession event in Duluth. That pilot effort proved a great success, and we are pleased to be expanding the event to all eight of greater Minnesota's judicial districts during 2019. (See ad, facing page.)

The program—a partnership between the MSBA, the courts, and district bar associations—consists of a single-day event designed to bring together all segments of the legal profession in the judicial district to consider significant issues facing the profession through presentations, panel discussions, and conversations. This year's 6th District event is taking place on Thursday 1/24 (8 am – 3 pm) at the Greysolon Ballroom at 231 East Superior Street in Duluth; the cost, for members and nonmembers alike, is $20. Lunch is included, along with 4.75 standard and one ethics CLE credits.

TrialBooks CLEs start in February

We're building a new resource for the practicelaw library. The TrialBooks series includes documents from our members' successful litigation outcomes, from complaint to closing argument. Inspired by last year's medical malpractice CLE by Elizabeth Fors, MSBA Online Services is launching these new materials in a series of CLEs starting in February. Look for Kyle Willems's *Pleadings and Insurance Coverage: What Every Litigator Needs to Know* on February 14 at noon. Also, watch the February calendar for TrialBooks CLEs on landlord/tenant disputes (commercial and residential) as well as criminal matters.

Civ Lit *Time's Up* manual now on Amazon

A print edition of the Civil Litigation Section publication *Time's Up: A Manual of the Statutes of Limitations in Minnesota for Civil Litigators* is now being offered for purchase through Amazon. The manual identifies and organizes time limits imposed for civil claims in the Minnesota Statutes. This manual covers statutes of limitation, statutes that direct action by a party during the pendency of a civil lawsuit, and statutes that direct a person or an entity to take a certain action within a specific time. It covers time limitations in the Minnesota Statutes as well as in the Minnesota Rules of Civil Procedure, General Rules of Practice in the District Courts, and the Minnesota Rules of Civil Appellate Procedure. The manual, which organizes the time limits by statute and rule numbers, is updated on an annual basis.

To find the manual on Amazon, search for *Minnesota civil litigation* under Books. As always, members of the Civil Litigation Section receive a free digital copy of the book with their annual membership. If you are interested in joining the section, you can find information and register online at *mnbar.org* (Members tab).

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Suicide prevention: Every lawyer's opportunity

In 1993, the managing partner of Leonard, Street and Deinard died by suicide at the age of 49. I clerked at Leonard, Street the following year and saw firsthand the deep impact that his life and sad passing had on the firm. In my position now, I am very cognizant of the deaths by suicide as well as the attempted suicides in our profession. This month I am giving over the column to an article by Joan Bibelhausen of Lawyers Concerned for Lawyers, which contains important information about suicide that every Minnesota lawyer should know. Remember, all services of LCL are confidential, and LCL will never share confidential information with the Office of Lawyers Professional Responsibility.

– SUSAN HUMISTON

Lawyer suicide is in the news

The American Lawyer recently published a heartrending essay, "Big Law Killed My Husband," by Joanna Litt, an attorney and the widow of LA attorney Gabriel MacConaill, who died by suicide in October.[1] Litt's tale in turn recalled a 2017 New York Times article, "A Suicide Therapist's Secret Past."[2] In it, therapist Stacey Freedenthal described her own attempt many years earlier. Even though she is well known in the field of suicide prevention, stigma had kept her from revealing this part of her history. As I read these stories, I thought about our profession and the stigma that can keep us from reaching out in our most desperate hours.

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

Not only are lawyers at risk, but our clients are as well. Clients in many areas of law are facing crisis, loss, or other hardship that can lead to a sense of desperation or hopelessness. Very similar cases may involve clients who respond to their situations very differently. If a client gives cues that they may be suicidal, attorneys have the opportunity to act.

For lawyers, we all know this is a stressful profession. Press coverage of lawyer suicides has magnified the potential impact of that stress. As a profession, we experience depression and alcohol use problems at rates significantly higher than the general population. We also experience greater rates of anxiety, chronic stress, and divorce, and we have a higher rate of suicide and suicidal thoughts. If you've attended any of LCL's CLE programs in the past several years, you've heard us talk about this, but we need to keep talking.

The chronic stress we experience may trigger depression or other illnesses, and may lead to a sense of helplessness, increasing anxiety, and the inability to complete even mundane tasks. We're paid to solve the problems of others and feel we should be able to solve our own problems ourselves. We may feel shame because lawyers aren't supposed to feel helpless. That helplessness can become hopelessness, and the risk for suicide grows exponentially.

What are the signs?

Symptoms of depression include:

- loss of interest in normally pleasurable activities;
- difficulty concentrating, remembering, or deciding;
- changes in sleep, appetite, and weight;
- fatigue;
- having thoughts of suicide.

At the same time there may be a rising sense of anxiety, as if every unfinished project is a ticking time bomb. Suicide enters one's thoughts as a reasonable solution to a seemingly insurmountable problem. The suicidal person may express a wish to die or make statements that appear to be saying goodbye. He may give away prized possessions, quickly wrap up files, or put his affairs in order. She may make a plan and acquire the means to carry it out, and that plan may simply be enough alcohol to prove deadly. People who talk about suicide can die by suicide. We all need to talk about it.

Our profession is addressing these concerns through initiatives such as "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change."[3] This 2017 report demands that we begin a dialogue about suicide prevention. Lawyer assistance programs have worked to increase awareness for decades, and are grateful to have additional allies in this critical effort. The report's call to action recommends events to raise awareness, sharing stories of those affected by suicide, providing education about signs and suicidal thinking, learning signs of distress, and making resources available. These are all good things that can make a difference.

The signs are not always verbal. Some warning signs of suicide include:

- hopelessness;
- withdrawal;
- desperation;
- increased use of alcohol and other controlled substances;
- impulsiveness or high-risk behavior;
- loss of engagement or sense of humor;
- deterioration in functioning.

Lawyers sometimes think we need to be perfect or we are a failure. Any possible failure becomes an opportunity for intense self-scrutiny and every move we make can become defined by winning or losing. A compromise or settlement may be seen as a failure because we didn't get everything we asked for when we reached for the sky. In the case of Mr. MacConaill, his widow wrote, "[S]imply put, he would rather die than live with the consequences of people thinking he was a failure." It doesn't have to be that way, but colleagues have to be observant and provide meaningful encouragement as well as permission for self-care.

What can you do?

Have the courage to ask and to act and be sure you have the time to listen if you personally choose to reach out. If you observe these disturbing behaviors, ask directly, but ask in a way that is true to you. "Have you thought of harming yourself? Are you in a lot of pain? Do you feel unsafe? Are you thinking of suicide?" Never ask in a way that suggests you need a "no" answer, such as "you're not thinking about suicide, are you?" Asking directly allows the person to speak freely. If he says "no" and you are still concerned, rephrase it and ask again. Give a reason why you asked; the person who said no may be ready to change her answer if you ask again and show you care. The person who is so depressed that he is paralyzed may not be able to affirmatively ask for help but may be able to answer a direct question honestly.

What happens next?

The next step is just listening. Do so calmly, because this is not your crisis to fix. Give your full attention and be prepared for the time it takes to learn why the pain is so great that dying by suicide seems to be a reasonable option. If you believe suicide may be imminent, get them to professional help and be supportive as they get there. If they have a therapist, call that number. If not, consider taking them to an emergency room. Call 1-800-SUICIDE or 1-800-273-TALK, both of which are national suicide prevention hotlines. Counselors are also available 24/7 through LCL at 612-646-5590 or 1-866-525-6466.

Once the immediate crisis is past, support is critical to ongoing recovery. Therapy can help someone through the immediate mental illness and provide tools to develop resilience in the future. Medications are often appropriate, especially in the early stages. It's hard for a lawyer to admit he is struggling financially, but many are—and LCL can provide connections to resources to support the cost of ongoing treatment. Personal support and acceptance are critical. We need to know we're not alone.

If reading this makes you think of someone you're concerned about, or if you recognize some of these symptoms in yourself, please act. Dr. Freedenthal reported that as she began to feel the effects of her suicide attempt, her brain and body fought back and she lived. Knowing that one can come out on the other side of debilitating pain can provide incredible hope. Call for coaching if you need help on how to reach out to someone. Call for yourself if you find yourself realizing that you've thought about suicide. Hundreds of your Minnesota colleagues called for help last year on many different issues that cause stress or distress in their lives. You're not alone, and LCL is here to help. ▲

JOAN BIBELHAUSEN is the executive director of Lawyers Concerned for Lawyers. LCL provides free and confidential peer and professional support to lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress. Through LCL, up to four free counseling sessions are available statewide. Services are free, confidential and available 24 hours a day. You can help us reduce the stigma. To learn more, to get involved, or to request LCL's Suicide Prevention CLE program, go to www.mnlcl.org, call 651-646-5590, or email (replied to during business hours) help@mnlcl.org.

Notes

[1] "Big Law Killed My Husband:" An Open Letter From a Sidley Partner's Widow," Originally published in The American Lawyer (11/12/2018), republished and available at TaxProf Blog, *https://taxprof.typepad.com/taxprof_blog/2018/11/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow.html.*

[2] *www.nytimes.com/2017/05/11/well/mind/a-suicide-therapists-secret-past.html*

[3] *https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf*

"Papers and effects" in a digital age

In 1761, Boston patriot James Otis argued against England's use of its "writs of assistance." Such writs, widely used in colonial times, permitted English officials to enter a Crown subject's private home or office—at will, and without regulation. These warrantless searches, also called "general searches," were used to investigate purported crimes against the Crown.

Otis argued against these writs, saying:

> Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they breach through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.[1]

After the Revolution, the founders prohibited these searches by enacting the Constitution's 4th Amendment. The Amendment forbids unreasonable searches and seizures, and requires that, henceforth, in order to search the government must have a warrant, issued by an independent magistrate, and upon proper cause. A valid 4th Amendment warrant must specify premises, persons, and define the evidence being sought.

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

And in executing the warrant, law enforcement is limited to seeking and seizing evidence actually related to the crime under investigation. This relationship between the crime being investigated and the search's extent sometimes leads to the aphorism that, "if you are looking for stolen televisions, you cannot look in sugar bowls."

There is, however, a corollary: While an investigator may only search for evidence related to a specific crime, the investigator need not be blind to evidence of other crimes in "plain view." So, while warrants must restrict the scope of the search, further investigations can be initiated if evidence of other crimes is readily observable.

A constitutional warrant, thus, protects citizens from general searches and unregulated intrusions into the citizen's person and property.

Citizens are protected against the "bare suspicions" against which James Otis argued. A specific warrant is critically important in protecting personal freedom.

But how do these principles translate into our increasingly digitalized world? Is a cell phone or a personal computer an object "in plain view?" The question is especially urgent now, when such devices may contain a vast array of extremely personal material about its owner, as well as evidence of a particular crime or material highly relevant to a legitimate investigation.

By way of a simple example, assume a person's cell phone or laptop computer holds a "notes" file showing drug debts owed, or drug proceeds taken. And assume an investigator obtains a valid warrant for those notes. Is that investigator, when analyzing that phone or computer, prohibited from looking into photo files that might reveal the owner trafficked in child pornography? The law is only beginning to grapple with these kinds of questions.

Part of the law's grappling has been felt in terms of revised admissibility standards. New amendments to Federal Rule of Evidence 902 address digital records such as those collected and preserved from devices, including emails. These additions make digital records submitted as evidence self-authenticating, meaning no additional evidence is required for admission in court:

> (13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).[2]

Even with these rules now in place, it still remains to be seen how the courts will apply them. It is clear that movements toward standardizing data collection and authentication are being made, and that adherence to proper procedures regarding digital evidence is increasingly recognized. Given the huge amounts of data stored on digital devices, admissibility issues are particularly important in examining 4th Amendment considerations. In addition to the need to stay within the limits set forth in a warrant, evidence admissibility requirements also protect a person's "papers and effects" and regulate what is allowed.

It is most unlikely that the 4th Amendment's drafters contemplated a single device that might contain records of personal communications, medical diagnoses and treatments, banking and financial transactions, family matters (remember, photography came far after the Constitution's drafting), and investment holdings, all in the palm of a person's hand.

The authors of this article suggest that the courts need to refine and redefine the 4th Amendment's protection of "papers and effects" as it applies to executing a search warrant of electronic data-storing devices. If an investigator may not look into a sugar bowl to find evidence of stolen televisions, it seems unreasonable to permit the same investigator to indiscriminately rummage through a citizen's smart phone or personal computer. ▲

Co-author Hon. JAMES M. ROSENBAUM (Ret.) served 25 years on the federal bench as a United States District Court Judge for the District of Minnesota and served as chief judge of the district. For the four years prior, he served as Minnesota's United States Attorney.

Notes

[1] *http://www.constitution.org/bor/otis_against_writs.htm*

[2] *https://www.rulesofevidence.org/article-ix/rule-902/*

The advantages of hiring an older law school graduate

Are you looking to hire a new lawyer who will be conscientious, innovative, motivated, and productive? Minnesota law schools have 68 J.D. students whom you might not have considered, but they fit that description. These 68 students are age 50 or over, and industrial/organizational psychology[1] studies have shown that older employees are more likely to possess these desirable attributes than younger colleagues.

The U.S. Bureau of Labor statistics projects that in 2019, 24 percent of the workforce will be age 55 or older. Yet discrimination based on age is rampant.[2] Negative stereotyping of older workers occurs quickly[3] and these types of stereotypes are resistant to change.[4] Those who harbor the stereotypes subconsciously ignore the many individuals who don't conform to their beliefs.[5]

Yet there is data to refute those stereotypes of older employees.

1. Stereotype: They are less productive.

Age is actually positively correlated with productivity measures, but older employees are often more negatively rated by supervisors than their peers.[6] Older workers multitask as effectively as younger workers[7] and are more adept at adapting job tasks to take advantage of personal strengths.[8] Older employees have fewer counterproductive work behaviors, such as aggression and substance abuse, compared to their younger colleagues.[9] Age does not impact creativity or performance of key job tasks.[10] Age is also positively correlated with proactive work behaviors, such as taking initiative.[11]

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2. Stereotype: They won't be able to get along with younger colleagues.

Age is significantly associated with higher levels of helpfulness to coworkers, a trait beneficial to teams and organizations.[12] Age is also positively correlated with exchanges between the employee and both colleagues and supervisors, as well as establishment of trust between coworkers.[13] Levels of optimism and attention to interpersonal relationships while problem-solving improve with age.[14] Studies have further shown that the concept of an older worker as a difficult colleague is an unfounded stereotype.[15]

3. Stereotype: They'll be sick and miss work.

Older employees are more likely to arrive at work on time than their younger colleagues.[16] They do not have more day-to-day physical health problems.[17] They do not have increased problems balancing work and family life.[18] Indeed, older employees tend to have fewer time constraints than those who are younger.[19]

4. Stereotype: They're not motivated.

The opposite is true. Older employees are more motivated in their work[20] and more motivated at applying their personal strengths to their job tasks to achieve goals.[21] Older people have been found to be more dependable than those who are younger.[22] They tend to be more conscientious at work than their younger colleagues,[23] and conscientiousness is a key predictor of job performance, encompassing traits like sense of purpose, persistence, and accomplishment of work tasks.[24] In fact, conscientiousness peaks in the mid-60s age range.[25]

5. Stereotype: They can't learn new skills/technology.

Research has shown that older employees are neither resistant nor unwilling to change.[26] They are more motivated to take of advantage of training to learn new skills.[27] In fact, age is positively related to innovative behavior.[28] These older new lawyers have shown their competency and adaptive ability by mastering the necessary skills to progress through law school and pass the bar.

You can be an important player in reducing discrimination against this talented group. Studies have shown that seemingly entrenched negative stereotypes can be changed in multiple ways. Simply becoming aware that the stereotyping exists and that it results in bias is enough to effect some change. Successfully countering the discrimination is best accomplished by integrating these older individuals into the workplace, so that others have more continuous exposure to examples of highly functioning members of this age group.

These new lawyers are often entering law as a second career, bringing with them a wealth of specialized knowledge, professional behavior, and interpersonal skills. Those who are over 50 especially are more practiced in communication skills and "reading" people. If you want to add a talented, dynamic lawyer to your team, examine whether you might have been harboring negative stereotypes of older individuals. And consider bringing one of these new older lawyers onto your team. ▲

Notes

[1] *www.siop.org*

[2] Elissa L. Perry & Lisa M. Finkelstein, *Toward a Broader View of Age Discrimination in Employment-Related Decisions: A Joint Consideration of Organizational Factors and Cognitive Processes*, 9 Human Resource Management Review 21, 21 (1999).

[3] Alison L. Chasteen, Norbert Schwarz, & Denise C. Park, *The Activation of Aging Stereotypes in Younger and Older Adults*, 57B Journal of Gerontology: Psychological Sciences 540, 544-45, (2002).

[4] Loren Falkenberg, *Improving the Accuracy of Stereotypes Within the Workplace*, 16 Journal of Management 107, 109-13 (1990).

[5] *Id.*

[6] David A. Waldman & Bruce J. Avolio, *A Meta-Analysis of Age Differences in Job Performance*, 71 Journal of Applied Psychology 33, 36 (1986).

[7] Phillip A. Allen et al., *Age Differences in Overlapping-Task Performance: Evidence for Efficient Parallel Processes in Older Adults*, 17 Psychology and Aging 505, 513 (2002).
[8] Dorien T. A. M. Kooij et al., *Job Crafting Towards Strengths and Interests: The Effects of a Job Crafting Intervention on Person-Job Fit and the Role of Age*, 102 Journal of Applied Psychology 971, 976 (2017).
[9] Thomas W. H. Ng & Daniel C. Feldman, *The Relationship of Age to Ten Dimensions of Job Performance*, 93 Journal of Applied Psychology 392, 400 (2008).
[10] *Id.*
[11] Thomas W. H. Ng & Daniel C. Feldman, *Evaluating Six Common Stereotypes about Older Workers with Meta-Analytical Data*, 65 Personnel Psychology 821, 828, 840 (2012).
[12] Ng, *Relationship*, *supra*, at 403.
[13] Ng, *Evaluating*, *supra*, at 841.
[14] Benjamin P. Chapman & Bert Hayslip Jr., *Emotional Intelligence in Young and Middle Adulthood: Cross-Sectional Analysis of Latent Structure and Means*, 21 Psychology and Aging 411, 415 (2006).
[15] Ng, *Relationship*, *supra*, at 403.
[16] *Id.*
[17] Ng, *Evaluating*, *supra*, at 841.
[18] *Id.*
[19] Jenette Jacob Erickson et al., *Putting Work and Family Experiences in Context: Differences by Family Life Stage*, 63 Human Relations 955, 956 (2010).
[20] Ng, *Evaluating*, *supra*, at 838.
[21] Kooij, *supra*, at 973.
[22] Frederick L. Oswald & Leatta M. Hough, *Personality and Its Assessment in Organizations: Theoretical and Empirical Developments*, in 2 Selecting and Developing Members for the Organization 153, 165 (Sheldon Zedeck ed., 2011).
[23] Brent W. Roberts et al., *Patterns of Mean-Level Change in Personality Traits Across the Life Course: A Meta-Analysis of Longitudinal Studies*, 132 Psychological Bulletin 1, 11 (2006).
[24] Murray R. Barrick & Michael K. Mount, *The Big Five Personality Dimensions and Job Performance: A Meta-Analysis*, 44 Personnel Psychology 1, 17 (1991).
[25] Oswald, *supra*, at 165.
[26] Ng, *Evaluating*, *supra*, at 840.
[27] Kooij, *supra*, at 976.
[28] Ng, *Evaluating*, *supra*, at 842.

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FRIDAY, JANUARY 18, 2019
12 – 1 PM

Email Marketing Basics for Law Firms
Presenter: Chelsey Lambert, Legal Technology Specialist
TUESDAY, JANUARY 22, 2019
12 – 1 PM

Ethics and Legal Research
Presenter: Fastcase
THURSDAY, JANUARY 24, 2019
12 – 1 PM

Crop Insurance – What You Need to Know
Presenter: Steven Pattee, Donna Law Firm
THURSDAY, JANUARY 31, 2019
TIME: 12 – 1 PM

Introduction to Legal Research on Fastcase
Presenter: Fastcase
DATE: THURSDAY, FEBRUARY 7, 2019
12 – 1 PM

Critical Infrastructure Protection – Cyber Security and the Bulk Electric System
Presenter: Michael Remington, Xcel Energy
TUESDAY, FEBRUARY 12, 2019
12 – 1 PM

'I stepped out of "traditional"—and never regretted it.'

Why did you go to law school?

I was a smart-ass kid in South Jersey. Grown-ups kept saying I should be a lawyer, so to meet some actual lawyers I joined the high school mock trial team. The lawyers taught me magic words, like: "The prejudicial effect outweighs the probative value." After looking up *probative* and *prejudicial*—my first exposure to legalese—I became Ms. Unstoppable High School Lawyer, raining Rule 403 down on my opponents.

Mock trial taught me that lawyers have both a license to make trouble and the power to set things right. I wanted to get some of that.

You're a longtime advocate for exploring non-traditional legal careers and alternative business models for lawyers. What prompted you to move in that direction?

Life. The traditional path led me straight from college to law school to a great firm in New York. I planned to serve that firm forever. But then I learned that on the traditional path, a couple of lawyers become partners and the rest go home. While I loved the job, my people didn't swim in the pond where the firm fished. I didn't know where to look for clients. Meanwhile, family and friends called and I couldn't help them—which, after three years of school and six figures of debt, seemed silly.

So I hit pause, left the firm, and took a teaching job. At that moment I stepped out of "traditional"—and I've never regretted it. Many others do the same because they're second- or third-career lawyers, or have lives and families and businesses, or just found what fits.

What drew you to the mission of the Collaborative Community Law Initiative, and how's the program going?

I was drawn to CCLI's mission because I lived it. The first three years of solo practice are not for the faint of heart; solos need all the support we can get. CCLI creates an environment where new lawyers who have started solo practices can learn from each other and from experienced mentors, while having the opportunity to represent justice-gap clients referred by other nonprofits and the private bar. Our advocates take at least 30 percent of their caseload representing clients who are at or below 300 percent of the federal poverty guidelines ($36,420 for a single person, $75,300 for a household of four). Our short-term goal is to help our advocates create sustainable practices in 18 months, about half the time it took me. Longer term, I'd love to see CCLI send small firms to every part of Minnesota that could use more legal help. The only lawyers regularly serving the middle 60 percent of the income spectrum in Minnesota practice in firms of one to seven lawyers—so if the justice gap is going to close, solos and small firms are going to get it done.

Things are going well with CCLI. The basic concept has been proved. We're getting around 100 calls a month, so people definitely want accessible legal services. Eight new lawyers are in the program now and more are on deck. Our alumni are out serving their communities. We've grown a lively community of advocates, alumni, and volunteer mentors.

KARIN CIANO is the owner of Karin Ciano Law PLLC, of counsel at probate litigation boutique Mason & Helmers, and executive director of the Collaborative Community Law Initiative, Minnesota's only legal incubator. To refer cases to CCLI please call (651) 321-9255 (English) or (651) 383-1450 (Espanol). To donate please visit www.givemn.org/organization/Cclimn

The program appears to be helpful to the courts and to the bar, because the clients who find our lawyers would otherwise be representing themselves with no guidance.

Our challenge for 2019 will be sustainable growth. The more advocates we admit, the more mentors and referrals we'll need to ensure everyone has work and support right away. And to support advocates outside the Twin Cities, we'll need to think about investing in technology, space, and people.

What have you found most valuable about your involvement in the bar association?

The bar association has connected me with my favorite thing: small groups of terrific people who work together to solve problems. For example, the Solo and Small Firm Section thought it would be great if small-firm lawyers working in rural Minnesota had loan-repayment opportunities like those available to other professions, such as veterinarians. We wrote a short piece of legislation proposing a program, and I just learned MSBA will be supporting it. I'm also grateful to the MSBA Foundation for their support of access-to-justice initiatives, including CCLI.

New lawyers sometimes ask where to meet other lawyers, find mentors, and connect with potential referral sources. If only such a place existed… well, it does, but you have to put down your devices and leave your office to get there.

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

I'll let you know.

TIMELINE

CORPORATE CONTRIBUTIONS TO DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION

By Roy S. Ginsburg

1999

FIRST STEPS

The legal profession takes its first formal stance on diversity when representing corporate America. This stance is articulated in a letter written by Charles Morgan, then general counsel (GC) of BellSouth. In part, it states:

> *We expect the law firms which represent our companies to work actively to promote diversity within their workplace. In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm's commitment and progress in this area.*

FIVE HUNDRED GCS SIGN THE LETTER.

2004

GIVING TEETH TO THE MORGAN LETTER

In an effort to give greater force to the stance expressed in the Morgan letter, Sara Lee GC Rick Palmore issues a call to action that states:

> *Decisions regarding which law firms represent our companies [will be] based in significant part on the diversity performance of the firms. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful intent in being diverse.*

The proclamation is significant, declaring that firms will face firing if they are insufficiently diverse.

ONE HUNDRED GCS SIGN ON.

Palmore

2009

LEADERSHIP COUNCIL ON LEGAL DIVERSITY

FROM PROCLAMATION TO PRACTICE

Palmore, to whom it's become clear that pronouncements can only go so far to change behavior, launches the Leadership Council on Legal Diversity (LCLD) and serves as its first chair.

The LCLD's membership comprises a Who's Who of Big Law managing partners and major corporate GCs. Today its membership consists of approximately 90 GCs and 180 managing partners.

The LCLD's flagship endeavor is its Fellows Program, which seeks to identify high-potential attorneys from diverse backgrounds and set them on the path to leadership in their organizations. Those selected to participate embark on a learning program that includes:

- **In-person conferences**
- **Training in the fine points of legal practice**
- **Peer-group projects to foster collaboration and build relationships**
- **Extensive contact with LCLD's top leadership**

2017

FURTHER STRIDES

Two major initiatives are introduced: Resolution 113 and the "Mansfield Rule."

RESOLUTION 113

The goal of Resolution 113, passed by the ABA House of Delegates, is to call on corporate legal departments to use their leverage to advance diversity in the profession. Specifically, the resolution "urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys."

OVER 100 LEGAL DEPARTMENTS AT MAJOR COMPANIES SIGN A LETTER PLEDGING THEIR SUPPORT.

THE MANSFIELD RULE

A second, more novel effort involves a program known as the Mansfield Rule. Under its terms, major law firms are to promote leadership opportunities for women and attorneys of color. This rule is modeled on the "Rooney Rule," which requires NFL teams to consider minority candidates when hiring coaches. The Mansfield Rule takes its name from Arabella Mansfield, the first woman admitted to practice law in the United States.

Mansfield

The Mansfield Rule measures and tracks whether firms have considered a diverse candidate pool of at least 30 percent women and minority lawyers when hiring for leadership and governance roles, making equity partner decisions, and filling lateral positions. More than 50 legal departments agree to support those firms that satisfy the rule's requirements by meeting and getting to know the new leaders and partners.

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The Revolution Continues

Toward greater modernization and uniformity in trust and estate law

By Robert A. Stein and Benjamin Orzeske

Fifty years ago, each state had its own rules and procedures for probating a decedent's estate.[1] The probate process in Minnesota and most other states had changed little for generations and needed modernization.[2] The 1969 promulgation of the Uniform Probate Code (UPC)[3] upset the status quo, and after some initial opposition the Minnesota Legislature enacted a UPC statute in 1974 on the recommendation of a Minnesota State Bar Association committee.[4] Other states followed suit. The UPC has now been adopted in large part by 18 states, and every state has adopted at least some portions of the UPC.[5]

The UPC is a product of the Uniform Law Commission (ULC),[6] an organization formed 126 years ago to promote uniformity in areas of state law where uniformity is desirable.[7] The ULC membership consists of volunteer attorneys appointed in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands.[8] These commissioners study proposals for new uniform laws and draft legislation in public meetings open to any interested stakeholder.

The body charged with reviewing the UPC and other trust and estate legislation and keeping it current is known as the Joint Editorial Board for Uniform Trust and Estate Acts (JEB).[9] JEB members are appointed by the ULC, by the American College of Trust and Estate Counsel (ACTEC), and by the American Bar Association Section of Real Property, Trust and Estate Law.[10] The JEB also appoints liaisons from the National College of Probate Judges and the American Association of Law Schools.[11] Following JEB recommendations, the ULC periodically drafts and promulgates amendments to the UPC, most of which have been adopted in Minnesota.

After the success of the UPC, the JEB was responsible for a torrent of uniform trust and estate acts. These included the Uniform International Wills Act in 1977, the Uniform Estate Tax Apportionment Act in 1982, an innovative act on succession without administration in 1983, a major update to the UPC's guardianship provisions in 1982, a revised Uniform Transfers to Minors Act in 1986 and the similar Uniform Custodial Trust Act in 1987, new acts governing nonprobate transfers of financial accounts and securities in 1989, the Uniform Prudent Investor Act in 1994, and uniform acts governing powers of attorney in 1979 and 1988.

In 1997, co-author Robert Stein delivered the Joseph Trachtman Lecture to the American College of Trust and Estate Counsel (ACTEC), which was subsequently published in *The Probate Lawyer*.[12] He described the wave of new statutory trust and estate law after so many years of little change as a uniform laws revolution in trust and estate law. This revolution continued into the 21st century, beginning with the Uniform Trust Code (UTC) in 2000—the first comprehensive codification of the law of trusts—that has now been adopted in 33 states, including Minnesota. The UTC was followed by:

- a revised Uniform Estate Tax Apportionment Act in 2003;
- a revised Uniform Power of Attorney Act and the Uniform Prudent Management of Institutional Funds Act in 2006;
- significant amendments to the UPC and the Uniform Principal and Income Act in 2008;
- an act allowing nonprobate transfers of real property in 2009;
- the Uniform Powers of Appointment Act in 2013;
- the Uniform Fiduciary Access to Digital Assets Act in 2014;
- the Uniform Trust Decanting Act in 2015;
- the Uniform Directed Trust Act and the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act in 2017; and, finally
- the Uniform Fiduciary Income and Principal Act last year.

Obviously, the revolutionary fervor to codify and modernize the law of trusts and estates through uniform laws shows no sign of abating.

The case for uniformity is stronger than ever. Estate planning can involve family members residing in many states and trusts sited in foreign jurisdictions. Clients move more frequently and sometimes own property in several states. Digital assets such as photos and documents stored on remote servers do not always respect traditional jurisdictional boundaries.

Moreover, the law is evolving faster than in previous generations. Today's estate planning attorneys routinely draft trusts that creatively divide a trustee's traditional duties among several parties who serve in specialized roles. Advanced discretionary techniques like decanting and adjusting between principal and income interests allow for greater flexibility to adapt to unforeseen future events. The ULC has answered these challenges by incorporating modern trends into its uniform trust and estate laws, allowing state legislatures to respond to the rapidly evolving legal environment.

The remainder of this article will discuss several recent uniform trust and estate acts not yet adopted in Minnesota.

Uniform Trust Decanting Act (UTDA)

The recently adopted Minnesota Trust Code[13] includes provisions on "decanting," the term used for distributions of trust assets into another trust with different terms (as wine is decanted from the bottle to another vessel).[14] But the Minnesota decanting law differs in several ways from the Uniform Trust Decanting Act.

One major distinction involves which rules to apply to which trusts. Both the Minnesota law and the UTDA provide two sets of rules governing decanting: a stricter set of rules for trustees with limited discretion and a more lenient set of rules for trustees with greater discretion. Trustees in the former category may decant for administrative purposes but generally may not alter beneficial interests. The UTDA defines the trustee's level of discretion differently than current Minnesota law, meaning some trustees who would be subject to the more lenient set of rules under the UTDA are subject to the more restrictive rules under Minnesota law.

To elaborate, the Minnesota Trust Code defines "unlimited discretion" as the unlimited power to distribute principal.[15] Any trustee without unlimited discretion is subject to the stricter set of rules; the trustee may decant, but all beneficial interests under the new trust must closely mirror those in the original trust. Contrast this with the UTDA structure: The UTDA has a similar set of restrictive rules for trustees with "limited distributive discretion" and a more lenient set of rules for trustees with "expanded distributive discretion."[16] A trustee with limited distributive discretion is defined as one subject to one of two familiar standards based in federal tax law: an "ascertainable standard" or a "reasonably definite standard."[17] On balance, fewer trustees would be subject to the stricter set of decanting rules under the UTDA.

The UTDA also includes an express exception for special needs trusts.[18] Even trustees with limited distributive discretion can decant to a special needs trust if it will benefit the beneficiary with a disability and all other beneficial interests remain unchanged.

There are other distinctions as well. The UTDA provides a series of savings provisions that can rescue an otherwise defective decanting when the decanting fiduciary commits an error.[19] This helps insure against potentially adverse tax consequences and avoid lawsuits alleging a breach of the duty of care.

Finally, the UTDA includes a liability shield for successor trustees that rely on an apparently valid decanting executed by a previous trustee.[20] Without this provision, professional fiduciaries may be reluctant to assume responsibility for a previously decanted trust. With it, the successor fiduciary will be held blameless while the original fiduciary remains responsible for its actions.

Uniform Directed Trust Act (UDTA)[21]

Another area where Minnesota law diverges from uniform law involves directed trusts. The Minnesota trust code includes provisions governing the use of directed trusts,[22] but they could be substantially improved by adopting the UDTA.

A fundamental difference between the UDTA and Minnesota law involves terminology. The Minnesota statute defines three types of directing parties (distribution trust advisor, investment trust advisor, and trust protector) and assigns default duties to each type.[23] This statutory approach will cause confusion if the drafter of a trust uses a different title for a directing party or assigns duties different from those anticipated by the statute. This is very likely to be the case when the drafter was unfamiliar with the Minnesota statute, either because the drafter practices out of state or because the trust predates the 2015 law. Subdivision 10 of the Minnesota law on directed trusts attempts to solve this problem by providing for application to "all existing and future trusts that appoint or provide for a directing party, including but not limited to a party granted power or authority effectively comparable in substance to that of a directing party as provided in this section."[24] This creates issues of fact that could lead to avoidable disputes.

The UDTA takes a much simpler approach. The act defines a "trust director" as any person, other than a trustee, who is granted a power over the trust (with certain exclusions) regardless of the person's title under the terms of the trust.[25] Moreover, a trust director has no default duties under the UDTA. Instead, the terms of the trust control, and the statute grants authority to exercise any further power appropriate to the exercise of a power granted in the trust instrument.[26] For example, a trust director granted a power by the settlor to direct investment of trust assets could also appropriately choose a broker to manage trades or bring suit for noncompliance with an investment direction.

The UDTA approach is preferable because of its simplicity, and also because it removes any ambiguity about the scope of a trust director's duties. The terms of the trust control—period. Drafters of trust instruments may use different titles from those specified in the Minnesota statute, or assign different duties, with full confidence that the settlor's intended division of duties will be legally enforceable.

Another advantage of the UDTA is its application of a state's rules governing trustees to trust directors. The common law is unclear with respect to a trust director's acceptance of office, obligation to post a security bond, statutes of limitation for liability, compensation, resignation, removal, and the appointment of successors to fill vacancies. The UDTA provides a simple solution: It incorporates the enacting state's current law governing trustees and applies it equally to similarly situated trust directors.[27] There are no equivalent provisions in the Minnesota statute.

The UDTA is similar to the Minnesota statute in other respects. Both apply the "willful misconduct" standard for holding directed trustees liable.[28] A trustee who complies with the authorized direction of a trust director is not liable unless by doing so the trustee engages in willful misconduct. Instead, the *trust director* has the same liability as a trustee would under the same circumstances. Both the UDTA and the Minnesota statute impose a duty on a trust director to keep a trustee reasonably informed about actions that affect the trustee's ability to perform its duties. But only the UDTA imposes a reciprocal duty on a trustee to keep a trust director reasonably informed as necessary.[29]

Finally, the drafters of the UDTA recognized that allocating liability among parties according to their duties is a reversal of the common law rule that holds co-trustees liable for each other's actions. Reasoning that it makes little sense to have conflicting rules based on whether a person is given the title of trust director or co-trustee, the UDTA allows settlors the option to relieve individual co-trustees of duties and liabilities to the same extent they could relieve a trust director or directed trustee.[30] The settlor must affirmatively elect this option, or the default common law rule applies.

Uniform Parentage Act (UPA 2017)

A new revision of the Uniform Parentage Act makes five changes to the law:

(1) It ensures equal treatment of children born to same-sex couples by using gender-neutral language throughout;

(2) It permits a court to extend certain legal rights to *de facto* parents who helped raise a child despite no biological relationship;

(3) it allows the mother of a child born of sexual assault to terminate the father's parental rights by order of the court;

(4) it updates surrogacy provisions in line with recent legal developments; and

(5) it gives children born using assisted reproductive technology limited rights to access medical and identifying information of the donors.[31]

Minnesota adopted a previous version of the Uniform Parentage Act in 1980[32] and should enact these revisions.

Uniform Power of Attorney Act (UPOAA)

This act helps prevent financial exploitation by restricting agents under a power of attorney (POA) from performing certain inherently risky acts (such as altering rights of survivorship or changing a beneficiary designation) unless the authority is expressly granted in the POA document.[33] It also gives legal standing to a broad range of persons to ask a court to construe the terms of a power of attorney or review the agent's conduct.[34] Minnesota's statute has no comparable provisions.

Uniform Fiduciary Principal and Income Act (UFPIA)

This is a newly revised and renamed version of the Uniform Principal and Income Act.[35] Minnesota adopted the previous version in 2001.[36] The revision allows conversion of an irrevocable income trust to a unitrust to allow for total-return investing when all interested parties consent.[37]

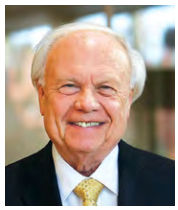
Uniform Recognition of Substitute Decision-Making Documents Act (URSDDA)

URSDDA allows for the cross-border recognition of powers of attorney—both for health care and for finances.[38] The title recognizes that the documents are called by other names (e.g. health-care proxies, representation agreements) in other jurisdictions. This act is the result of a joint project between the ULC and the Uniform Law Conference of Canada, which has promulgated a similar law for Canadian provinces.[39]

Conclusion

The revolution in new uniform trust and estate laws continues. The ULC is drafting a new uniform act on electronic wills, which are currently permitted in three states and are being actively promoted to state legislatures by online vendors.[40] Approval of the Uniform E-Wills Act is expected in July 2019. Another drafting project will address the rise of crowdfunding for informal charitable appeals.[41] The drafting committee is considering who owns the funds for tax purposes, whether to impose fiduciary duties on the campaign organizer, and whether to regulate the use of excess funds raised once the original purpose for collection has been fulfilled. Final approval is expected in 2020.

The Minnesota Legislature has adopted dozens of uniform laws over the years. The uniform laws discussed here would improve the trust and estate law of Minnesota and should be evaluated for possible adoption in Minnesota as soon as possible. ▲



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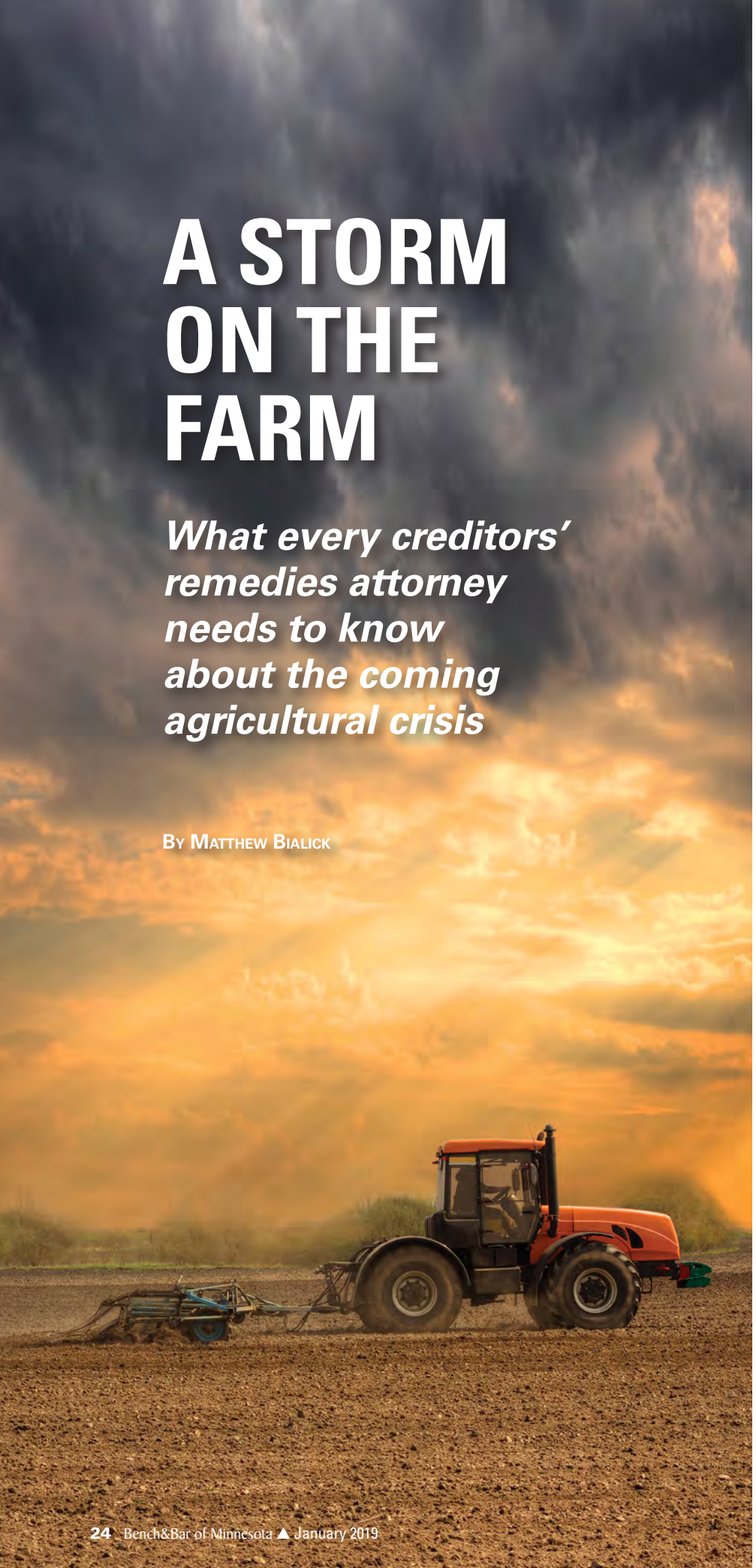
Notes

[1] Robert A. Stein, *Probate Reformation: The Impact of the Uniform Laws*, 23 PROBATE LAWYER 8 (1997).
[2] *See id.* at 8–10. *See also* Christopher Hunt, "A New Day in Minnesota Trust Law," 72 BENCH & B. MINN. (2015) (noting that until 1989, some provisions in Minnesota trust law had not been updated since the state was a territory).
[3] Stein, *supra* note 1, at 8.
[4] MINN. STAT. §524.1-101 et seq. (1974) (adopting UPC provisions).
[5] *See UPC Enactment Chart*, UNIF, LAW COMM'N, *http://www.uniformlaws.org/Shared/Docs/Probate%20Code/UPC%20Chart.pdf* .
[6] Co-author Robert A. Stein has been a commissioner from Minnesota since 1973 and served as president of the ULC from 2009–2011.
[7] *About the ULC*, UNIF. LAW. COMM'N, *http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC*.
[8] *Frequently Asked Questions*, UNIF. LAW COMM'N, *http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions*.
[9] *Committees: Joint Editorial Board for Uniform Trust and Estate Acts*, UNIF. LAW COMM'N, *http://www.uniformlaws.org/Committee.aspx?title=Joint%20Editorial%20Board%20for%20Uniform%20Trust%20and%20Estate%20Acts*.
[10] *Probate Code Summary*, UNIF. LAW COMM'N, *http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code*.
[11] Uniform Law Commission Reference Book (Nat'l Conference of Comm'rs on Unif. State Laws eds., 2017–2018).
[12] Robert A. Stein, *Joseph Trachtman Lecture, Probate Reformation: The Impact of the Uniform Laws*, 23 PROB. LAW. 10 (1997).
[13] MINN. STAT. Ch. 502.
[14] MINN. STAT. §502.851 (2016).
[15] *Id.* §502.815(i) ("'Unlimited discretion' means the unlimited power to distribute principal. A power to distribute principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation of the power to distribute principal.").
[16] UNIF. TRUST DECANTING ACT §§11–12 (UNIF. LAW COMM'N 2015).
[17] *Id.* §12(a) ("'[L]imited distributive discretion' means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard."); *Id.* § 2(2) ("'Ascertainable standard' means a standard relating to an individual's health, education, support, or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A)[, as amended,] or 26 U.S.C. Section 2514(c)(1)[, as amended,] and any applicable regulations."); *Id.* §2(21) ("'Reasonably definite standard' means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A)[, as amended,] and any applicable regulations.").
[18] *Id.* §13(a).
[19] *Id.* §§19, 22.
[20] *Id.* §6.
[21] Both co-authors served on the drafting committee for the Uniform Directed Trust Act.
[22] MINN. STAT. §501C.0808 (2016).
[23] *Id.*
[24] *Id.* subdiv. 10.
[25] UNIF. DIRECTED TRUST ACT §2 (UNIF. LAW COMM'N 2017). For exclusions, see *Id.* §5.
[26] *Id.* §6.
[27] *Id.* §16.
[28] *Compare id.* §9, *with* MINN. STAT. §501C.0808 (2016).
[29] UNIF. DIRECTED TRUST ACT §2 (UNIF. LAW COMM'N 2017).
[30] *Id.* §12.
[31] UNIF. PARENTAGE ACT Prefatory Note (UNIF. LAW COMM'N 2017).
[32] MINN. STAT. 257.51–.71(2016).
[33] UNIF. POWER OF ATTORNEY ACT §201 (UNIF. LAW COMM'N 2006).
[34] *Id.* §116.
[35] UNIF. FIDUCIARY INCOME AND PRINCIPAL ACT (UNIF. LAW COMM'N 2018).
[36] MINN. STAT. §501C.1113 (2016).
[37] UNIF. FIDUCIARY INCOME AND PRINCIPAL ACT §§301–309 (UNIF. LAW COMM'N 2018).
[38] UNIF. RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT (UNIF. LAW COMM'N 2014).
[39] *Id.* Prefatory Note.
[40] *Committees: Electronic Wills*, UNIF. LAW COMM'N, *http://www.uniformlaws.org/Committee.aspx?title=Electronic%20Wills*.
[41] *Committees: Management of Funds Raised Through Crowdfunding Efforts*, UNIF. L. COMM'N, *http://www.uniformlaws.org/Committee.aspx?title=Management%20of%20Funds%20Raised%20Through%20Crowdfunding%20Efforts/*.



A STORM ON THE FARM

What every creditors' remedies attorney needs to know about the coming agricultural crisis

By Matthew Bialick

A crisis is currently brewing in Minnesota's agricultural sector. Years of low commodities prices brought on by a global supply glut have been taking their toll. Over the past several years, many farmers experienced losses due to the low prices, but those losses have been kept somewhat under control due to record production yields.

But in 2018, the already low prices of one key commodity—soybeans—went from bad to cataclysmic due to the trade war with China. In the span of two months, prices dropped from almost $10.50 per bushel to just over $8.00 per bushel. While the Federal Market Facilitation Program (known colloquially as the Emergency Aid Program) will offset these losses to some degree, the program limits aid payments to $125,000 per farmer, paid out over two years, and thus very likely will not compensate farmers fully for their losses.

Additionally, and even more significantly, Minnesota farmers are likely to experience production yields in 2018 that are far less favorable than yields of the recent, record-setting years, due largely to excessive moisture during the planting and harvest seasons.

As a result of all this, many agricultural economists are forecasting that the average Minnesota farmer will experience heavy losses in 2018. Economist Thomas Walker, Jr. of Praexis Business Labs has forecasted that based on current prices, government payments, and likely yields, the average Minnesota farm can expect to lose between $200,000 and $600,000+ (depending on size and several other factors) in 2018. This level of loss would bring working capital down to zero for many farmers.

Such large losses, paired with a commodities market that does not show any signs of improving in the near future, will also force many banks into a position in which they will have no option but to non-renew loans set to mature over the next few months and also to forego lending additional funds for 2019 crop and livestock inputs. This action could trigger a large-scale market correction in 2019 that produces a wave of foreclosures and other creditors' remedies actions by agricultural goods and service providers.

An increase in creditor's remedies activity means an increase in associated legal work. This creates an opportunity for

Minnesota lawyers but also a number of major traps for the unwary. Collecting on an agricultural debt is very different from collecting on general commercial debt. This is true regardless of whether the debtor is a farmer or an agricultural goods or service provider that has been forced into insolvency due to out-of-control receivables from its farmer customers.

While not a remotely exhaustive list, here are several things every creditors' remedies attorney should know about agricultural collections.

Minnesota Farmer-Lender Mediation Act

First and foremost, every creditors' remedies attorney dealing with an agricultural debt needs to be aware of the Farmer-Lender Mediation Act. This law prescribes that before any creditor (not just lenders, as the name might imply) takes most meaningful collection action on a debt owed by a farmer in excess of $15,000, they have to offer the farmer the right to participate in a three-month mediation process involving all secured creditors. During this process, the creditor is barred from taking any further collection action. Failure to offer the debtor farmer-lender mediation could render all subsequent collection action invalid.

Statutory liens

Next, creditors' remedies attorneys need to understand that when dealing with agricultural commodity collateral, there exists a world of secret statutory liens. Under Minnesota law, most agricultural goods and service providers are granted super-priority liens on the commodities produced in connection with their goods and services that, if perfected, can trump a bank's prior perfected security interest. Perfection generally occurs (among other things) through filing a UCC Financing Statement within strict, statutorily mandated timelines. Many goods and service providers never file the financing statements and some do not even realize that a lien exists.

If proper perfection is not made, then the statutory lien does not trump a prior perfected security interest, but it is still a lien. As such, creditors' remedies attorneys must ensure that all statutory lien creditors are named as parties to any enforcement action that seeks a determination of lien priority, and that they are provided notice of liquidation of the commodity collateral before it is sold.

A final note on statutory liens: Attorneys need to remember to perfect and assert these liens if they are collecting on behalf of an agricultural goods or service provider. Since many goods and service providers do not ever perfect their statutory liens, and since there are often very tight perfection deadlines at play, the very first thing an attorney should do after receiving a new collection file is to assess whether any statutory liens exist and then take immediate steps to perfect the liens that do exist.

CNS Financing Statements

All creditors' remedies attorneys dealing with a debt secured by a lien on agricultural commodities need to be aware of the existence of CNS Financing Statements (also called Effective Financing Statements). CNS Financing Statements are documents filed with the Minnesota Secretary of State that give notice to commodities buyers that a creditor has a lien on a certain farmer's agricultural commodities. By filing a CNS Financing Statement, a creditor's lien on agricultural commodities follows the commodities, notwithstanding their sale in the ordinary course of business. As a result, if the buyer does not make payment out to both the farmer and the creditor, and the proceeds are not remitted to the creditor by the debtor, the creditor can actually take steps to assert lien rights against the buyer.

This presents another potential source of recovery upon non-payment and presents another trap for the unwary if the attorney represents a commodities buyer that does not realize the legal implications of buying commodities and fails to satisfy all associated liens.

FSA guaranteed loans

When dealing with liquidation of agricultural debts for banks, it is not uncommon to run into loans that have been guaranteed in part by the United States Farm Services Agency (FSA). Attorneys need to be aware that whenever they are liquidating an FSA-guaranteed loan, an incredibly specific set of requirements come into play as to timing, documentation, and due diligence. The failure to follow these guidelines can result in the reduction, or even the total invalidation, of the FSA guarantee.

While a complete discussion of all applicable requirements is beyond the scope of this article, one special point is worth mentioning. Under FSA guidelines, before a bank can liquidate an FSA-guaranteed loan, it must make a determination as to whether a borrower is eligible for the Interest Assistance Program. This is a federal program from which struggling borrowers can receive a government-subsidized reduction in the applicable interest rate. Even though this program has not been funded since 2011, banks are required by federal law to assess the program's applicability and submit a form to the FSA indicating whether the bank believes the program is appropriate for the borrower. Failure to do so could render all subsequent liquidation action invalid.

Statutory right of first refusal

One final trap for the unwary exists in the statutory right of first refusal applicable to agricultural land. An agricultural creditor may not lease or sell agricultural land it obtained from a debtor (through means such as foreclosure, deed in lieu, etc.) without first offering the debtor a right of first refusal on the land. Failure to offer a right of first refusal can affect the marketability of the title and can subject the creditor to liability.

Conclusion

Given the current economic climate in agriculture, it appears that a large-scale market correction is likely in either 2019 or 2020. Any legal work resulting from such a correction carries with it a host of pitfalls and challenges. Creditors' remedies attorneys who intend to practice in this space should make sure they are fully up to date on all legal and regulatory requirements and are comfortable dealing with agricultural collateral and the associated statutory liens. ▲

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Minnesota's Public School System Goes on Trial

By Jamie Boyer and John Munich

Cruz-Guzman presses the question of what constitutes an adequate public education

The achievement gap in America's schools is one of our nation's most persistent and pernicious problems. Educators, administrators, researchers, legislators, and courts ceaselessly debate why the gap exists and how to close it. Yet a universal solution—one that is educationally, politically, and economically feasible on a statewide or even district-wide scale—remains elusive. Lawsuits filed on behalf of at-risk students across the country routinely ask "are our schools good enough?" And that very question is now before the Minnesota courts in *Cruz-Guzman v. State of Minnesota*.[1]

Cruz-Guzman asserts that the Minneapolis and St. Paul school districts are illegally segregated along racial and economic lines. The lawsuit alleges that poor and/or minority students attend "separate and unequal" schools that do not provide the same educational opportunities as more affluent suburban districts. Plaintiffs contend state policies concentrate minority and/or low-income students in segregated, and in some cases hyper-segregated, schools. They demand an end to these policies and an adequate, desegregated school system.

This article discusses the *Cruz-Guzman* case, the broader national backdrop against which it is being played out, and the theories and evidence typically presented in school adequacy and desegregation lawsuits.

Cruz-Guzman alleges state policies cause "separate and unequal" schools

Cruz-Guzman was filed on behalf of parents and students attending the Minneapolis Public Schools, Special School District No. 1, and the Saint Paul Public Schools, Independent School District 625 (collectively, public schools). Plaintiffs contend the public schools are segregated on the basis of race and socioeconomic status and that this segregation violates the Minnesota Constitution's Education Clause (Article XIII, §1), Equal Protection Clause (Article I, §2), and Due Process Clause (Article I, §7). According to the complaint, the public schools are disproportionately composed of students of color and/or students living in poverty and are not equal to whiter, more affluent schools in the surrounding area. Plaintiffs contend their schools are "separate and unequal" because inadequate resources force them to fund services addressing concentrated poverty at the expense of staffing, professional development, instructional materials, technology, and extracurricular activities. This forced allocation of resources, in turn, depresses educational opportunities, student achievement, and future employment prospects.

Plaintiffs allege the fault lies with policies that illegally segregate students along racial and economic lines. These policies include: (1) boundary decisions; (2) open enrollment policies; (3) the formation of charter schools exempted from state desegregation requirements; (4) misuse of funding; (5) the formation of community schools; (6) discriminatory discipline practices; (7) improper use of special education services, alternative schools, and limited English proficiency programs; (8) discriminatory suspension policies; (9) racially based teacher assignments; and (10) capital projects reinforcing segregation. Plaintiffs contend these practices deny public school students the educational and social benefits of an integrated education.[2]

Plaintiffs seek relief from the state of Minnesota, the Minnesota House of Representatives, the Minnesota Senate, the Minnesota Department of Education, and the Commissioner of Education, Dr. Brenda Cassellius (collectively, state defendants). Plaintiffs demand: (1) the certification of a class comprising public school students with the named plaintiffs acting as class representatives; (2) a decree that the state defendants are violating the Education, Equal Protection, and Due Process Clauses of the Minnesota Constitution; (3) an injunction ordering the state defendants to end and remedy their constitutional violations by providing plaintiffs with an adequate and desegregated education; and (4) their costs and attorneys' fees.

The state defendants argued that *Cruz-Guzman* raised issues best resolved by the Legislature, not the courts, and moved to dismiss the case. On July 25, 2018, a split Minnesota Supreme Court ruled 4-2 that the lawsuit could proceed, holding that "separation-of-powers principles do not prevent the judiciary from ruling on whether the Legislature has violated its duty under the Education Clause or violated the Equal Protection or Due Process Clauses of the Minnesota Constitution." A dissent filed by Justice Anderson and joined by Chief Justice Gildea disagreed, contending the Minnesota Constitution clearly empowered the Legislature—and only the Legislature—to provide plaintiffs' requested relief.

Minnesota's Education Clause provides that "it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state." In *Skeen v. State*,[3] the Minnesota Supreme Court determined that education is a fundamental right under the state constitution. As the Court explained, this entitlement is not "merely a right to anything that might be labeled as 'education,' but rather, a right to a general and uniform system of education that is thorough and efficient, that is supported by sufficient and uniform funding, and that provides an adequate education to all students in Minnesota."

The *Cruz-Guzman* Court acknowledged that the Minnesota Constitution assigned responsibility for the public school system to the Legislature and that matters of educational policy fell within that authority. Plaintiffs themselves "acknowledged that it is not the court's function to dictate to the Legislature the manner with which it must correct its constitutional violations," the Court noted. Nonetheless, the Court rejected the notion that "the judiciary cannot adjudicate whether the Legislature has satisfied its constitutional duty under the Education Clause," especially considering that "the judiciary is not required to devise particular educational policies to remedy constitutional violations." At the same time, however, the Court admitted that defining terms used in the Education Clause and determining whether the constitution was satisfied would "inevitably require[] a measure of qualitative assessment."

Undeterred, the Court concluded it would "not shy away from our proper role to provide remedies for violations of fundamental rights merely because education is a complex area. The judiciary is well equipped to assess whether constitutional requirements have been met and whether [Plaintiffs'] fundamental right to an adequate education has been violated." The Court declined to accept legislative superiority in this arena, explaining "[w]e cannot fulfill our duty to adjudicate claims of constitutional violations by unquestioningly accepting that whatever the Legislature has chosen to do fulfills the Legislature's duty to provide an adequate education."

The Court also rejected the state defendants' argument that the Speech or Debate Clause of the Minnesota Constitution immunized the legislative defendants from suit. That clause provides: "The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place."[4] Simply put, the Speech or Debate Clause grants an absolute privilege from defamation liability to members of the Legislature performing official duties.

The state defendants argued this clause broadly provides immunity from suit for any actions taken in a legislative capacity. The Court disagreed, noting the state defendants' lack of authority for their position. Ultimately, the Court declined to "interpret one provision in the constitution—the Speech or Debate Clause—to immunize the Legislature from meeting its obligation under more specific constitutional provisions—the Education, Equal Protection and Due Process Clauses."

Finally, the Court rejected the state defendants' claims that necessary parties were not joined in the case. Specifically, defendants argued that some of plaintiffs' requested remedies could only be enacted by school districts and charter schools, which are not parties. The Court noted that non-parties are frequently affected by judicial rulings regarding the constitutionality of state laws or actions, but they are not required to be parties to a suit. Consequently, while districts and/or charter schools "might eventually be affected by actions potentially taken by the State in response to this litigation, those possible effects are not enough to require that [they] be joined as necessary parties."

> Today's adequacy trial is a highly developed exercise, involving sophisticated and complicated expert studies, testimony from dozens of witnesses, and the filing of hundreds, if not thousands, of exhibits.

Justice Anderson, joined by Chief Justice Gildea, dissented. These justices believed that plaintiffs' complaint presented non-justiciable, political questions whose resolution rested entirely with the Legislature. The dissent argued the plain language of the Education Clause commands the Legislature to establish and fund public schools, and further reasoned that when "the constitution *textually* commits a matter to another branch of government and that branch acts within the scope of its powers, we cannot review the political judgment and discretionary actions of that branch or its officials." (Emphasis in original.)

The dissent further contended this case differs from other Education Clause cases because *Cruz-Guzman* does not challenge a specific legislative enactment. The Court is not, therefore, deciding "whether a statute is constitutional or whether the acts or omissions of government actors complied with the language of a statute." Rather, the question is more general—what constitutes an adequate education?—and the dissent argued courts are "wholly unsuited to setting constitutional minimums in education adequacy.... It is not the province of the judiciary to monitor or judge the wisdom of the policy and political decisions made to address the many factors that might lead to change in any given educational year."

In the end, the dissent maintained, "a district court will be asked to pass judgment on plans, perhaps many plans, extending over many years, to assure that an 'adequate' education is provided to students." Assuming an appeal, that court "will then weigh in on the definition of an 'adequate' education and whether that standard is constitutional." Ultimately, the judiciary "will not be a bystander to this construction project; it will have final approval over what is built and how."

Despite these arguments, the majority of the Minnesota Supreme Court ruled that plaintiffs' Education, Equal Protection, and Due Process Clause claims were justiciable, that the case could proceed against the legislative defendants and that potentially affected schools, districts, and/or charter schools need not be joined in the lawsuit. The Court's ruling reversed the appellate court and upheld the district court's ruling on the state defendants' motion to dismiss. *Cruz-Guzman* now returns to the district court for further proceedings.

The national picture: Adequacy and desegregation litigation in 2018

More than 45 states have seen some version of an education "adequacy" lawsuit in their courts.[5] In brief, these cases ask state courts to determine whether the public funding provided by the state for K-12 education is "adequate," "sufficient," or "thorough" enough to meet the public education standards set out in state constitutions. Although the case often thought to demark the origin of adequacy litigation, *Robinson v. Cahill*,[6] was decided over 40 years ago, adequacy litigation can be thought of as the natural successor to so-called equity lawsuits and even desegregation cases.[7] Those latter cases began to wane after a trio of Supreme Court decisions in the 1990s that spurred federal trial courts to release school districts and states from judicial supervision over desegregation programs, many of which were aimed at providing compensatory relief to formerly *de jure* segregated public schools by ordering increased state and local funding to be provided to those schools.[8]

Equity lawsuits, the first wave of public school funding litigation, were aimed at remedying public funding differences across schools and districts in a given state. Those differences were largely the result of school funding systems that often relied on a local property tax as one component of the funding mechanism, usually coupled with state revenues generated by state income or other taxes. As one might expect, one result of this type of system is that school districts that have high property tax valuations—because, for example, they have highly assessed commercial property or include amenities such as resort areas—are able to generate higher funding from their local components and accordingly are able to fund their schools at higher levels than districts that lacked local property wealth. Plaintiffs in equity lawsuits were often successful in arguing that children from relatively property-poor districts should not receive less funding (and less education resources) than students who attended schools in districts with more property wealth.

To remedy these variations, and sometimes as a result of court orders in equity cases, states began to formulate equalizing components into their school-funding mechanisms so that relatively fewer state dollars would flow to property rich districts, while additional "equalizing" dollars would flow from the state to those districts that had lower local property valuations. A few states, such as New Mexico, broke new ground and virtually did away with the local property tax component to their funding systems, greatly reducing—if not eliminating—variations in the revenues per pupil across districts. Over time, however, plaintiffs began to focus more on "adequacy," shifting the argument from "all students deserve equal funding" to a new contention that students are entitled to funding adequate to meet their particular needs, considering factors such as student poverty, student disabilities, and English language status.

In recent years, adequacy lawsuits have been tried in a number of states, including Kansas, Missouri, South Dakota, New York, Connecticut, New Mexico, and Montana, among others. Today's adequacy trial is a highly developed exercise, involving sophisticated and complicated expert studies, testimony from dozens of witnesses, and the filing of hundreds, if not thousands, of exhibits. These trials often last for months, and plaintiffs may be represented by large, sophisticated law firms working on a pro bono or reduced rate basis. This commitment of resources is appropriate, considering that millions, and sometimes billions, of dollars are at stake.

Typical theories and proof

Adequacy lawsuits are often reduced to a simple question—does money matter? While this inquiry makes for a catchy soundbite, it obscures the fact that such cases involve complex, politically charged questions about the achievement gap that persists in every state between children from disadvantaged backgrounds and their peers from more economically secure families. Plaintiffs, for their part, generally argue that more funding is needed to provide services to at-risk students and that the state's failure to appropriate more money is directly responsible for lackluster student performance. Defendants, in contrast, often contend that appropriations are adequate but mis- or underused, and that money alone cannot close an achievement gap caused by non-school factors like poverty. Put in soundbite terms, plaintiffs argue that "more money matters most," while defendants counter that "how you handle money matters most."

Evidence in adequacy cases tends to focus on three things: (1) school resources (inputs); (2) student performance (outputs); and (3) the relationship between those factors (causation). Plaintiffs' goal is to show that a lack of school resources is directly responsible for poor student performance, while defendants want to demonstrate that resources are adequate and, in any event, there is no direct causal relationship between increased funding and higher student achievement. Evidence demonstrating inputs and outputs tends to be data-based and provided through witnesses like education department officials, school administrators, teachers, parents, students, and legislators. Evidence of causation, however, is generally provided by expert witnesses who have devoted their careers to investigating the relationship, or lack thereof, between spending and student achievement.

While every state varies, most have a school funding formula that dictates how much money each school district receives annually. Adequacy lawsuits are usually filed when the state reduces or fails to increase the amount of money flowing through this formula to the schools. The goal of plaintiffs' input evidence is to show how these funding choices affect at-risk students. This is generally accomplished through testimony describing the enhanced needs of these students and how such needs are left unmet because of staffing shortages, inferior technology and instructional resources, an inability to fund additional instructional time, a lack of counselors, and a dearth of extracurricular opportunities.

Defendants' input evidence, in contrast, focuses on the total funding districts receive from all sources and how such money is managed. To that end, defense witnesses may testify that at-risk students receive more (sometimes significantly more) targeted funding from state and federal sources, that districts frequently do not prioritize learning over unnecessary administrative and staffing costs, that schools fail to utilize all funding available to them, and that existing resources within schools are adequate.

Depending upon the state, each side might also introduce evidence of recently enacted education initiatives and argue about their effectiveness. Examples of such initiatives include teacher evaluation systems incorporating a student growth component, implementation of a Common Core curriculum, specific reading/math programs, and systems driving increased accountability from the districts to the state. Generally speaking, plaintiffs tend to argue such initiatives are not enough or even harmful, while defendants contend they are effective or so new they must be given time to work.

Outcome evidence is fairly straightforward. Plaintiffs produce standardized test scores for students, or a subset of students, as evidence of inadequacy. Defendants then provide alternate explanations for those scores, such as student characteristics or ineffective staffing, and/or seek to mitigate such evidence by showing that students within certain subgroups are showing growth toward closing the achievement gap.

It is causation—the relationship between school inputs and student outputs—that provides the most hotly contested issue in any adequacy lawsuit, if not the entire field of education. Researchers spend entire careers analyzing whether there is a systematic causal relationship between funding and achievement. These experts provide the key testimony as to whether an alleged lack of inputs *causes* low student outcomes. The evidence supporting such conclusions usually consists of statistical regression analyses using student longitudinal data. Or, in plain English, an examination of whether student achievement over time is attributable to in-school resources like class size, teacher experience, or per-pupil spending or to non-school factors like poverty, the educational attainment of the parents, and English language learner status.

Not surprisingly, plaintiffs' experts generally claim a causal link exists between funding and achievement, while defense experts argue student outcomes are almost entirely driven by non-school factors. The evidence presented by both sides falls into two categories: (1) historical and (2) state-specific. Regarding the former, experts from both sides may examine previous studies addressing this issue and debate their relative merits. Regarding the latter, experts may examine several years' worth of state-specific student data—usually standardized test scores and student demographic information—to analyze the factors most closely correlated with achievement. The results provide some of the most revealing evidence about the various factors that influence student achievement, and to what extent.

In the end, adequacy lawsuits are a close examination of how a public school system is functioning. Questions of how much money is needed, whether the districts are good stewards of those dollars, and whether students (and *which* students) are learning are complicated, emotionally charged questions of the utmost importance. The *Cruz-Guzman* case now presents those very questions to Minnesota courts. Although the lawsuit focuses on the Minneapolis and St. Paul districts, the issues raised by the case and the resolution reached by the courts are likely to resound throughout Minnesota. ▲

Notes

[1] *Cruz-Guzman v. State of Minnesota*, 27-CV-15-19117.

[2] A portion of plaintiffs' allegations mirror those brought in a case a number of years ago involving the Hartford, Connecticut schools, *Sheff v. O'Neill,* 238 Conn. 1 (1996) and closely resemble the types of claims and arguments asserted in federal court desegregation lawsuits. These types of claims involve complex analyses of the racial compositions of schools, housing patterns, achievement and other outcome disparities existing among different demographic groups, and so on. *Cruz-Guzman* is a relatively rare lawsuit that marries these type of desegregation claims along with a traditional school funding challenge.

[3] *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993),

[4] Minn. Const. art IV, §10.

[5] Funding adequacy cases have been decided in every state except Mississippi, Nevada, Utah, and Hawaii.

[6] *Robinson v. Cahill*, 62 N.J. 473 (1973).

[7] *See* J. Dunn and M. West, *From Schoolhouse to Courthouse – The Judiciary's Role in American Education* (2009) 96 ff.

[8] *See, e.g., Missouri v. Jenkins*, in which the trial court ordered state and local governments to provide over $1.3 billion in additional funding to pay for physical upgrades, additional educational programs, and magnet schools intended to draw non-minority children to public schools within the urban Kansas City, Missouri district. In 1995, the United States Supreme Court held that the remedy imposed by the lower court in Kanas City exceeded the scope of the violation. 515 U.S. 70 (1995).

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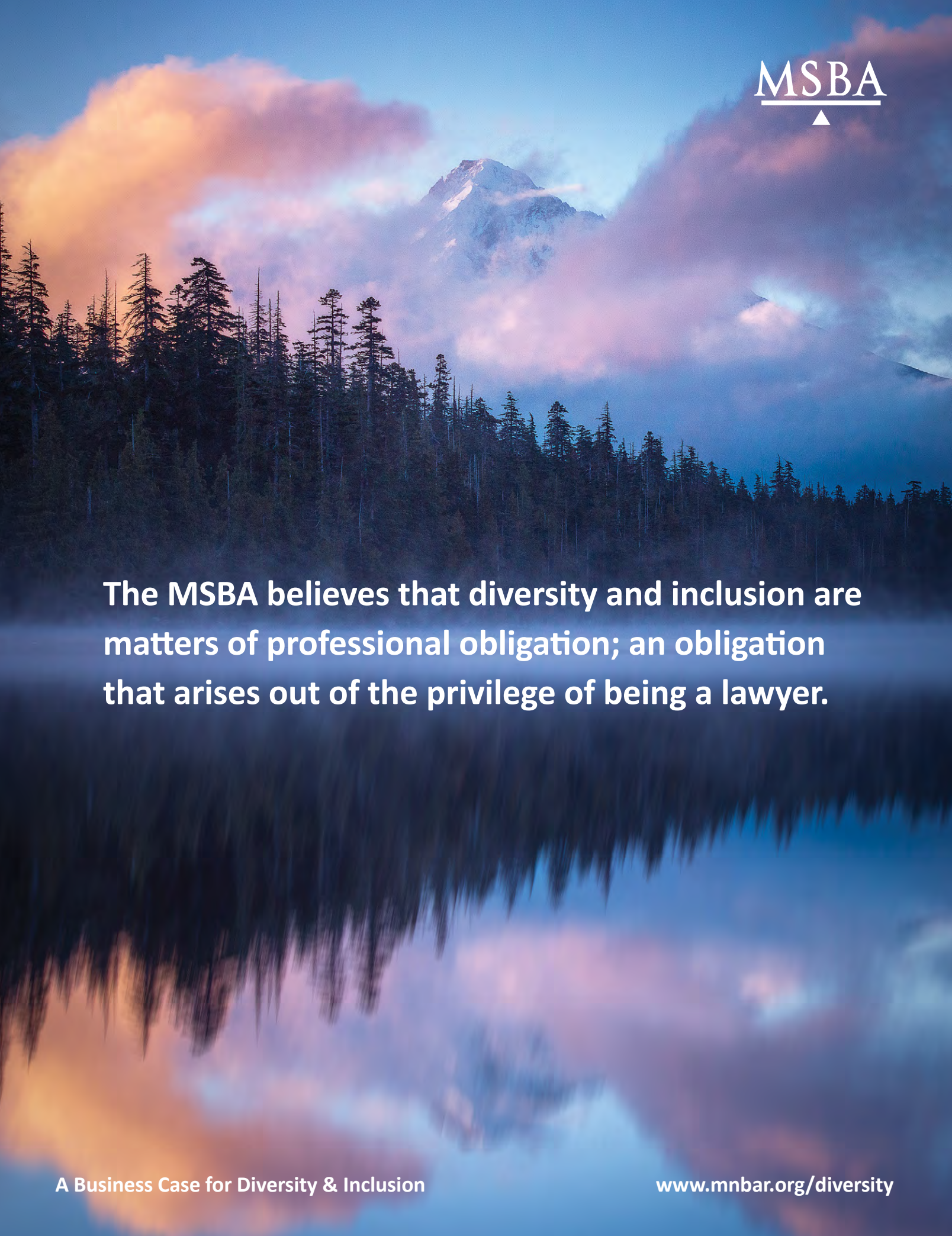
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Fair Trials in the Age of Facebook

When social media are everywhere, escaping prejudicial publicity becomes almost impossible

By Steven P. Aggergaard

When there has been intense media coverage of high-profile homicides or other incidents, criminal defendants in Minnesota typically seek to change the venue of a trial from the county where the incident occurred. The goal is to lessen the possibility of the jury including persons who have formed opinions about an incident based on media coverage.

But as the definition of "media" has broadened to include social media, there is increasingly no venue in the state where a criminal defendant can find jurors who have not been exposed to information and opinions concerning high-profile incidents.

A case in point is the trial in 2017 of Jeronimo Yanez, the St. Anthony, Minnesota police officer who was tried for the death of Philando Castile. Yanez shot Castile during a traffic stop just north of the Minnesota State Fairgrounds in July 2016. Seconds later, Castile's passenger, Diamond Reynolds, began broadcasting the incident on Facebook Live.

In an instant, Reynolds became not only a trial witness and creator of trial evidence, but also a member of the "media," as her video was shared on Facebook far beyond Ramsey County.[1]

A key reason the video went viral is that Castile was the second African-American man fatally shot by a police officer in as many days. The previous morning in Baton Rouge, Louisiana, a police officer fatally shot Alton Sterling in an interaction that also was caught on video. Images from that incident, like Castile's, spread across social media.[2] And so did opinions about both shootings.

The public discourse about officer-involved shootings of African-American men was ongoing when Yanez was charged with second-degree manslaughter and dangerous discharge of a firearm. Given the widespread publicity, Yanez asked for the venue of his trial to be transferred from Ramsey County.

Judge William H. Leary denied the request, explaining "the death of Mr. Castile has been the subject of ongoing public comment locally, statewide and nationally." The judge also cited Yanez's concession "that no area of the state has been 'shielded' from such publicity."[3]

Yanez's trial remained in Ramsey County, and he was acquitted. Still, the case helps demonstrate that in the Facebook era it can be difficult if not impossible to find a venue in Minnesota that has been shielded from pretrial publicity.

And although the Minnesota Rules of Criminal Procedure are broadly worded to protect a criminal defendant's right to a fair trial, the rules are often of limited help as a practical matter.

Broad discretion, narrow application

The plain language of the Minnesota Rules of Criminal Procedure gives district courts broad discretion to grant transfer-of-venue motions, even on a court's own motion. According to Rule 25.02, a trial should be moved "whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had."

The rule does not limit "material" to traditional news coverage by professional journalists. Theoretically at least, a criminal trial's venue may be transferred based solely on the existence of an overwhelming amount of social media.

Although Rule 25.02 leaves room for district courts to transfer venue for that reason, the rule presupposes that a criminal defendant will build a district court record containing evidence of the pretrial publicity and its prejudicial effect. Specifically, Rule 25.02 authorizes use of testimony, affidavits, written statements, opinion surveys, or "other material having probative value" to support a change-of-venue motion. However, the rule goes on to clarify that testimony, affidavits, or statements "must not be required as a condition for granting the motion."

In practice, though, a criminal defendant who seeks a change of venue is wise to build a substantial evidentiary record to prove jurors—likely specific jurors—have been prejudiced by the media and as a result have formed pretrial opinions about a defendant's guilt. This is because although a defendant need not prove "actual prejudice" at the district court level, "a defendant must prove 'actual prejudice' on appeal of a denial of the motion to change venue."[4]

State v. Thompson

There was a time when the sheer volume of media coverage might have provided grounds for a district court to transfer the venue of a high-profile trial. The 1963 case of *State v. Thompson* helped set that standard. The case resulted from the murder of Carol Thompson in St. Paul's Highland Park neighborhood. When her husband, prominent St. Paul attorney T. Eugene Thompson, became a suspect, the media coverage became intense.

"Probably no case in the memory of anyone in this locality has aroused so much interest and so much discussion as this one," the Minnesota Supreme Court wrote in a *per curiam* opinion. "Over a period of several months hardly a day has elapsed when something has not been said or written in a news medium of one kind or another."[5]

The pretrial coverage included not only the basic facts of Thompson's arrest but also quotations from persons involved in the case who provided their opinions. For example, the St. Paul police chief was quoted as characterizing the death as a "murder for profit."[6]

Because of such pretrial publicity, Thompson sought and received a change of venue, which the Minnesota Supreme Court affirmed. Yet, reminiscent of a time when the types of "media" could be counted on one hand, the trial was transferred only across the river, from Ramsey County to Hennepin County.

In doing so, the Supreme Court paid little attention to any record Thompson might have made in the trial court. Rather, the court broadly held that "when it appears that the public has been subjected to so much publicity about a case that it seems unlikely that a fair trial can be had in the locality in which the trial normally would be held, the court can and should see to it that the trial is transferred to another locality in which it is more probable that a fair trial can be had."[7]

The court did not address the issue of whether Thompson was required to show "actual prejudice." However, the committee that drafted Rule 25.02 of the Minnesota Rules of Criminal Procedure did address the issue, and today the rules specify: "Actual prejudice need not be shown."

The American Bar Association's *Fair Trial and Free Press Standards,* written in 1968 and revised in 1979 and 1991, took a similar position. In commentary to the ABA's guideline for transferring venue, the ABA directed that a showing of "actual prejudice" should not be required.[8]

But from the late 1970s through the 1990s, Minnesota courts were tightening the standard for transferring a criminal trial's venue even as the reach of media broadened past the limits of local broadcast signals or newspaper circulation trucks.

Practically speaking, prejudice required

In 1979, the Minnesota Supreme Court held publicity must be "massive" before prejudice could be presumed and a criminal trial moved for that reason.[9] Two years later, the Court held a defendant must show pretrial publicity "affected the minds of the specific jurors involved in this case" before venue could be transferred.[10]

In 1984, in *State v. Kinsky,* the Minnesota Supreme Court held that a district court in Winona County did not err when it denied a transfer of venue without a record of news articles, opinion surveys, or other materials.[11] Further, as the Court explained: "With our present methods of communication, it is unlikely that any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."[12]

In the 1990s, the methods of communication evolved to the point that live broadcasts could take place anywhere, from Persian Gulf battlefields to Minnesota cornfields. Television became the dominant form of media, and cable news was available around the clock. Even in Minnesota's smaller media markets, reporters could take advantage of satellite technology to deliver live reports from any part of the state.

Among those parts was Moose Lake, Minnesota, situated on Interstate 35 between the Twin Cities and Twin Ports media markets, where Katie Poirier, 19, was abducted from a convenience store in May 1999. The abduction had all the makings of a news story that would play in multiple media markets. Besides the sensational facts themselves, there was grainy surveillance-camera video of a man in a New York Yankees t-shirt leading Poirier away.[13]

The video helped the state become transfixed by the abduction. "An extensive search and investigation were conducted, accompanied by extensive local and statewide news coverage."[14] Eventually, Donald Blom was arrested and gave a statement admitting to abducting and killing Poirier in Carlton County.

When Blom's trial began in 2000, he sought and received a transfer of venue 65 miles away to the St. Louis County courthouse in Virginia. During the 20-day trial, Blom moved for a transfer of venue nine more times. "In each reevaluation, the court reached the same conclusion that nowhere in the state would Blom face a jury unexposed to publicity about the case."[15]

Blom was convicted, and the Minnesota Supreme Court affirmed both the conviction and the district court's venue rulings, explaining "no evidence had been provided to indicate that any part of Minnesota had been shielded from such publicity."[16]

As the Court made clear in *State v. Blom,* in all likelihood there was no place in Minnesota where Poirier's abduction and Blom's alleged role in it had not been discussed and where potential jurors might not have come to opinions.

Enter Facebook

The Minnesota Supreme Court issued *State v. Blom* in 2004, the same year Facebook was launched. Twitter came two years later. Within the next decade, anyone with an iPhone could become a live broadcaster in an instant.

By the time the Diamond Reynolds video went viral, media technology had evolved rapidly but the law had not. *Kinsky* and *Blom* were still good law and provided grounds for Ramsey County Judge Leary to deny Officer Yanez's motion.

As the judge explained: "Certainly, it is more evident than ever that, given the saturation of electronic communication in the years since *Blom* and *Kinsky* were decided, 'our present methods of communication' make it unlikely that any community has been impervious to forming 'impressions or opinions' regarding the case."[17]

Given Yanez's acquittal, there was neither need nor opportunity for a Minnesota appellate court to consider whether the rules governing transfer-of-venue motions should, or even could, evolve along with media technology.

What does seem clear is that as the present methods of communication inevitably become obsolete next year, next month, or next week, it will become increasingly difficult to transfer a criminal trial's venue based solely on the volume of pretrial media. ▲

Notes

[1] "What the police officer who shot Philando Castile said about the shooting," Washington Post (6/21/2017). *https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/*

[2] "Two days, two deaths: The police shootings of Alton Sterling and Philando Castile," NPR (7/7/2016). *https://www.npr.org/sections/codeswitch/2016/07/07/485078670/two-days-two-deaths-the-police-shootings-of-alton-sterling-and-philando-castile*

[3] *State v Yanez,* No. 62-CR-16-8110, 2017 WL 2998859, at *2 (Minn. Dist. Ct. 4/6/2017).

[4] *State v. Parker,* 901 N.W.2d 917, 924 (Minn. 2017).

[5] *State v. Thompson,* 123 N.W.2d 378, 381 (Minn. 1963).

[6] *Id.*

[7] *Id.* at 381.

[8] ABA Criminal Justice Standards Committee, *ABA Standards for Criminal Justice Fair Trial and Free Press, Third Edition* (1991). *https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_fairtrial.authcheckdam.pdf*

[9] *State v. Beier,* 263 N.W.2d 622, 626 (Minn. 1978).

[10] *State v. Salas,* 306 N.W.2d 832, 836 (Minn. 1981).

[11] *State v. Kinsky,* 348 N.W.2d 319, 323 (Minn. 1984).

[12] *Id.* (internal quotation omitted).

[13] *State v. Blom,* 682 N.W.2d 578, 588 (Minn. 2004).

[14] *Id.*

[15] *Id.* at 608.

[16] *Id.* at 595.

[17] *Yanez*, 2017 WL 2998859, at *2.

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Landmarks in the Law

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

CIVIL PROCEDURE

JUDICIAL LAW

Minn. R. Civ. P. 59.01; affirming denial of motion for new trial after settlement. Plaintiff and defendant were parties to a marriage dissolution proceeding. The parties attended mediation, where an agreement was reached to fully resolve the dispute. After mediation, respondent circulated proposed findings of fact, conclusions of law, and order for judgment. Petitioner refused to sign the proposal, citing fact issues related to the mediation, including respondent's failure to disclose all assets and petitioner's lack of capacity to agree at mediation. Petitioner moved for a new trial on these issues. This motion was denied.

On review, the court of appeals affirmed, finding no abuse of discretion on the merits of appellant's claims. The court of appeals acknowledged the district court's finding that relief was not available because no trial occurred, but did not engage in any analysis of this argument. ***Bitker v. Bitker***, No. A17-1749, 2018 WL 5780414 (Ct. App. Minn. 11/5/2018).

Minn. R. Civ. P. 53.01; affirming appointment of special master. Appellant is a father subject to strict supervision requirements for visits with his child. Father petitioned the court for less restrictive community-based supervised time. After providing all parties an opportunity for comment, the court appointed a special master to serve for two years with discretion "to modify the current parenting time consistent with the court's previous orders." The order establishing the special master also created a four-stage plan to guide the special master's role in permitting the father to exercise his parental visitation rights under less restrictive means. The court apportioned 90% of the financial responsibility for the special master upon the father, citing his substantial resources as compared to the mother. The mother appealed this decision appointing the special master and assessing any portion of his fees to her.

The court of appeals affirmed on both issues. Under Rule 53.01, the district court has broad discretion to appoint a special master to address any pretrial and post-trial matters that cannot be effectively addressed by the district court. Citing Rule 53.01, the district court found it was ill-equipped to implement and monitor the supervision plan it ordered, and acknowledged the parties needed "a nimbler process" that permits "real time decisions" and the "possibility to change their behavior for the best interests of the child" and "eliminate their unhealthy power dynamic." The court of appeals agreed that the record supported the district court's exercise of discretion.

The court of appeals also affirmed apportionment of 10% of the fees upon the mother. The district court order "ensured that both parties had a financial stake in promoting efficient and effective use of the special master." The order also allowed the special master to alter the financial arrangements to require only one party to contribute to the cost if the need arises. ***Burdette v. Raiche***, No. A18-0626, 2018 WL 5780443 (Minn. Ct. App. 11/5/2018).

Minn. R. Civ. P. 65.01; affirming denial of temporary injunctive relief. EMERGE is a community development organization that provides employment readiness training, credentialed training placement, job placement, and retention services. In 2016, EMERGE was awarded a multi-million grant by the Minnesota Legislature to carry out its purpose. The grant was to be administered by DEED. EMERGE and DEED entered a contract to govern their relationship. In 2017, DEED issued a monitoring report, detailing substantial concerns with EMERGE's internal operations and recordkeeping procedures and alleged these failures violated the terms of their contractual relationship. DEED placed EMERGE on suspension pending further review.

A dispute arose between EMERGE and DEED regarding reimbursement of

expenses during the suspension period. Ultimately, EMERGE sued DEED and, among other things, moved for a temporary injunction and for a writ of mandamus instructing DEED to reimburse EMERGE's qualified expenses.

The district court denied EMERGE's motion for injunctive relief, but issued the writ of mandamus instructing DEED to reimburse certain expenses. DEED appealed. In affirming denial of EMERGE's motion for temporary injunctive relief, the court of appeals reviewed the *Dahlberg* factors, which control such motions. These factors require the courts to consider: (1) the nature and background of the relationship between the parties preexisting the dispute; (2) the comparative harm to the parties if temporary injunctive relief is granted or denied; (3) the movant's likelihood of ultimate success on the merits; (4) the public policy considerations applicable to that relationship; and (5) the administrative burdens involved in judicial supervision of ongoing litigation. After review, the court of appeals determined the *Dahlberg* factors were not met, specifically, that EMERGE lacked a likelihood of ultimate success on the merits and on public policy grounds.

The court of appeals also reversed the writ of mandamus, finding the district court improperly resolved material fact issues that carry a statutory right to jury trial when issuing the writ. ***EMERGE Community Development v. Minnesota Department of Employment and Economic Development, et al.***, No. A18-0555, 2018 WL 6273106 (Minn. Ct. App. 12/3/2018) (unpublished).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

This month we present a chronological recap of a dozen of the most interesting and important employment and labor law cases decided by the federal and state courts for Minnesota in 2018.

January

■ **At-will employment; salary plan not modified.** A group of at-will management employees could not have their bonuses capped after higher amounts were agreed to as part of a compensation plan in an employment agreement they signed with their employer. The 8th Circuit Court of Appeals held that the compensation plan constituted an offer to enter into a unilateral contract, and the employer could not modify it after the managers had begun their performance. ***Boswell v. Panera Bread Company,*** 879 F.3d 296 (8th Cir. 1/5/2018).

February

■ **Union organizing; failure to hire.** An employment staffing agency wrongfully failed to hire four electricians who were helping to organize a labor union at the facility. The 8th Circuit affirmed a determination of the National Labor Relations Board (NLRB) that "anti-union" animus improperly contributed to the failure to hire them. ***Aerotek v. National Labor Relations Board***, 2018 Minn. App. WL 987805 (8th Cir. 02/21/2018).

March

■ **Union hiring; exclusive hall violation.** The hiring practices of a labor union for employees who work at entertainment facilities violated the National Labor Relations Act. The 8th Circuit denied the union's challenge to a determination that the union's exclusive hiring hall infringed the Act. ***International Alliance et al. v. National Labor Relations Board,*** 885 F.3d 1123 (8th Cir. 3/6/2018).

April

■ **Labor arbitration; reinstatement overturned.** The reinstatement by an arbitrator of a Richfield police officer, who was fired for excessive use of force with a Somali youth, was overturned. The court of appeals held that "clear public policy" warranted the extremely rare step of reversing the arbitral ruling. ***Richfield v. Law Enforcement Labor Services (on behalf of Nathan Kinsey)***, 2018 WL 1701916 (Minn. App. 4/9/2018).

May

■ **Disability discrimination; accommodation denied.** A request by a UPS driver for a disability accommodation of an 8-hour workday without overtime was rejected. The 8th Circuit Court of Appeals, in a decision written by Judge James Loken of Minnesota, ruled that working overtime was an "essential function" of the package delivery position, which precluded an accommodation under the Americans with Disabilities Act. ***Faidley v. United Parcel Service of America, Inc.***, 889 F.3d 993 (8th Cir. 5/11/2018).

June

■ **Non-compete contract; inspection impermissible.** The failure of a party seeking to enforce violation of a non-compete agreement to prove irreparable harm bars injunctive relief, though the contractual language recited that a breach would cause "irreparable" harm and warrant "an injunction." The state Supreme Court overturned an appellate court ruling and reinstated a lower court's refusal to issue an injunction on grounds that the boilerplate language alone did not merit equitable relief. ***St. Jude Medical, Inc. v. Carter,*** 913 N.W.2d 678 (S.Ct. 6/27/2018).

July

■ **Forfeiture of commissions; proportionality standard**. The standard for deciding whether an employee's failure to satisfy a provision in the employment contract to return property upon termination justified a forfeiture of earned commissions should be based on mutuality of the breach and its proportionality to the amount to be forfeited. The state Supreme Court remanded for the trial court to make a determination based upon balancing the proportionality of the significance of the failure to return the property against the amount of commissions sought by the employee. ***Capistrant v. Lifetouch National School Studios,*** 2018 WL 3558943 (8th Cir. 7/25/2018) (unpublished).

August

■ **FELA, federal interest ratio applies.** The federal rate for prejudgment interest applies to Federal Employees Liability Act (FELA) claims brought in the state court of appeals for workplace injuries. The Minnesota Court of Appeals, affirming a Hennepin County District Court ruling, held that, to ensure "uniformity" on claims that can be concurrently brought under federal or state law, the lesser federal rate (capped at about 2% rather than the 10% Minnesota rate) applies. ***Alby v. BNSF Railway Company,*** 2018 WL 3716257 (8th Cir. 8/6/2018) (unpublished).

September

■ **Disability discrimination; "good faith" bars claim.** An employer who made a "good faith" effort to accommodate an employee's disability prevailed in a lawsuit claiming violation of the employee's rights under the Americans with Disabilities Act and the parallel provision of the Minnesota Human Rights Act. Affirming a ruling of U.S. District Court Judge Richard Kyle in Minnesota, the 8th Circuit held that the employer made a "good faith" response to the request for accommodation made by the employee. ***Sharbono v. Northern***

States Power Company, 902 F.3d 891 (8th Cir. 9/6/2018).

October

■ **Unemployment compensation; sleeping at work.** A residential services overnight staffer was denied unemployment compensation benefits for sleeping on the job, which constituted disqualifying "misconduct." ***Appolon v. Mentor Management, Inc.,*** 2018 WL 48855407 (Minn. Ct. App. 10/8/2018) (unpublished).

November

■ **Retaliation rejected; applicant lacks claim.** A job applicant who was denied a scheduling accommodation due to religious observance was not entitled to pursue a retaliation claim. Affirming a ruling of U. S. District Court Judge David Doty, the 8th Circuit held, in a decision written by Judge Loken, that withdrawal of a conditional job offer was not actionable as adverse action. ***EEOC v. North Memorial Health Corp.***, 908 F.3d 1098 (8th Cir. 11/13/2018).

December

■ **Unemployment compensation; trucker denied benefits.** An over-the-road truck driver who quit his job was denied unemployment compensation benefits. The court of appeals held that the trucker did not have "good cause" to quit because he wanted longer periods to stay at home. ***Welch v. Twin Express, Inc.,*** 2018 WL 6273093 (Minn. Ct. App. 12/3/2018) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **Two additional federal circuits weigh in on Clean Water Act applicability to discharges via groundwater.** In September 2016, the U.S. Courts of Appeals for the 4th and 6th Circuits held that the Clean Water Act (CWA) NPDES permit requirement for point-source discharge to waters of the U.S. does not apply to seepage from coal-ash ponds and landfills that travels through groundwater to jurisdictional surface waters. The courts' decisions add to a growing body of divided federal case law. Although the CWA only applies to point-source discharges of pollutants to *surface* waters, about half the courts that have addressed this issue have concluded that if pollutants discharged to ground-

water subsequently migrate through the groundwater and end up in a jurisdictional surface water, this constitutes a *de facto* discharge to the surface water that requires an NPDES permit. The 6th Circuit issued a pair of largely matching decisions on 9/24/2018 regarding seepage from coal-ash lagoons in Kentucky and in Tennessee. In holding that the seepage discharge at each facility did not require an NPDES permit, the court held that "[f]or a point source to discharge into navigable waters, it must dump directly into those navigable waters." In these cases, the pollutants entering jurisdictional surface waters "are not coming from a point source; they are coming from groundwater, which is a nonpoint-source conveyance" over which "[t]he CWA has no say."

The 6th Circuit also held that finding jurisdiction under the CWA would be inconsistent with the regulatory balance Congress struck between the CWA and the Resource Recovery and Conservation Act (RCRA). EPA's 2015 coal combustion residual (CCR) regulations established technical requirements for CCR landfills and surface impoundments under subtitle D of RCRA, including provisions regarding contaminants leaking into groundwater. However, RCRA also explicitly exempts from its coverage any pollution that is subject to CWA regulation. 42 U.S.C. §6903 (27). Because of this conflict, the 6th Circuit reasoned, interpreting the CWA to cover seepage discharges at the coal-ash lagoons would be "problematic." ***Kentucky Waterways Alliance v. Kentucky Utilities Co.***, No. 18-5115 (6th Cir. 9/24/2018); ***Tennessee Clean Water Network v. TVA***, No. 17-6155 (6th Cir. 9/24/2018).

On a very similar set of facts involving coal ash lagoons associated with a Virginia power plant, the 4th Circuit also held that no NPDES permit was required. The court emphasized that the coal-ash lagoons "could not be characterized as discrete 'points,' nor did they function as conveyances. Rather, they were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them." ***Sierra Club v. Va. Elec. & Power Co.***, 903 F.3d 403 (4th Cir. 9/12/2018).

ADMINISTRATIVE ACTION

MPCA proposes new general permit for pond wastewater treatment facilities. The Minnesota Pollution Control Agency (MPCA) issued a public notice on 9/17/2018 of its intent to issue a new general permit for pond wastewater treatment facilities (WWTFs). Facilities eligible for coverage under the proposed permit—National Pollution Discharge Elimination System/State Disposal System (NPDES/SDS) Wastewater Pond General Permit No. MNG585000—would be WWTFs that: have existing stabilization and/or aerated pond systems with a controlled discharge to surface waters; predominantly treat domestic sewage; discharge during predefined, allowed discharge windows; meet predetermined effluent limitations; and are MPCA-classified as a Class D facility.

The proposed permit would replace MPCA's stabilization pond general permit, MNG580000, which expired in August 2015. MPCA was delayed in its efforts to issue the new general permit due to the adoption of the agency's 2015 river eutrophication standards and other new water quality standards relevant to the general permit. In addition, the MPCA in 2015 also began evaluating the need for phosphorus limits in NPDES/SDS permits on a watershed basis. This evaluation required the MPCA to review each WWTF's contribution to downstream water that would impact lake or river eutrophication standards.

MPCA plans to issue notices of coverage (NOCs) to municipal wastewater pond facilities in batches, over a period of time, as watershed phosphorus reviews are completed and permit eligibility is determined. The agency has published a list of permittees immediately eligible for coverage under MNG585000. These facilities will be issued a NOC upon issuance of the new general permit. Facilities currently covered under the expired stabilization pond general permit, and not included in the first batch of facilities to be issued NOCs under MNG585000, will remain covered under the MNG580000 until the MPCA is able to complete the review and issue either an NOC under the new permit or an individual permit.

Some rural communities have expressed concern that the new permit may require them to implement new phosphorus removal strategies, including the construction of costly new treatment facilities. The comments period on the proposed permit closed 11/16/2018.

MPCA finalizes first reissued taconite-mining NPDES/SDS permit since 1987. On 12/1/2018, the Minnesota Pollution Control Agency (MPCA) reissued an NPDES/SDS water discharge permit to U.S. Steel for its Minntac tailings basin facility near Mountain Iron, MN. The five-year-term permit expired in 1992 but had been administratively continued by MPCA, allowing the company to continue to operate in accordance with the permit's terms. In issuing the permit, MPCA also formally denied U.S. Steel's request for a variance from certain water quality standards including sulfate, specific conductance, and total dissolved salts, and also denied the company's requests for contested case hearings on both the variance and the permit.

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FAMILY LAW

JUDICIAL LAW

District court may appoint a special master over a party's objection to address post-decree parenting issues. Mother and father began litigating child custody disputes in 2010, resulting in a court awarding mother sole legal and physical custody as a result of father's "numerous acts of domestic violence." Father received only limited parenting time at the highest possible level of supervision. After a series of post-decree motions, father moved the court for a less restrictive supervised schedule, providing the district court with a proposed protocol prepared by an expert psychologist. The court approved father's protocol over mother's objection, and appointed a special master under Minn. R. Civ. P. 53.01(a)(3) to implement the transition. In support of its decision, the court specifically found that a special master provided "a more nimble process" for "real time decisions," which the court—acting alone—could not accommodate. The court also apportioned the cost between the parties, largely based on their discrepant resources.

Mother appealed, arguing, *inter alia*, that the district court improperly appointed a special master over her objection. The court of appeals affirmed, permitting the appointment of a special master under the Rules of Civil Procedure. Specifically, the court of appeals held the lower court was permitted to use a special master to "address… post-trial matters that cannot be addressed effectively and timely by an available district judge." Minn. R. Civ. P. 53.01(a)(3). The district court also made sufficient findings to support its imposition and apportionment of the special master's expense. Notably, the decision highlights the distinction between special masters—which may be appointed

over a party's objections—and parenting consultants, which remain extra-statutory creatures of contract. *C.f. Custody of W.N.M. v. Jacobs*, No. A12-1817, 2013 WL 4404575, at *3 (Minn. Ct. App. 8/19/2013). Though the use of parenting consultants is far more typical in family proceedings, special masters remain an available, albeit seldom-used tool. *See* Lynn Jokela & David F. Herr, "Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool," 31 Wm. Mitchell L. Rev. 1299, 1307 (2005). ***Burdette v. Raiche***, No. A18-0626, 2018 WL 5780443 (Minn. Ct. App. 11/5/2018).

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FEDERAL PRACTICE

JUDICIAL LAW

Fed. R. Civ. P. 23(f); class certifications affirmed. The same 8th Circuit panel affirmed two district court orders granting class certification on the same day.

The panel affirmed an order certifying a class in an action alleging that the Missouri Department of Corrections violated the 8th Amendment and the ADA by providing inadequate medical screening and care for chronic Hepatitis C patients, rejecting defendants' argument that the medical condition of each class member would necessitate a "highly individualized" inquiry. The panel also declined to reach defendants' arguments on the merits of plaintiffs' ADA claim in the context of a Fed. R. Civ. P. 23(f) appeal. ***Postawko v. Missouri Dept. of Corrections***, ___ F.3d ___ (8th Cir. 2018).

The same panel also slightly modified and then affirmed a district court's class certification order alleging insurance coverage-related claims under Arkansas law. ***Stuart v. State Farm Fire & Cas. Co.***, ___ F.3d ___ (8th Cir. 2018).

Judicial estoppel and quasi-estoppel claims rejected. The 8th Circuit rejected the plaintiffs' judicial estoppel and quasi-estoppel arguments, finding that defendants' representations to the IRS were not "clearly inconsistent" with positions they adopted under the FLSA and Nebraska law. ***Baouch v. Werner Enters., Inc.***, 908 F.3d 1107 (8th Cir. 2018).

Denial of late motion for extension affirmed. Where the plaintiff did not seek an extension of his time to oppose the defendant's summary judgment motion until nine days after his opposition was due, the district court denied the plaintiff's motion and granted the defendant's motion for summary judgment, the plaintiff moved for reconsideration of the denial of his extension motion, and that motion was denied, the 8th Circuit found no abuse of discretion in the district court's denial of that motion given plaintiff's counsel's "carelessness and mistakes," and the "absence of any apparent meritorious defense" to the motion. ***Giles v. St. Luke's Northland-Smithville***, 908 F.3d 365 (8th Cir. 2018).

Numerous orders on motions for sanctions or attorney's fees granted or denied. Describing the plaintiff's motion to compel one defendant to sign interrogatory responses even after she had signed supplemented and amended responses as "unnecessary and frivolous," Magistrate Judge Menendez awarded the defendants attorney's fees pursuant to Fed. R. Civ. P. 37(a)(5) in an amount to be determined. ***Smith v. Bradley Pizza, Inc.***, 2018 WL 5920626 (Nov. 13, 2018).

Judge Ericksen denied the parties' cross-motions for Rule 11 sanctions, despite finding that the plaintiff's motion for Rule 11 sanctions was "not clearly warranted under existing law." ***Genz-Ryan Plumbing & Heating Co. v. Weyerhaeuser NR Co.***, 2018 WL 5886173 (D. Minn. 11/9/2018).

Judge Frank affirmed Magistrate Judge Thorson's denial of the defendant's motion for sanctions premised on plaintiffs' alleged violation of a previous order, agreeing with the magistrate judge that the plaintiffs did not "willfully or otherwise violate" that order. ***Murphy ex rel. Murphy v. Piper***, 2018 WL 5875486 (D. Minn. 11/9/2018).

Judge Ericksen denied the defendant's motion for sanctions under Rule 11 and the FDCPA, despite her finding that the plaintiff's claims "border[ed] on the frivolous." ***Peacock v. Stewart Zlimen & Jungers, Attorneys, Ltd.***, 2018 WL 5808808 (D. Minn. 11/6/2018).

Where plaintiff's counsel acknowledged that it improperly shared attorney's eyes-only documents with its client, Magistrate Judge Menendez ordered counsel to pay a $500 sanction, but denied defendants' request for an award of attorney's fees and expenses related to its sanctions motion, finding that defendants' counsel's meet-and-confer efforts were "insufficient," and that meet-and-confer efforts "must involve at least one in-person meeting or personal telephone conversation between counsel." ***Nutri-Quest, LLC v. AmeriAisa Imports, LLC***, 2018 WL 5785952 (D. Minn. 11/5/2018).

Numerous motions for leave to amend granted and denied. Magistrate Judge Bowbeer denied the plaintiffs' untimely motion to file a third amended complaint filed more than nine months after the deadline in the scheduling order,

rejecting plaintiffs' argument that there was "good cause" for their delay. ***Zean v. Wells Fargo Bank, N.A.***, 2018 WL 6326413 (D. Minn. 12/4/2018).

Magistrate Judge Thorson granted plaintiffs' untimely motion to file a second amended complaint in a patent case despite a finding of "undue delay," but conditioned her grant of that motion on the plaintiffs' payment of reasonable attorney's fees attributable to the delay pursuant to 28 U.S.C. §1927. ***Berger v. Lydon-Bricher Mfg. Co.***, 2018 WL 6259250 (D. Minn. 11/30/2018).

Judge Wright rejected the plaintiff's appeal of an order by Magistrate Judge Thorson denying the plaintiff's motion for leave to file a second amended complaint without prejudice, while criticizing the plaintiff's "dilatory conduct and subversion of the Federal Rules of Civil Procedure." ***Subramanian v. Tata Consult. Servs. Ltd.***, ___ F. Supp. 3d ___ (D. Minn. 2018).

Magistrate Judge Leung granted the plaintiff's motion for leave to file an amended complaint that transformed her individual case into a putative class action, rejecting defendants' argument that the additional cost of litigating class-wide claims constituted prejudice sufficient to warrant a denial of the motion for leave to amend. ***Hendrickson v. Fifth Third Bank***, 2018 WL 6191948 (D. Minn. 11/28/2018).

While expressing some skepticism over the merits of the plaintiff's proposed amended bad-faith denial of insurance benefits claim, Magistrate Judge Menendez relied on Rule 15's "lenient amendment standard" in granting the plaintiff's motion. ***Darmer v. State Farm Fire & Cas. Co.***, 2018 WL 6077985 (D. Minn. 11/21/2018).

Judge Magnuson found good cause for the plaintiff to amend its answer to counterclaim to assert new defenses, finding that it had acted with "reasonable diligence" once information relating to these new defenses was uncovered. ***Qwinstar Corp. v. Anthony***, 2018 WL 5847243 (D. Minn. 11/8/2018).

Magistrate Judge Rau denied the relator's motion for leave to file a third amended complaint in a *qui tam* action that had been pending for more than seven years, finding no justification for the relator's delay in seeking to further amend the complaint, and that the amendment would impose a "tremendous burden" on the defendant. ***United States ex rel. Higgins v. Boston Sci. Corp.***, 2018 WL 5617565 (D. Minn. 10/30/2018).

■ **Multiple cases on removal and remand.** Judge Tostrud remanded an action originally filed in the North Dakota courts under the forum-defendant rule, finding that while the forum-defendant rule is viewed as procedural in most circuits, it is treated by the 8th Circuit as a non-waivable jurisdictional defect. ***Ally Bank v. Finstad***, 2018 WL 6267656 (D. Minn. 11/30/2018).

Judge Schiltz remanded an action removed from the Minnesota courts on the basis of diversity jurisdiction where the defendant limited liability companies acknowledged that they were unable to identify the citizenship of their members. ***Cypress Creek Renewables Devel., LLC v. Sunshare, LLC***, 2018 WL 5294571 (D. Minn. 10/30/2018).

Judge Nelson denied a motion to remand, agreeing with the removing defendant that the court could exercise ancillary jurisdiction over the action because it arose out of the alleged breach of a settlement agreement that the court expressly retained jurisdiction over. ***Cardiovascular Sys., Inc. v. Cardio Flow, Inc.***, 2018 WL 5278728 (D. Minn. 10/24/2018).

■ **Motion to quash deposition subpoenas for trial counsel granted.** Applying the 8th Circuit's *Shelton* (*Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)) test, Magistrate Judge Menendez granted a motion to quash subpoenas seeking the deposition of plaintiffs' trial counsel. ***Int'l Controls & Measurements Corp. v. Honeywell, Int'l, Inc.***, 2018 WL 5994189 (D. Minn. 11/15/2018).

■ **Order requiring plaintiff file a redacted complaint affirmed.** Judge Nelson affirmed an order by Magistrate Judge Brisbois that directed the plaintiff to file a redacted version of his amended complaint that would omit the home addresses of multiple Minnesota judges. ***Scheffler v. City of New Hope***, 2018 WL 6012181 (D. Minn. 11/16/2018).

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INDIAN LAW

JUDICIAL LAW

■ **ICWA and MIFPA active efforts do not require social services agencies to provide all available services.** Under the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act, a court must find that the social services agency engaged in "active efforts" to preserve the Indian child's family—including the agency's making appropriate and meaningful services available to the family—before the court can make an out-of-home permanency decision.

The district court terminated the parents' parental rights, and they appealed, arguing (among other things) that the social services agency did not engage in "active efforts" because it did not provide in-home parenting services to improve the father's parenting ability. The court of appeals affirmed, agreeing with the district court that the agency provided other services to improve the father's parenting ability and that "[a]ctive efforts do not require every service that may be available be offered." ***In the Matter of the Welfare of the Child of: T.L.F. and D.S.***, No. A18-462, 2018 WL 5117001 (Minn. App. 10/22/2018).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Patent: Default by e-commerce sellers results in enhanced damages. Judge Nelson recently granted a permanent injunction and awarded damages for infringing activity by e-commerce sellers. Core Distribution owns patents for a collapsible ladder. Core alleged that several e-commerce sellers sold infringing versions of the ladder on Amazon.com. Core sued each seller for patent infringement, false advertising, and deceptive trade practices. Unable to identify the true identities of the Amazon sellers, Core pursued action against each as a "John Doe" defendant and served each seller with the complaint. After the sellers failed to respond to Core's complaint, the court entered default against them and held that each defaulting seller had infringed Core's patent claims and falsely advertised and represented that the infringing ladders met the required industry standards. The court granted a permanent injunction against the sellers from continuing their unlawful activities and awarded Core trebled damages and attorneys' fees. ***Core Distribution, Inc., v. John Doe 1***, No. 16-CV-04059 (SRN/HB), 2018 WL 6178720 (D. Minn. 11/27/2018).

Trademark invalid because holder did not show exclusive use. The 8th Circuit Court of Appeals recently held a trademark invalid because the holder did not prove it exclusively used the mark. Sturgis Motorcycle Rally, Inc. (SMRI) owns several federally registered marks relating to an annual biker rally held in the City of Sturgis, South Dakota. SMRI sued several parties associated with souvenir provider Rushmore Photo & Gifts, Inc. (RPG) for infringement of the word mark STURGIS. A jury found RPG liable for trademark infringement, and RPG appealed. The appellate court held that RPG could still rebut the presumption of validity conferred by the STURGIS mark's federal registration. Furthermore, since the STURGIS registration was submitted under section 2(f) of the Lanham Act, SMRI also had to provide sufficient evidence showing that the mark became distinctive of SMRI's goods based partly on substantially exclusive and continuous use. SMRI's examples of previous use failed to show that the public associated the STURGIS mark with a single, particular source of goods and services. In addition, evidence showed extensive third-party use of the STURGIS mark, and SMRI could not prove that either it or the preceding mark owner had ever exclusively used the mark in connection with the rally's commercial activities. Since SMRI could not show exclusive use of the mark, the court held that SMRI could not prove that the mark was distinctive, and therefore it was invalid. The court reversed the jury's infringement verdict and remanded the case to the district court. ***Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.***, 908 F.3d 313 (8th Cir. 2018).

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PROBATE & TRUST LAW

JUDICIAL LAW

Evidence required to appoint a guardian or conservator. A friend of appellant's petitioned to have a guardian and conservator appointed after appellant was observed in local businesses with soiled pants on two separate occasions. In addition, the proposed guardian and conservator, who was also a friend of appellant, visited appellant's home, found it to be "dilapidated" and "unlivable," and smelled fuel oil throughout the home. These observations were generally confirmed by the court-appointed visitor. Finally, appellant exhibited signs of confusion, including when he claimed he had just had his furnace checked, even though it had not been checked in 10 years.

The district court granted the petition and appointed a guardian and a conservator. The court of appeals reversed, holding that the district court made only "conclusory findings" that were "not substantiated with specific evidence." Specifically, the court noted that the only evidence referenced by the district court was that appellant exhibited confusion during the hearing and the "unquestionable" motives of the petitioner and the proposed guardian and conservator. The court of appeals also noted that "[t]here was no evidence presented and minimal testimony provided about the availability of alternative services that could have been provided to [appellant] to avoid the need for a guardian and conservator." Given those deficiencies, the court held that "the record evidence was insufficient to meet

the clear and convincing standard of proof required to support the appointment of a guardian and conservator." ***In re the Guardianship and Conservatorship of Reinhold Struhs***, 2018 WL 6273101 (Minn. Ct. App. 12/3/2018).

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TAX LAW

JUDICIAL LAW

■ **Sales & use tax: Prosthetic devices.** Handi Medical Supply, Inc. appealed a determination of the Commissioner of Revenue, claiming that its products were exempt from sales tax. Most of the product-types at issue are specialty dressings and bandages. Minnesota law provides that sales of prosthetic devices were exempt from sales tax. (Minn. Stat.§297A.67, subd. 7.) Minnesota law defines prosthetic devices as a replacement, corrective, or supportive device worn on or in the body to: 1) artificially replace a missing portion of the body; 2) prevent or correct physical deformity or malfunction; or 3) support a weak or deformed portion of the body. Handi relied on product descriptions in the Healthcare Common Procedure Coding System for determining which products were nontaxable. The tax court held that Handi did not provide sufficient evidence to establish that some products met the Minnesota definition for prosthetic devices but had sufficient evidence for other products. Thus, summary judgment was granted in part and denied in part. ***Handi Medical Supply, Inc. v. Comm'r of Rev.***, No. 8898-R (Minn. T.C. 10/31/2018).

■ **Pell Grants "income" for purposes of calculating qualification for property tax refund.** Federal Pell Grants are awarded to students who demonstrate extraordinary financial need; typically, only students pursuing undergraduate degrees are eligible. Pell Grants, unlike some other forms of education aid, do not have to be repaid and are not considered federal taxable income so long as the grant money is used for specified purposes. At issue in this case was whether $4,263 the taxpayers received in Pell Grants constituted "income" such that the grants were properly included in the taxpayer's income for purposes of determining eligibility for another program—Minnesota's property tax refund program. Eligibility for a property tax refund depends on "household income" as that term is defined in Minnesota Statute 290A.04, subd. 1. Household income includes categories of receipts that are specifically excluded from federal taxable income, and includes "nontaxable scholarship or fellowship grants." Minn. Stat. 290A.03, subd. 3(a)(2)(xiii). The court determined that Pell Grants are properly included in income for property tax purposes, and upheld the tax court's summary judgment award to the commissioner. The court reasoned that the plain language of the statute encompasses Pell Grants, and since the plain language was clear, no further analysis was necessary. ***Waters v. Comm'r***, ___ N.W.2d ___ (Minn. 12/5/2018).

■ **Withdrawals from retirement account to support gambling habit not exempt from early distribution penalty as "medical expense."** In 2010, petitioner Gillette became addicted to gambling. Petitioner spent a majority of her time at casinos and her gambling addiction became so severe that in 2012 she began withdrawing from her retirement account to support her gambling habit. The commissioner assessed a 10% early distribution penalty on the amounts withdrawn from her retirement account. Gillette argued that her gambling addiction was a medical condition caused by prescription medication; thus, the distributions were either 1) a distribution attributable to a disability under 72(t)(2)(A)(iii) or 2) a distribution for a medical expense under 72(t)(2)(B). The court rejected petitioner's argument that she had a medical condition covered by the exceptions because although a gambling addiction might be a medical condition, it is a "remediable impairment." An impairment is remediable if the taxpayer can treat the impairment with reasonable effort and safety to himself, and where taxpayer will not be prevented by the impairment from engaging in his customary or any comparable substantial gainful activity. Therefore, the court upheld the early distribution penalty. ***Gillette, et al. v. Comm'r***, TC Memo 2018-195 (2018).

■ **Tax procedure: Reprint not a "copy" but sufficient evidence of notice.** This dispute surrounded the procedural efficacy of the commissioner's notice of deficiency. In particular, the petitioner argued that the commissioner never created a notice of deficiency, and that if such a notice was created, it was not mailed to the petitioner. The commissioner conceded that the commissioner failed to maintain a copy of the notice of deficiency in the petitioner's file; however, the commissioner produced a certified mail receipt and further produced a reprint of the notice. Petitioner objected to the admission of the reprint, arguing that the Federal Rules of Evidence requires a "copy" and not a reprint. The court concluded that the reprint was not a duplicate and that in fact there were differences between the original notice of deficiency and the proffered reprint. However, the reprint evidenced information that had been stored in the commissioner's database and therefore provided sufficient evidence to support the commissioner's determination regarding the existence of a notice of respondent's determination of a deficiency. ***Gregory v. Comm'r***, TC Memo 2018-192 (2018).

■ **Tax procedure: Who has the burden of production when petitioner dies after filing but before trial?** A deceased taxpayer, Lydia Ramirez, had been a successful entrepreneur and investor. Before she died, she was in a dispute with the

commissioner about the nature of many of her businesses. In particular, Ramirez reported that her businesses produced passive income, which she offset with her rental properties' passive losses. But the commissioner reclassified most of Ramirez's business income as active. The commissioner also assessed underpayment penalties. In this opinion, the court first addressed the active v. passive question; the estate lost. The court then turned to the issue it characterized as "novel." The issue, as the court articulated it: "When an individual dies after filing her petition but before trial, who has the burden of producing evidence that the penalties were approved in writing by a supervisor—the Commissioner or petitioner's estate?" The court first rejected the estate's argument that the taxpayer had a reasonable cause defense to the penalties.

The novel question, though, remained. The question arose because the commissioner cannot assess a section 6662 penalty unless that penalty is personally approved in writing by the immediate supervisor of the individual making such determination. If there is no evidence in the record of an essential condition for the imposition of a penalty, the party who had the burden of production loses. If Ms. Ramirez had lived, the issue would be straightforward: The commissioner would lose. However, because the estate, and not the individual, was before the court, additional analysis was required since the language of the statute speaks only to individuals; in relevant part, the statute provides that the commissioner has the burden of production on penalties only "in any court proceeding with respect to the liability of any *individual*." Sec. 7491(c) (emphasis added). In a lengthy analysis, the court reasoned that the ultimate question is whether the underlying tax liabilities relate to an individual taxpayer (in which case, the burden is on the commissioner) or a non-individual taxpayer (in which case, the burden is on the taxpayer). Because this dispute was about the underlying liabilities of an individual taxpayer—even though that taxpayer was deceased—the burden was on the commissioner. The commissioner did not meet that burden, and the estate was not liable for the penalties. ***Estate of Ramirez v. Comm'r***, T.C.M. (RIA) 2018-196 (T.C. 2018).

■ **Income tax: Treatment of Medicare waiver payments.** Kimberly and Raymond Schafer appealed a notice of determination in which the commissioner decreased the taxpayers' 2014 Minnesota Working Family Credit (WFC) and property tax refunds for tax years 2013 and 2014. The dispute was due to the treatment of Medicare waiver payments that the Schafers received. For purposes of the WFC, the Schafers treated the payment as earned income, which would result in a higher credit. In contrast, for purposes of the property tax refunds, they excluded it from their household income. Under IRS Revenue Notice 2014-7, Medicaid waiver program payments are excludable from income under IRC Section 131. Additionally, Form M1PR instructions clarify that Medicare payments are treated as nontaxable income in household income. Taxpayers did not provide any evidence to overcome the commissioner's *prima facie* validity and the tax court granted summary judgement for the commissioner. ***Schafer v. Comm'r of Rev.***, No. 9118-R (Minn. T.C. 11/20/2018).

LOOKING AHEAD

■ **Minnesota House announces committees.** Rep. Paul Marquart (DFL-Dilworth) has been named chair of the Minnesota House Taxes Committee, and Rep. Diane Loeffler (DFL-Minneapolis) will chair the Minnesota House Property and Local Tax Division. Marquart has served on one of the two committees since 2009 (excluding the 2015-2016 session). Loeffler has also served on one of the two committees since 2009 and was vice-chair of the Tax Committee during the 2013-2014 session. The Minnesota Senate has yet to release its committee rosters for the 2019-2020 session.

■ **Taxes and treaties: Decision expected in *Washington State Department of Licensing v. Cougar Den Inc.*** The court heard arguments on October 31 in this dispute between a Yakama tribal citizen and the taxing authority of the state of Washington. Yakama citizen Kip Ramsey imports gasoline through his company, Cougar Den. The gasoline is transported over about 30 miles of Washington state highway into the Yakama reservation for sale at Yakama gas stations. Relying on language in an 1855 treaty that permits Yakama citizens to "the right, in common with citizens of the United States, to travel upon all public highways," Cougar Den claims it is exempt from the state tax that would otherwise be applicable to off-reservation commercial activities that make use of public highways. Cougar Den argues this treaty right goes beyond simply permitting travel on public highways, and in fact prohibits the fuel tax that would burden travel and therefore impinge on the treaty right. Commentators noted the atypical line-up of justices during oral argument, with Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh appearing in alignment and sympathetic to the tribe's argument. The decision below is reported at ***Cougar Den v. Wash. State Dep't of Licensing***, 392 P.3d 1014 (Wa. 2017).

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TORTS & INSURANCE

JUDICIAL LAW

■ **Insurance: Subrogation actions against "its insured."** A 16-year-old student of defendant school caused a fatal accident while driving his cross-country teammates and a volunteer coach to an

extracurricular athletic competition in South Dakota. The competition was not sponsored by the Minnesota State High School League because it took place after the season had ended and the team's coaches were not allowed to help the students prepare for it. The meet was, however, posted on the team's website and team members were "encouraged to participate." In addition, the student's parents informed the volunteer coach that the student would be driving and asked that they travel in close proximity. The volunteer coach confirmed they would travel in "a caravan at a safe speed." Further, while the student's parents told the volunteer coach that the student could legally transport other students, he was not legally permitted to do so. *See* Minn. Stat. §171.055, subd. 2(c) (2016). ("For the first six months of provisional licensure, a provisional license holder may not operate a motor vehicle carrying more than one passenger under the age of 20 years who is not a member of the holder's immediate family.")

Plaintiff brought a negligence action against defendant school, seeking to recover for personal injuries she suffered and for the death of her husband. The district court granted the school's motion for summary judgment, concluding that, as a matter of law, the school did not owe a duty of care to members of the general public such as plaintiff. The court of appeals affirmed on different grounds, holding that the school's conduct did not create a foreseeable risk of injury to a foreseeable plaintiff.

The Minnesota Supreme Court reversed the decision of the court of appeals. The Court began by noting the general rule that the school, like any other person or entity, "does not owe a duty of care to the general public if the harm is caused by a third party's conduct." This rule, however, is subject to two exceptions: "(1) if there is a special relationship between the plaintiff and the school and the harm to the plaintiff is foreseeable; or (2) if the school's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." The Court held the first exception was inapplicable, as there was no special relationship between the general public and the school. But the Court held that genuine issues of material fact precluded summary judgment under the second exception. The Court held that plaintiff is "capable of proving that this is a case of misfeasance" on the part of the school, as an assistant coach organized the trip and approved of the student driving members of the team. The Court also held that the risk was potentially foreseeable, as the student was only 16, had been licensed for less than six months, could not legally drive multiple passengers under the age of 20, and the accident resulted when the student and coach were distracted by electronic devices. The Court remanded the case for trial.

Justice Anderson filed a dissenting opinion, joined by Chief Justice Gildea. Justice Anderson would have held that the school had no duty as a matter of law because (1) the allegations only involved nonfeasance, rather than misfeasance, and (2) the injuries suffered by plaintiff were not foreseeable. ***Fenrich v. The Blake School***, No. A17-0063 (Minn. 11/21/2018). *https://mn.gov/law-library-stat/archive/supct/2018/OPA170063-112118.pdf*

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Phyllis Karasov was elected to the board of directors at Larkin Hoffman. Karasov leads the firm's labor and employment practice and manages its blog. She advises businesses from a variety of sectors, including construction, manufacturing, education, nonprofit, and health care.

Hoff Barry PA announced that Scott B. Landsman, Justin T. Templin, Shelley M. Ryan, and Jared D. Shepherd assumed partnership roles and management of the firm, effective January 1. George C. Hoff and Thomas G. Barry, Jr. will continue practicing with the firm as of counsel.


VAN NURDEN

Joel D. Van Nurden of Van Nurden Law, PLLC was named the 2018 Safety Project Attorney of the Year by Tubman Pro Bono Safety Project. The Safety Project provides quality pro bono legal representation to low-income victims of domestic violence.

Tom Vollbrecht of Fabyanske, Westra, Hart & Thompson PA was announced as an elected Fellow by the American College of Construction Lawyers board.

Bradley J. Walz has joined Barnes & Thornburg as a partner in the corporate department, where he helps companies on a broad range of business and transactional issues.


WEBBER

Robert P. Webber was appointed as a co-chair of the Immigration Committee of the National Asian Pacific American Bar Association. He practices employment-based immigration law based in Edina.

The Wisconsin-based law firm of DeWitt Ross & Stevens SC, and its Minneapolis affiliate, DeWitt Mackall Crounse & Moore SC (DeWitt), announced that the Intellectual Property law firm of Nikolai & Mersereau, PA, has combined its practice with DeWitt's. Attorneys Thomas J. Nikolai, James T. Nikolai, and Charles G. Mersereau, along with their three staff members, have joined DeWitt's Minneapolis office.


PEDEN

Danielle Peden has joined Brandt Criminal Defense as an associate attorney. Peden comes to the firm with years of experience on both sides of the criminal justice system.

Caroline Bressman and Jay Eidsness joined Nichols Kaster with the wage and hour team, where they will be litigating cases for unpaid wages. Chloe O'Neill joined the firm's ERISA group, where she will handle class action cases involving the imprudent management of employee 401(k) funds by employers.


BAGGIO

Alexander M. Baggio has joined the law firm of Hinshaw & Culbertson LLP as an associate. He advises businesses in commercial litigation, labor and employment disputes, and ERISA and non-ERISA life, health, and disability matters.


CHAMBERS

Christine W. Chambers has joined Hinshaw & Culbertson LLP as an associate. Chambers represents clients in insurance, personal injury, and property damage matters.

Schuyler Tilson-Doheny ("Skye") has joined Berg Myers Law Offices, PA. She graduated from Mitchell Hamline School of Law in 2016 and focuses her practice on tribal law, probate administration, and estate planning.

James Vollstaedt was certified as an MSBA Board Certified Real Property Law Specialist. This certification program is administered by the Minnesota State Bar Association and approved by the State Board of Legal Certification.


CHESKIS

Anton Cheskis became a name partner at Huemoeller, Gontarek & Cheskis PLC. Cheskis does litigation arising from real estate transactions, speaks about elder abuse, has tried cases dealing with abuse of fiduciaries, and handles commercial and probate litigation.


MCFARLAND JACKSON

Mercedes McFarland Jackson was elected to a three-year term as a member of the Minnesota Chamber of Commerce Board of Directors. Jackson is an officer in Fredrikson & Byron's private equity and bank & finance groups, where she specializes in debt finance transactions and advises clients on compliance matters under financing and corporate governance documents.


GOODWIN

Michael Goodwin has joined Roe Law Group, PLLC. Goodwin was as a litigator with the Minnesota Attorney General's Office, where he worked on matters related to employment, tax, and civil rights. He graduated from Mitchell Hamline School of Law.

Derek Archambault has joined Eckberg Lammers working with the municipal law group. In his new role, Archambault will focus his practice on criminal prosecution. He is a graduate of University of St. Thomas School of Law.

In Memoriam

VICKI GIFFORD, age 71, of Stillwater, passed away on November 12. She attended William Mitchell College of Law and graduated in 1985. During her career as an attorney, she practiced in St. Paul and Stillwater. She was a prosecuting attorney in Woodbury, city attorney for Grant township, and ran her own private practice for 20 years.

WILLIAM SHIELDS FALLON, age 87, of St. Paul died on November 27. He graduated from the University of Minnesota Law School in 1956. He practiced law for nearly 50 years as an assistant United States Attorney, in private practice with several St. Paul law firms, as general counsel of the American National Bank, and in his final years, until he retired in 2005, as the chancellor for civil affairs at the Archdiocese of Saint Paul and Minneapolis.

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SUPERIOR, WI/DULUTH, MN Bankruptcy/SSDI Attorney Position. Nicolet Law Office, SC is looking for an attorney for their Superior, WI location to handle bankruptcy and SSDI in both Wisconsin and Minnesota. We are looking for an associate attorney who is interested in working in a growing office that embraces technology, quality of life, and client-focused practice. The position would office in Superior, WI. Ideal applicants would have at least one-year experience in the practice of law along with licensed in both WI and MN, or be willing to be licensed in both states with assistance of Nicolet Law. However, recent bar examinees are encouraged to apply. Applicant must have an interest in practicing in the area of chapter 7 and chapter 13 bankruptcy law along with SSDI. Nicolet Law offers competitive pay and benefits. Please email cover letter, resume, and references to Russell Nicolet at: russell@nicoletlaw.com.

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WAGNER, FALCONER & Judd is seeking a general practice attorney in its Minneapolis, MN office. Applicants must be able to assist clients with their legal needs through telephonic consultations, document review, legal research, and provide feedback to questions in all areas of the law. Applicants must have a dual law license as well and be practicing for a minimum of two years. Come and join our team! Email: tkrumwiede@wfjlawfirm.com.

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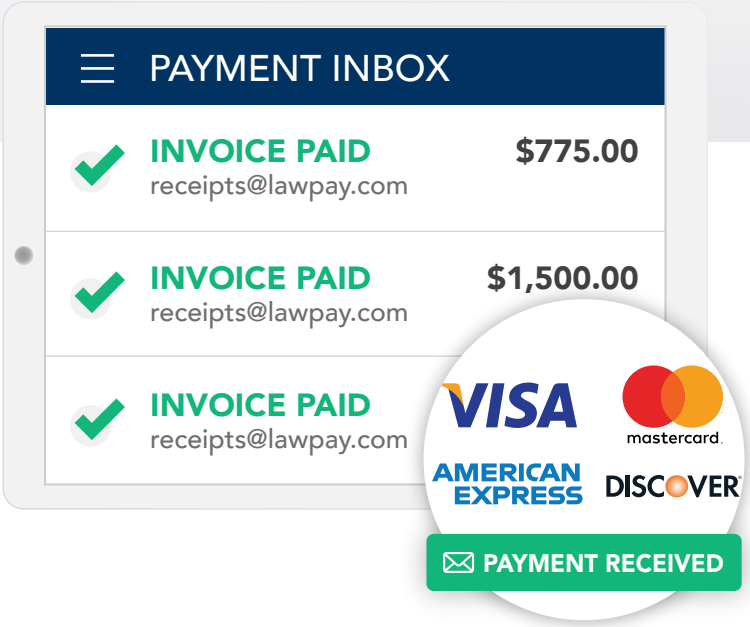

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