OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER VII
AUGUST 2019
www.mnbar.org

Bench&Bar OF MINNESOTA

Access to Justice made easy (well, easier)

The newly revamped LawHelpMN gives lawyers a way to help people they couldn't otherwise assist.

Dispute Resolution Institute

Ranked TOP 5 in the nation in dispute resolution for the 19th consecutive year
by *U.S. News & World Report*

Negotiating Complex Cases in the Global Business Environment

Giuseppe De Palo INTERNATIONALLY RENOWNED TRAINER

During his career, Mr. De Palo has contributed to the resolution of over 2,000 disputes, mediating and negotiating cases in more than 50 countries and dealing with parties of over 80 different nationalities.

September 12-14, 2019

MITCHELL HAMLINE SCHOOL OF LAW • $980
CLE CREDITS APPROVED 15 STANDARD; 4.25 ELIMINATION OF BIAS

Participants will examine the applicability of traditional negotiation theory to complex cases in this highly interactive, advanced negotiation skills-based training.

DAY 1 Focus on negotiating in especially challenging circumstances

DAY 2 Focus on the complexities of multi-party and multi-issue negotiations, including an exercise on establishing an international business alliance

DAY 3 Engage with highly complex negotiation issues after completing the exploration of cross-cultural dimensions in negotiation

Participants are expected to have completed a basic negotiation training or have significant negotiation experience to perform in, and benefit from, this advanced level training.

QUESTIONS: KITTY.ATKINS@MITCHELLHAMLINE.EDU or 651-695-7677

For full agenda, faculty bio and registration information, visit our website:

MITCHELLHAMLINE.EDU/DRI/COMPLEXNEGOTIATION

MH
MITCHELL | HAMLINE
School of Law

Register online at: www.mnbar.org/cle-events

MSBA

MONDAY, AUGUST 26
Free and Low Cost Resources from the MSBA
1.0 CLE CREDIT APPLIED FOR

TUESDAY, AUGUST 27
Using Document Assembly for Basic Estate Planning for Modest Estates
1.0 CLE CREDIT APPLIED FOR

WEDNESDAY, AUGUST 28
Introduction to Legal Research
1.0 CLE CREDIT APPLIED FOR

THURSDAY, AUGUST 29
Legal Tech Competence
1.0 CLE CREDIT APPLIED FOR

fastcase® Smarter legal research. | practicelaw | Court Ops | mndocs | communities at my.mnbar.org

OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER VII
AUGUST 2019
www.mnbar.org

Bench&Bar OF MINNESOTA

ON THE COVER

Bench&Bar
OF MINNESOTA

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

Editor
Steve Perry
sperry@mnbars.org

Design & Production
Jennifer Wallace

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

MSBA

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

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

Service: Opportunity & Obligation

Tom Nelson shared symbolic keys to the profession at the MSBA Convention in June.

When I joined Popham, Haik, Schnobrich, Kaufman & Doty—a blink of an eye ago—there were two early knocks on the door. David (now Judge) Doty said: "What do you want to do in the bar association?" Mr. (now Wayne) Popham said: "What do you want to do in the community?" Then there was Marc Whitehead ("On the way to the ABA; come on along!"); Tom Berg (public servant and leader personified); and Denver Kaufman (HCBA president). Similarly, when I later joined Leonard, Street and Deinard (now Stinson), public service and community leadership were presumed: Allen Saeks, Moe Sherman, Ellen Sampson, Byron Starns, Lowell Noteboom—and fast forward to Theresa Hughes and Adine Momoh. So many others. Marvelous models.

But why? Sure, it's at the core of their character and professionalism. But there's more. When we were admitted to the bar, we were given the key to our profession; it came not only with opportunity, but also with obligation. We have a cultural contract requiring service and citizenship.

That's fair. We are, after all, a monopoly, and a self-regulated one at that. Nobody else can practice law. Only us. In exchange for the opportunity to enjoy the fruits of that monopoly (and as with any contract), there are terms and conditions. We are obliged to fulfill our part of the bargain. For example: Excellence. Ethics. Dignity and decency, hopefully leavened with good humor and humility. And, importantly, public service and citizenship.

That is the oath we take and the pledge we make. Lawyers that we are, it's even in our rules. As "public citizens," we have a "special responsibility for the quality of justice;" we have a duty to "exemplify the legal profession's ideals of public service;" we play a "vital role in the preservation of society." This is what the general public looks to us for—and rightly expects of us—and counts on us to do and to be.

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

This reminder of our duty of public service and citizenship comes at a particularly urgent and perilous time—calling to mind Dr. King's reference to "the fierce urgency of now." As Yeats once worried, sometimes it seems as if the center no longer holds—not the political center, but the center at the core of our constitutional design. Put simply, it is our job as lawyers to hold that center together.

Just to write it out loud, I have three contexts of concern:

(1) First, our institutions, as strong as they are, seem under attack:
- The independence, dignityand authority of the judiciary;
- The Congressional role in our delicate checks-and-balances design, including, I fear, that related to war;
- The right to vote, and to be counted;
- Our flawed but vital Fourth Estate.

(2) Second, there is an ugly and dangerous "meanness" afoot:
- Anti-Semitic marches and murders;
- Anti-Muslim mobs and muggings—including a bombing in Bloomington;
- Hate and hateful crimes, fueled by fears and phobias, often racist or sexist, and too often accompanied by gunfire; and
- Children in cages or washed up on shore—with families of color being torn apart or traumatized by threats. (Read that again, please: Children in cages or washed up on shore.)

(3) Third:
- A disturbing "justice gap," between those who are "poor enough" to qualify for legal aid (not all of whom can be served—not even close), and those wealthy enough to afford a lawyer of their choice;
- Accompanied by a tsunami of *pro se* litigants;
- All of which is not sustainable, and threatens to overwhelm our court system—causing the system to creak and sometimes crack.

These challenges and attacks are happening on our watch, and sometimes in our name. We cannot be bystanders; we cannot avert our eyes. Each of these realities erodes the rule of law. If we breach our nation's promise of access to justice and equal justice under law, the rule of law itself is imperiled. Justice is not like the laws of physics or the rules of arithmetic (basically, in force no matter what). No; we must not only guard justice, but make it happen. It depends on us, just as we depend on it. The "moral arc of the universe" might be long and may very well bend toward justice, as Dr. King suggested, but we have to reach up to that arc to help it bend even more—and toward America.

None of which leads to "woe is me" or "woe is us." I'm still an optimist. Why? Because of lawyers. Lawyers are the key to meeting these challenges. As lawyers, we learned it; we get it; we know where the gears and levers are. So, yes: optimism—as long as we fulfill our dual duty of service and citizenship. Fulfilling our obligation will be key to our nation's ability to survive and thrive, with equal justice under law. ▲

Bank on Justice helps civil legal aid

Last year was the first year in a decade that Interest on Lawyer Trust Accounts (IOLTA) rose. Rising interest rates translate to more resources to help low-income Minnesotans meet their basic needs because IOLTA revenue funds civil legal aid programs in our state.

The MSBA has launched the Bank on Justice recognition program to provide our attorney members with a list of banks that pay higher interest rates on IOLTA accounts and do not charge fees, therefore maximizing revenue for access to justice. The program's benchmark interest rate will be reassessed annually.

For the year that runs from July 1, 2019 to June 30, 2020, the minimum rate will be 1.0 percent paid on some or all of a bank's IOLTA accounts. The MSBA requests public IOLTA interest rate information from the Minnesota IOLTA Program to determine which banks meet this criteria.

Bank on Justice replaces the Prime Partners program previously administered by the MSBA. The MSBA Access to Justice Committee recommended the move in response to changes in market interest rates and their impact on IOLTA accounts. Members can check the MSBA website at *www.mnbar.org/BankOnJustice* to keep abreast of the banks that qualify for recognition. Currently these six banks are being recognized, because each bank is paying at least 1.0 percent on some or all IOLTA accounts: Bank of America, BMO Harris, Minnesota Bank and Trust, Unity Bank North, US Bank, and Wells Fargo.

Join the practicelaw development community

We're excited to let you know that practicelaw—the MSBA's collection of forms, checklists, apps, videos, and other members-only resources—has launched a new development community. In the community, members draft, edit, comment, and share ideas on the creation and maintenance of new practicelaw resources. It's a great way to work collaboratively with fellow members, and to make a valuable contribution to one of the MSBA's most popular member benefits. Members from all practice areas are welcome to request access by sending an email to Mike Carlson (*mcarlson@mnbars.org*).

MEMBERSHIP IN THE DEVELOPMENT COMMUNITY ALSO INCLUDES:

- ***Exclusive offers***: Free, developers-only CLEs, socials, and other events.
- ***Monthly developer newsletter***: Developer news, member recognition, tips and tricks.
- ***Personalized training***: Get one-on-one training for tools like Community.Lawyer, Fastcase, and other MSBA online resources.
- ***Prizes!*** Our top 10 most active members each earn a $50 Amazon Gift Card.

At its final meeting of the 2018-19 bar year earlier this summer, the MSBA Health Law Section honored five attorney members with Lifetime Achievement Awards: (from left) Jack Breviu, Margo Struthers, Patricia Sonnenberg, John E. Diehl, and Barbara Tretheway. Read their stories in then next page.

At the recent MSBA Convention, Paul Godfrey presented the 2018-2019 President's Award to the MSBA Access to Justice Committee for its commitment and ongoing efforts to ensure justice for all. Larry McDonough and Sally Silk accepted the award on behalf of the committee.

Health Law Section Gives Lifetime Achievement Awards

At its final meeting of the 2018-19 bar year, the MSBA Health Law Section recognized five amazing attorneys with Lifetime Achievement Awards. The award was created this year to recognize an exceptional class of retiring health law attorneys who have made significant contributions to the practice area during their careers. Over 100 attorneys attended the May 31 lunch on a beautiful day at the Town & Country Club. Many of those recognized began practicing health law before it was known as health law. All have had a significant impact on our community and on the attorneys they have mentored. Below is a brief summary of the contributions of each.

Jack Breviu

Jack Breviu recently retired from a long and influential career as a health care attorney. He served as an assistant attorney general for nearly 20 years and as general counsel of United Healthcare for seven years, and he spent nearly 20 years in private practice with Stinson LLP. Most importantly, he left a legacy of attorneys and clients to whom he provided invaluable guidance and mentorship. In addition to his practice, Jack provided leadership and service to the Children's Law Center and served on the Community-University Health Care Center (CUHCC) Board. Jack was a frequent lecturer on health law matters and served as an adjunct professor of health law at William Mitchell College of Law. When asked to comment on Jack's career, his former client Mary Maertens, chief executive officer of Avera-Marshall Regional Medical Center, had this to say:

> Jack has had an exceptional career. He is an expert in his field, [with a] pragmatic and commonsensical approach seasoned with a one-of-a-kind sense of humor. He is a wonderful friend, mentor, and confidant. Irreplaceable in the field of health law.

Jack will be spending his retirement in Minnesota with his wife Linda, making frequent trips to the North Shore and spending lots of time with children and grandchildren. His intellect, keen judgment, and good humor will be missed in the halls of Stinson and in the bar at large.

John E. Diehl

One might assume that if a person shows up day after day for 50 years, he might be able to accomplish something, and so it has been with John Diehl. Through the private practice of law, public service, and civic involvement, he has been a change agent in the healthcare system in Minnesota and around the country.

In the policy arena, John Diehl developed the laws to authorize and regulate health maintenance organizations, thus establishing the format for a structured, vertically integrated healthcare system—the predicate for our current system and the future of healthcare delivery. Perhaps even more significantly, in 1975 he "invented" the "assigned risk pool" strategy that made affordable individual health insurance available to persons with preexisting conditions who could not buy insurance.

There is a maxim that great lawyers are a product of great clients, so Mr. Diehl is justifiably proud that his private practice clientele has included the Aetna Life & Casualty Co., University of Minnesota Hospitals and Clinics, the American Hospital Association, the Minnesota Hospital Association, the Minnesota Medical Association, the Mayo Clinic, the Joint Commission on Accreditation of Health Organizations, the Hennepin County Medical Society, the Sisters of Providence, Fairview Health System, the Allina Health System, and many others.

Rural healthcare has especially benefited from Mr. Diehl's involvement. In the 1970s he helped develop a network of specialty providers that held clinics in small towns throughout Minnesota. And, as Medicare evolved from a cost-based system, he was an advocate for critical-access hospitals. And he modified state laws to allow the mostly rural governmental hospitals to engage in cooperative ventures and other emerging structures so as to remain viable players in our evolving system.

John also designed, developed course materials, and taught "Health Law" from 1977 to 1987 (the first such course in American law schools), and throughout his career he has been a frequent lecturer for the healthcare industry and health law organizations. He has also been a healthcare system "insider," serving as a board member (for 20 years) and chair of Gillette Children's Specialty Healthcare, a member of the board of the Minnesota Hospital Association, a member of the board of directors of the East Metro Medical Society Foundation, a founder and 20-year board member of the federally qualified community health center known as Open Cities, and a 20-year volunteer and board chair of the American Cancer Society.

John has also been actively involved with the development of the health law bar. In the mid-70s he was part of the group of lawyers that established an informal health law interest group (which evolved into a Hennepin County Bar Association committee), an MSBA health law committee, and, ultimately, the MSBA Health Law Section. Over the years, he served as a member of the section governing council and as its treasurer,

secretary, vice chair, program chair, and chairman.

The health law bar is characterized by the high quality of creative, ethical lawyers, who are chosen to represent these important clients. So through it all, the most interesting and rewarding aspect of his practice has been the privilege to work (and play) with many of our most outstanding lawyers. Thus, it is Mr. Diehl's abiding pleasure to have practiced with the likes of Horace Hanson, Joe Hamilton, Jim Geraghty, Jules Hannaford, Joel Tierney, Greg Orwall, Ben Hippe, Kevin Hughes, Jack Kennefick, Bruce Hanson, Greer Lockhart, Tom Vogt, Jack Wood, Gary Davis, Fremont Fletcher, John Stone, Margo Struthers, Mike Putzier, Paul Torgerson, Jay Christianson, Pat Plunkett, Jack Brevieu, John Beattie, Todd Freeman, Kit Friedemann, Jim Platt, Jon Oviatt, Gordon Apple, Tim Johnson, Jan Halvorson, Keith Dunder, Susan Kratz, Mary Foarde, Kathy Young, David Melloh, Dan McInerney, David Feinwachs, Dick Wexler, Dave Hutchinson, Terry O'Brien, David Glazer, Steve Lokensgard, Patrick Cole and *many* others, who have contributed in such a positive way to our community through their diligent and effective work as lawyers.

Patricia Sonnenberg

Pat Sonnenberg first practiced health law when she joined the Minnesota Attorney General's Office. During the course of her 32 years in the AG's Office representing the Minnesota Department of Human Services, she successfully defended the state agency's claims for over $26 million in federal funds that had been disallowed by the U.S. Department of Health and Human Services. These cases saved state tax dollars and helped ensure there were funds to provide necessary services to needy Minnesotans. Earlier in her career, when the federal government refused to approve a state plan amendment that would allow Minnesota's Medical Assistance (MA) program to pay Personal Care Assistants (PCAs) to accompany MA recipients whenever they ventured outside their homes, an administrative hearing on the disapproval was held in St. Paul. Pat produced a number of witnesses, including a rehabilitation physician and several recipients with disabilities, to establish that the state's proposed expansion of PCA services was medically necessary. The hearing officer and federal agency upheld the state plan disapproval, reasoning that federal law did not allow such payments. Unbeknownst to her, though, Congressman Bruce Vento sent staff to the hearing, and subsequently ushered through an amendment to the federal Medicaid law that allows payment for PCAs to accompany Medicaid recipients whenever they go outside their homes. That amendment is now codified at 42 U.S.C. section 1396d(a)(24).

Margo Struthers

Margo has made notable contributions to health care clients and has provided thoughtful and generous support to colleagues, including health law attorneys, students, and the MSBA Health Law Section. With her deep knowledge, experience, good sense, and intellect, Margo has provided practical and creative advice and solutions for complex matters affecting individuals, health care providers, payers, medical manufacturers, and associations.

Her interest in health law began before law school. During a time when important health laws were enacted in Minnesota, she assisted a health care lobbyist. Establishing early and deep roots, Margo learned the law, met people in the industry, including attorneys, and was well-suited to begin a legal career in which health law has been her primary focus.

In her transactional practice, Margo often counsels clients on regulatory compliance. Her deep knowledge has also been instrumental in health care litigation, including her defense of a client in a constitutional challenge to the Minnesota Comprehensive Health Insurance Act of 1976 (a Minnesota predecessor to the Affordable Care Act) and her representation of a medical staff in a case in which the Minnesota Supreme Court, in 2014, held that medical staff bylaws can be a contract between a hospital and its medical staff.

Generous with her time and knowledge, Margo inspired future health lawyers while teaching a seminar on fraud and abuse compliance at the U of M Law School for several years. This generosity has extended to the legal community. The MSBA has long been important to Margo, and she considers this award a great honor. In 1978, Margo received the *Bench and Bar* Author's Award with a colleague. Margo has been a consistent and active supporter of the Health Law Section, serving in leadership and speaking roles that gave her the

Barbara Tretheway

Barb Tretheway's journey to becoming a prominent health care attorney can be attributed to gritty hard work, with a few pinches of serendipity. Growing up during a time of momentous social change in the 1960s and '70s, Barb was drawn to the legal profession by a simple desire to "do what's right." She initially worked as a paralegal in the burgeoning area of employee benefits at a law firm in Milwaukee before attending law school at the University of Wisconsin-Madison (with the prodding of one of the firm's leaders that she was smarter than the attorneys there).

During law school, Barb earned a summer clerkship with Gray, Plant, Mooty, Mooty & Bennett in Minneapolis, and within a few years after graduating she established and was leading GPM's health law practice. Barb saw momentous change in the health law industry during the 1990s, with legislation like the Stark Law bringing unprecedented complexity to previously unremarkable business relationships. She worked on many notable transactions during her 12 years at GPM, including the formation of the University of Minnesota Physicians medical practice group.

In 2000, Barb accepted the role of General Counsel at HealthPartners and was at the helm of its law department until her retirement in July 2019. The most fun she had as a lawyer was navigating intricate transactions that brought organizations (and their governance) together, especially when such mergers—like the behemoth HealthPartners-Park Nicollet combination in 2013—melded organizations with a shared culture, mission, and vision.

But it's possible Barb's most important impact on her community has little to do with her legal prowess. Barb founded and served as the executive sponsor for the HealthPartners' award-winning Sustainability Program. The Program has received numerous national awards, including Practice Greenhealth's System of Change Award. The Program has redirected millions of pounds of organic waste from landfills to recycling programs, and its numerous initiatives have saved the organization tens of millions of dollars. Barb personally received Practice Greenhealth's 2019 Visionary Leader Award, underscoring the indelible mark she's made on the legal profession and global health.

On civility and ethics

Remember this?

> [I] do swear that [I] will support the Constitution of the United States and that of the state of Minnesota, and will conduct [myself] as an attorney and counselor at law in an ***upright and courteous manner***, to the best of [my] learning and ability, with all good fidelity as well to the court as to the client, and that [I] will use no falsehood or deceit, nor delay any person's cause for lucre or malice. So help [me] God. (Emphasis added.)

For more than a century, this has been the oath taken by attorneys upon admittance to the bar in Minnesota.[1] In fact, Minnesota is one of 21 states with an attorney oath that contains a specific reference to civility.[2] While Minnesota's oath appears to have always mentioned civility, some states, such as Texas, added civility to their oath as recently as 2015. A majority of states' oaths are silent on civility.[3]

Notwithstanding our solemn promise of courtesy, I do not need to tell you that many Minnesota lawyers fall short of consistent uprightness and courtesy. Nor is this a particularly new insight. You may remember the Professionalism Aspirations approved and endorsed by the Minnesota Supreme Court in January 2001?[4] Many states enacted such guidelines beginning in the 1990s in response to concerns about deteriorating professionalism. I remember well those conversations and concerns when I first started practicing in the mid-1990s. This Office wrote frequently about the subject in the 1990s as well.[5]

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.

While there are certainly several ethics rules in Minnesota that may be implicated by uncivil conduct (which I will discuss shortly), the persistent nature of this issue has prompted some states to do more with their ethics rules. For example, Michigan has an ethics rule, which can serve as the basis for discipline, which states: "A lawyer shall treat with courtesy and respect all persons involved in the legal process."[6] This rule has withstood constitutional scrutiny.[7] South Carolina added a civility clause to its oath, required all lawyers to retake the new oath, and specifically included violation of the oath as a grounds for discipline.[8]

Minnesota has not experienced a push to do more with its ethics rules on civility, but I have received several requests over the last year to write an article regarding ethics and civility. As we look at some of the challenges in the profession, including lawyer well-being, and see reports on the pervasive nature of bullying and harassment in the profession,[9] there is no doubt that the lack of civility is damaging the profession. As Chief Justice Burger observed almost 50 years ago, "Lawyers who know how to think but have not learned how to behave are [a] menace and a liability, not an asset, to the administration of justice."[10]

Crossing the line

All unethical conduct is unprofessional, but not all unprofessional conduct is a violation of the ethics rules warranting discipline. As Judge Cleary (then OLPR Director) noted in 1999, a lot of "ill-mannered" conduct—general rudeness or name-calling that is coarse but not hostile in terms of race or gender, for example—is typically outside of the reach of the ethics rules.[11] Certain misconduct, however, is unquestionably both unprofessional and unethical.

For example, Rule 3.1, Minnesota Rules of Professional Conduct (MRPC), prohibits frivolous claims of law or fact. Rule 3.3, MRPC, prohibits lying to the court or the submission of false evidence (or failing to correct previously submitted false evidence). Rule 4.1, MRPC, prohibits a lawyer from making a knowingly false statement on behalf of a client, and Rule 8.4(c) prohibits dishonest or deceitful conduct generally.

Other rules may be less obvious or may not occur to practitioners. For example, there is an entire rule specifically denoted to fairness to the opposing party and counsel. Rule 3.4, MRPC, has many subparts and is worth a refresher. A lawyer shall not, or counsel another to, "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value."[12] A lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[13] While the first two clauses of this rule are well-known, don't forget the third clause. It is not improper to pay a witness's expenses or to compensate an expert witness—but otherwise, take care. A lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."[14]

One of my personal favorites (due to painful memories of ridiculous discovery disputes): A lawyer shall not "in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[15] Discovery is to gather information to support or defend a case; it not supposed to be a pitched battle or war of attrition. Prosecutors are well aware of this next rule, but general litigators may not be: A lawyer shall not "in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a

personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."[16] From the first clause, take care when trying to use "bad facts" you know about the opposing party that have little to do with the dispute at hand. You may think it is fair leverage, but if it's unrelated to the matter at hand, it may not be. Finally, a lawyer shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party" unless the person is a relative or an employee.[17]

Rule 4.4(a), MRPC, is particularly on point for some uncivil conduct: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use means of obtaining evidence that violate the legal rights of such a person."[18] Every year, lawyers violate this rule and are disciplined. One example of recent public discipline involved intentionally grabbing opposing counsel by the arm during a deposition.[19] For a variety of reasons, there is probably no good reason to touch anyone you work with, except for a handshake. A related Rule, 8.4(g), prohibits harassment based on protected status in connection with a lawyer's professional activities.[20] Rule 8.4(h) prohibits discriminatory acts that violate federal, state or local law.[21] Remember also that Rule 8.2, MRPC, prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." Truthful statements regarding the judiciary are protected; knowing or reckless false claims are not. While this overview is brief, the text of the rules denotes the type of conduct that crosses the line from uncivil to unethical.

Conclusion

To quote Judge Cleary again, "Good lawyers are not only ethical, they are also professional, and they do not need to resort to misbehavior to get our attention."[22] Incivility demeans the profession, wastes time and resources, interferes with the efficient resolution of disputes, and contributes to the toxicity of the profession. Just because it might not be unethical does not mean incivility should be practiced. Please remember your oath and work at not being that person. ▲

Notes

[1] *See* Minn. Stat. §358.07 (2019) (emphasis supplied). Legislative history disclosed same oath in 1905 as well.

[2] David A. Grenardo, *A Lesson in Civility*, 32 Geo. J. Legal Ethics 135, 149 (2019).

[3] *Id.* (Texas added the words "with integrity and civility in dealing with and communication with the court and all parties" to its oath in 2015.)

[4] These Aspirations can be found in the Minnesota Rules of Court at 1197 (2019).

[5] *See, e.g.,* Edward J. Cleary, "Professionalism: More than Civility," Bench & Bar (October 1999). The OLPR website contains numerous article on the topic of civility and ethics under the "Articles" tab.

[6] Rule 6.5(a), Michigan Rules of Professional Conduct.

[7] *General Administrator v. Fieger*, 719 N.W.2d 123 (Mich. 2006); *Fieger v. Michigan Supreme Court*, 553 F.3d 955 (6th Cir. 2009).

[8] Rule 7(a)(6), South Carolina Rules for Lawyer Disciplinary Enforcement.

[9] "Us too? Bullying and Sexual Harassment in the Legal Profession," International Bar Association (May 2019).

[10] *A Lesson in Civility,* 32 Geo. J. Legal Ethics at 138.

[11] Edward J. Cleary, "Professionalism: More than Civility," Bench & Bar (October 1999); *see also* Martin A. Cole, "When Incivility Crosses the Line," Bench & Bar (January 2014).

[12] Rule 3.4(a), MRPC.

[13] Rule 3.4(b), MRPC.

[14] Rule 3.4(c), MRPC.

[15] Rule 3.4(d), MRPC.

[16] Rule 3.4(e), MRPC.

[17] Rule 3.4(f), MRPC.

[18] Rule 4.4(a), MRPC.

[19] *In re Williams*, 917 N.W.2d 423 (Minn. 2018).

[20] Rule 8.4(g), MRPC, states "It is professional misconduct for a lawyer to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities."

[21] Rule 8.4(h), MRPC, states "It is professional misconduct for a lawyer to commit a discriminatory act prohibited by federal, state or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer."

[22] Edward J. Cleary, "Professionalism: More than Civility," Bench & Bar (October 1999).

Security, convenience, and medical devices

As the Internet of Things continues to expand into every area of our lives, so too do our concerns about its secure use. The convenience of internet connectivity cannot be denied—the benefits of instant communication have made our society what it is today. From our washing machines to our smartphones, connectivity has spawned an unprecedented ease of use for consumers. But when the Internet of Things includes our personal medical devices, health and safety issues are paramount.

In recent years, the security of medical devices has been increasingly scrutinized. Can a hack actually be perpetrated and if so, how?What are the potential risks if you're the victim of a hack? These issues have understandably raised a lot of concerns for patients and their families. Recent reports surrounding Medtronic's insulin pumps highlight the growing demand for a focus on patient security, even when no harm from the potential threat has yet been reported.

In the FDA's official alert, the primary concern was that "due to cybersecurity vulnerabilities identified in the device, someone other than a patient, caregiver or health care provider could potentially connect wirelessly to a nearby MiniMed insulin pump and change the pump's settings."[1] No patches or solutions are available to remediate this security vulnerability, so ultimately the recommendation is for patients to upgrade to a newer, more secure device.

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

Earlier this year, Medtronic was also the subject of an FDA alert regarding vulnerabilities discovered in a number of its implantable cardiac devices, clinic programmers, and home monitors. The concern with these devices was that without encryption, authentication, or authorization, unauthorized access becomes a significant risk. In spite of the devices' lack of basic security features, the FDA recommended that health providers encourage patients to continue using the monitors, noting, "The benefits of remote wireless monitoring of an implantable device outweigh the practical risk of an unauthorized user exploiting these devices' vulnerabilities."[2] Whether it's a cardiac device or an insulin pump, it would seem that discontinuing their use pose a far greater risk than the potential for a cyber attack. These devices have allowed health care practitioners to treat patients with incredible ease.

In the medical device field as in any tech sector, it remains true that when we gain convenience, we lose security. Any sort of internet connectivity makes us vulnerable to potential threats. But where medical devices are concerned, overestimating the risk can pose dangers in itself. In regard to the cardiac device vulnerabilities, I would posit that—like the St. Jude cardiac device issues that were in the media a few years ago—an attack would most likely require close proximity to the victim over an extended period of time. Likewise, an attack on a WiFi-connected insulin pump would also require close proximity.

That said, it is imperative that medical device companies acknowledge their responsibility to provide the most secure devices to patients. There is a growing impatience with any organization that refuses to implement basic security measures in its products, especially organizations responsible for the safe production of medical devices. Responding to security vulnerabilities and public concern is only the tip of the iceberg. If an organization develops a strong internal culture of security, that will be evident in its products. Medical device manufacturers must move beyond system patches, fixes, and recalls to establish thorough testing protocols and procedures that take cybersecurity concerns into account from the design phase to production. While there is no such thing as perfect security, organizations are expected to implement basic cybersecurity safeguards (such as authentication and encryption) while also standing ready to respond to future vulnerabilities or patient concerns.

Progress in the cybersecurity sphere requires the active participation of all involved parties—including government agencies, organizations, manufacturers, health professionals, and patients. As patients continue to push for the best security measures and force organizations to respond to concerns, a new degree of cybersecurity awareness and understanding is becoming evident within medical settings. ▲

Notes

[1] *https://www.fda.gov/news-events/press-announcements/fda-warns-patients-and-health-care-providers-about-potential-cybersecurity-concerns-certain*

[2] *https://www.fda.gov/medical-devices/safety-communications/cybersecurity-vulnerabilities-affecting-medtronic-implantable-cardiac-devices-programmers-and-home*

Small-Firm Technology BOOTCAMP

Thursday, October 24, 2019

12:30 – 6:00 pm | MSBA Office, Minneapolis

REMOTE PARTICIPATION AVAILABLE

This bootcamp is for solo and small-firm lawyers who are ready to adopt the best legal technologies to grow and sustain their firms. We'll touch on everything from bringing in new clients through the front door to capturing more revenue in your back office, all with the help of technology that's accessible and affordable.

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

MSBA

CLE CREDITS
4.0 CLE credit will be applied for

BONUS!
Free professional headshots for attendees

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

REGISTER
www.mnbar.org/cle-events

MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY

You can trust over 35 years of experience protecting lawyers.

There is a reason MLM is the ***only*** professional liability insurance carrier endorsed by the MSBA.

Put your trust in the carrier
created by lawyers,
run by lawyers,
exclusively serving lawyers.

- Works exclusively with lawyers professional liability insurance
- Specializes in solo to mid-size firms
- Returned over $**60 million** in profits to policyholders since 1988
- Offers an array of services to mitigate risks

Protecting Your Practice is Our Policy.®

Get a fast quote today!
www.mlmins.com
or contact Chad Mitchell-Peterson
612-373-9681 or chad@mlmins.com

Crossing the border: Tips for attorneys

Do you use your smartphone for work purposes? Have you ever taken your smartphone or work laptop on vacation? Was that vacation in another country?

The rise of smartphone technology and ever-smaller computers and tablets has given attorneys greater access to their client files and confidential information from anywhere. But that increased connectivity presents new challenges, including the possibility that carrying your device across the U.S. border could result in a violation of Rule 1.6 of Professional Conduct or other ethics rules.

In the past few years, U.S. Customs and Border Patrol (CBP) has gone from completing approximately 15,000 border searches per year to over 32,000 in 2017.[1] And the numbers are expected to be even higher in fiscal year 2018 through 2019.

The increase in border searches is already affecting attorneys.[2] For example, Hector Ruiz, an attorney for an immigration-related legal aid and non-profit organization, was stopped one evening in December 2018 and held for four hours before he finally allowed CBP agents to search his smartphone. Similarly, Taylor Levy, a legal coordinator for a charity that operates on both sides of the southern border, was held for approximately three hours, asked repeated questions about his clients and political beliefs, and told he would be arrested if he did not answer the questions and unlock his phone to be searched by CBP agents. After he repeatedly asserted the material on his phone was confidential and subject to attorney-client privilege, Levy was ultimately released (with a warning that he might be subject to further searches every time he crossed the U.S. border).

CANDACE M. GROTH is a corporate attorney with the Dallas, Texas office of Minneapolis-based Virtus Law, PLLC. She regularly advises clients on cybersecurity, data privacy, and general corporate matters, with a focus in the technology, healthcare, and real estate industries.

Both Ruiz and Levy were stopped at the U.S. border pursuant to what is called the "border-search exception," which permits U.S. agents to stop and in many cases search individuals without a warrant at the U.S. border, or within 100 miles of the border.[3] The 100-mile border zone includes large swathes of the United States, including substantial urban areas. (Houston, Chicago, New York City, Washington, D.C., Los Angeles, and Seattle are all included in this border zone.) Almost the entire states of Michigan, Maine, New York, New Hampshire, Vermont, Massachusetts, Connecticut, New Jersey, and Florida are also included. In Minnesota, the 100-mile border zone stretches as far south as the northern Minneapolis-St. Paul suburbs. Neither reasonable suspicion nor probable cause is required for most searches at U.S. borders.

Wait, so CBP can search my device?

In a nutshell, (technically) yes. The CBP Directive, issued on January 4, 2018, states that:

> Border searches of electronic devices may include searches of the information stored on the device when it is presented for inspection or during its detention by CBP for an inbound or outbound border inspection. The border search will include an examination of only the information that is resident upon the device and accessible through the device's operating system or through other software, tools, or applications. Officers may not intentionally use the device to access information that is solely stored remotely.[4]

As part of the border search, an individual may be required to provide passcodes or other information needed to access encrypted information. CBP, with certain supervisor approvals, can detain devices for five to 15 days (or more) even if the owner has departed the border.

The ABA, in response to concerns raised by its members, formally petitioned the CBP in May 2017 for clarification regarding its policies concerning border searches of attorneys and legal professionals.[5] The CBP adopted regulations responding to this request in Section 5.2 of the 2018 Directive, which sets out specific procedures that CBP agents are supposed to follow when attorney-client or confidentiality privileges are asserted during a search.[6] These procedures include CBP contacting the Associate/Assistant Chief Counsel office for assistance, segregating privileged materials through a "Filter Team," and destruction of privileged materials upon completion of the search/review.

Attorney ethical obligations

Searches of attorneys' devices at the U.S. border implicate several of the Minnesota Rules of Professional Conduct.[7] These rules include:

- Rule 1.1: Competence, including maintaining the requisite knowledge and skill regarding technology;
- Rule 1.4: Communication, including the requirement to keep a client informed about his/her/its matter, which would include disclosures of client information during a border search; and
- Rule 1.6: Confidentiality, including that "a lawyer shall not knowingly reveal information relating to the representation of a client" except under certain limited exceptions.

For supervisors, managing partners, and similar individuals, Rules 5.1 and 5.3, related to supervision of other attorneys, paralegals, and staff, may also be relevant. Neither the Minnesota Rules of Professional Conduct nor the applicable Minnesota disciplinary authority have issued guidance regarding searches of attorney devices at borders, although some bar associations, such as the New York City Bar, have issued ethics opinions regarding the issue.

Practical tips for crossing the border

Searches of devices at borders (including those of attorneys) is almost certain to increase in the future. But there are some steps, in line with the Minnesota Rules of Professional Conduct, that you can take to protect your device and your clients' information while crossing international borders:

(1) Eliminate or minimize the number of electronic devices that are in your possession when travelling, particularly those that have confidential or attorney-client privileged information. Some attorneys carry a separate device for international travel with only limited information on it.

(2) If an electronic device is necessary for a trip, take steps to minimize confidential and attorney-client privileged information stored on the device. You should keep in mind that the CBP directive states that only information on the device (not information solely in the cloud/offsite) can be searched. However, attorneys should take steps to minimize access to sensitive information, such as by removing and logging out of applications that allow access to cloud-based client file systems and/or internet-based phone systems.

(3) Before approaching a border area, consider placing electronic devices in "airplane" mode and/or disabling WIFI, Bluetooth, and cellular connections. Also consider whether you should power down and lock the electronic device. Do keep in mind that the CBP may require you to provide passcodes and similar information required to unlock or decrypt a device.

(4) If a CBP agent makes a request or demand to search your device, be prepared to identify yourself as an attorney, judge, or other legal professional and advise the agent that the device contains confidential and/or attorney-client privileged information. You may wish to carry your business card or bar licensure card.

(5) Remember that the CBP Directive instructs CBP agents to take certain actions in relation to information that is confidential and/or attorney-client privileged. However, you must actively assert that the information on your device is confidential and/or privileged.

(6) If, despite your best efforts, your device is searched by CBP agents, consult the Minnesota Rules of Professional Conduct and your firm's general counsel or trusted ethics counsel regarding what additional steps, if any, should be taken, including client disclosures of the search.[8]

With these tips in mind, you can improve the chances that your next international vacation will have you finding some peace and tranquility, not searching for a good malpractice attorney. ▲

[1] U.S. Customs and Border Prot., Dep't of Homeland Sec., CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics (1/5/2018), *available at https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and* (last visited 7/1/2019).

[2] Julia Ainsley, *More lawyers, reporter stopped and questioned at border by U.S. officials*, NBC Universal (3/18/2019), *https://www.nbcnews.com/politics/immigration/more-lawyers-reporter-stopped-questioned-border-u-s-officials-n984256* (last visited 7/1/2019).

[3] Tanvi Misra, *Inside the Massive U.S. 'Border Zone'*, Citylab, The Atlantic Monthly Group (5/14/2018), *https://www.citylab.com/equity/2018/05/who-lives-in-border-patrols-100-mile-zone-probably-you-mapped/558275/* (last visited 7/1/2019); Ryan Singel, *ACLU Assails 100-Mile Border Zone As 'Constitutional-Free' – Update*, Wired (10/22/2018), *https://www.wired.com/2008/10/aclu-assails-10/* (last visited 7/1/2019).

[4] U.S. Customs and Border Prot., Dep't of Homeland Sec., Border Search of Electronic Devices, CBP Directive No. 3340-049A (1/4/2018), *available at https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf* (last visited 3/30/2019).

[5] *ABA urges Homeland Security Department to modify procedures for searching lawyers' electronic devices at U.S. border crossings*, Am. Bar Ass'n (10/12/2018), *https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may2017/border/* (last visited /7/1/2019); Rhonda McMillion, *ABA advocacy prompts new protections for lawyers' electronic devices at US border*, ABA Journal (May 2018), *http://www.abajournal.com/magazine/article/advocacy_protections_lawyers_border_search* (last visited 7/1/2019); Letter from Linda A. Klein, President, American Bar Association, to General John F. Kelly, USMC (Ret.), Secretary of Homeland Security, and Joseph B. Maher, Acting General Counsel, Department of Homeland Security (5/5/2017), *available at https://www.americanbar.org/content/dam/aba/images/government_affairs_office/attyclientprivissue(bordersearchesofattorneydevices%2cabalettertodhs%2cfinalversion%2cmay5%2c2017).pdf* (last visited 7/1/2019).

[6] There have been some assertions that these procedures are not being explicitly followed, including in the cases of Levy and Ruiz mentioned earlier in this article. However, the CBP Directive is still too new for cases to have wound through the court system and for case law to have developed around this issue.

[7] Minn. R. Prof. Conduct, *available at https://www.revisor.mn.gov/data/revisor/court_rules/pr/prcond-toh_2018-06-29_03-29-23/prcond-toh.pdf* (last visited 3/30/2019); Am. Bar Ass'n, *Electronic Device Advisory for Mid-Year Meeting Attendees* (1/10/2018), *https://www.americanbar.org/content/dam/aba/events/meetings_travel/scerp-electronic-device-advisory-djcbsg-1-10-18.authcheckdam.pdf* (last visited 7/1/2019).

[8] *See* Am. Bar Ass'n, *Electronic Device Advisory for Mid-Year Meeting Attendees* (1/10/2018), (providing some practical tips for attorneys crossing the U.S. border with digital devices); New York City Bar, Formal Op. 2017-5 (5/9/2019), *available at https://s3.amazonaws.com/documents.nycbar.org/files/2017-5_Border_Search_Opinion_PROETHICS_7.24.17.pdf* (last visited 7/1/2019) (discussing an attorney's ethical duties regarding U.S. border searches of electronic devices containing clients' confidential information).

'The purpose of the bar is to bring together attorneys'

Why did you go to law school?

I wanted to help people who have been wronged find justice in the courtroom. When I applied, I was working as a 911 dispatcher and serving the community at the start of the legal problem. I wanted to work toward the end goal and see the resolution.

THERESA PAULSON launched her solo practice, Thrive Legal Services, in 2016. After graduating from the University of Minnesota - Duluth with a B.A. in philosophy/applied ethics in 2004, she worked as a police dispatcher for the City of Saint Paul from 2005-15. She graduated from William Mitchell College of Law in January 2014. She was a member of the End Revenge Porn Now Legislative Task Force in 2015 and has also worked as a guardian ad litem and clerked for judges on criminal and child protection matters. She lives in Saint Paul with her family, cat, and fish.

Tell us a little about your law practice, and about why you chose a solo practice.

Given the economy at the time, my personal drive, and how I wanted to serve people seeking justice in a courtroom, I built my own business. My business is named after my philosophy for serving my client and the community. My practice focuses on client growth through litigation. I handle child protection defense, criminal defense, and family law matters.

You've earned a lot of gratitude from your colleagues in the 19th District Bar Association for reviving the district bar and helping to connect its members to each other. Tell us some of the things you've done to help build those ties.

A vast portion of our legal community expressed a desire for the bar to be rebuilt. If someone told me it couldn't be done, I kept on going. I had lunch with judges and spoke with county attorneys and civil practice attorneys to learn what they expected from the bar association. I spoke with past presidents and listened to the hurdles they encountered. The feedback I received was that the legal community wanted a place to gather as a community but didn't think it was possible.

Over the last three years, the question I have been most asked is "what is the purpose of the bar?" The purpose is to grow the experience and relationships of the legal community and to connect attorneys with others who have different practices. Very few areas of practice are islands unto themselves. The purpose of the bar is to bring together attorneys so that when attorneys need help, they are a phone call or two away from help.

We decided to make events paid for by the bar and pool resources away from donations into creating and supporting events across the district. Non-members are welcome to attend any event. Non-members do have to pay for the annual meeting, but are welcome to attend any other event free of charge. We included non-members to build the community and encourage people to come out to events to connect with each other.

In January 2017, I had a kitchen table session at the Lake Elmo Inn with several judges and attorneys whose sense of humor I adore. The goal was to make the annual meeting a fantastic experience. We decided on creating two awards. The first award, Judicial Excellence, is awarded to a judge for the work they do for the legal community off of the bench. The second award is the 19th District Pheasant Award. It recognizes the mentorship that an attorney and/or judge provides to the legal community. These awards are about character, and making the effort to grow and support the legal community.

We moved the annual meeting to the historic Stillwater Courthouse with catering. Having our meeting at the first courthouse in Minnesota is amazing and brings an historic feel to our efforts. The 19th District is very grateful to the Washington County Park staff, which continues to permit us use of the facility.

Every attorney I met who lives in the district or works in the district, I invited to at least one function. I talked up the bar to others, spoke about what we are doing, and talked about past events. For some events, I have called hundreds of attorneys' offices to spread the word. And at the Annual Meeting, I asked members to devote 10 hours of their time during the year to the bar: five hours for the annual meeting, three hours for one other event during the year, and two hours inviting others to attend events.

I would like to thank each and every one of the judges and attorneys who have put their time and effort into revitalizing the 19th District bar. Without their grace and presence, it would never have happened.

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

Spending time with my family, baking bread, gardening, and pyrography. ▲

New law aims to reduce wage theft by requiring detailed offer letters

BY KATE BISCHOFF

When you got your first offer letter as a freshly minted lawyer, you may have been tempted to frame it. It signified the beginning of a legal career and a goal achieved following three grueling years of law school. These days, employers in all industries view the offer letter as an opening salvo in a desperate attempt to lure a new employee from an ever-shrinking candidate pool. Candidates may view it the same way and attempt to negotiate a higher salary or better benefits. Now, with a little legislative action, the offer letter has taken on a new life as an important and necessary compliance tool.

This past session, the Minnesota Legislature made it easier for employees (and the Department of Labor & Industry) to determine if they are getting paid what they should be by enacting the Wage Theft law. Without substantively changing much, the new law turns a welcome letter into a box-checking exercise every employer must undertake and every employee must sign.

The new law requires employers to give a detailed notice to new employees when they start employment. It must include the following:

- Employee's employment status (e.g. full-time vs. part-time) as well as exempt status under the Fair Labor Standards Act and the basis of any exemption (e.g. administrative, executive, computer-related, or other)
- Pay period information, including how frequently the employee will be paid
- Date of first paycheck
- How pay is calculated (e.g. hourly, salary, piecemeal, commission, etc.)
- List of any allowances that may be paid (e.g. housing, meals, etc.)
- Description of any paid time off, including sick, vacation, personal time off, and how an employee accrues time off and how to use it
- List of deductions, including benefit, tax, and any other lawful deductions
- Employer's legal and operating names
- Employer's address (mail and/or principal place of business) and telephone number
- If applicable, an offer to translate this information into another language

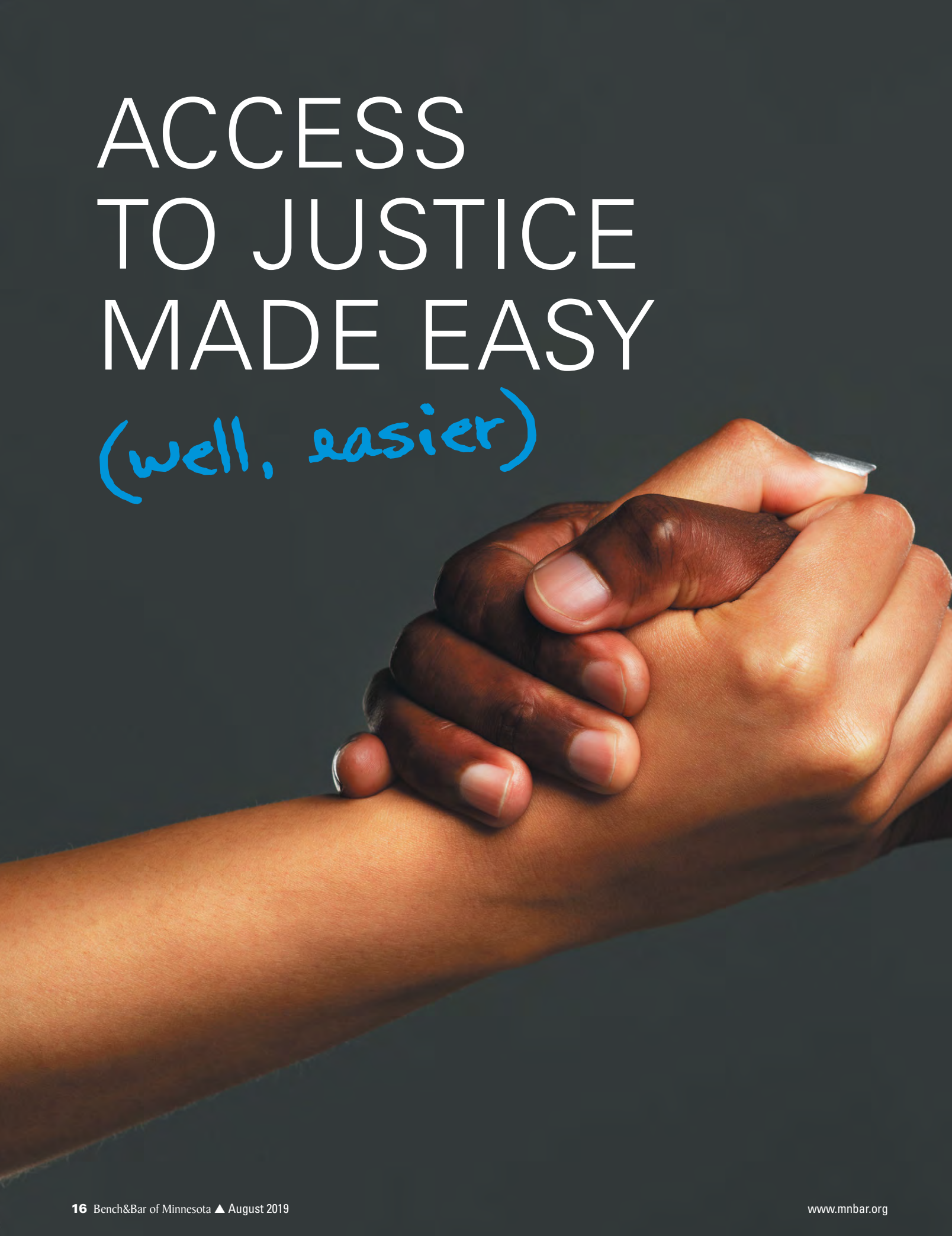
This new notice does not require a new document but an updated offer letter. With the exception of the basis for an FLSA exemption, nearly all of these items were already covered in most offer letter templates, and any additions can be easily added. If a candidate negotiates changes to wages or benefits, the offer letter should be amended to include those changes. Once finalized, the employee must sign the offer letter to acknowledge they have received it. A record of this acknowledgement must be retained in the employer's records and be available to the Department of Labor & Industry within 72 hours of any demand from the agency. With this, every employer can be compliant with the new law without having to develop a new notice from scratch.

All of this legalese does not mean that an offer letter need be a cold, clinical document that employees sign and stuff into the large pile of paperwork they're given on their first day. It can and should still be the warm, welcoming letter sent to attract candidates to the job. The warmth is equally important as giving employees a clear roadmap to calculate their own pay.

This may all seem like busy work for employers. In a sense, this is true. Yet, the modifications most employers are required to make are relatively minor if the employer was already using offer letters as a standard recruiting practice. Regardless, the Legislature's hope to reduce unlawful wage practices is furthered by the new law, and we should all applaud that initiative.

KATE BISCHOFF is the founder of tHRive Law & Consulting and teaches in Mitchell Hamline School of Law's online certificate program in human resources compliance.

ACCESS TO JUSTICE MADE EASY (well, easier)



The newly revamped LawHelpMN can't singlehandedly solve the justice gap—but it gives Minnesota lawyers a great way to refer people they couldn't otherwise assist to the legal help they need.

By Bridget Gernander

Justice for all is one of the fundamental promises of our democracy—important enough to be the closing words we recite in the Pledge of Allegiance. As a profession, lawyers struggle to reconcile the principle of justice for all with the reality of 25 years of research showing that only a small fraction of the civil legal needs of low-income people across the country are being met.[1] Despite a strong civil legal aid system that works to provide high quality services in every county in the state, programs in Minnesota turn away 60 percent of eligible clients who request help due to limited staff and volunteer resources.[2]

It was also 25 years ago that the Minnesota Judicial Branch first included the need for services to self-represented litigants in its strategic planning process.[3] Since that time, the Minnesota Judicial Branch has been a leader in court forms and informational services for people navigating the system without the assistance of an attorney. But in many ways these court resources were considered separate from the access to justice work being done through civil legal aid and the private bar. This often results in confusion about how and where to refer a low- or middle-income client for legal assistance. The Judicial Branch website includes a wide range of resources, as do the websites of law libraries and civil legal aid, but up to now there has been no overarching structure bringing all the services together.

Introducing the new LawHelpMN

Rather than putting the burden on the person facing the legal problem to navigate multiple websites and phone numbers, we knew we needed to put the burden on the system to get the user to the right place. To do this, the Minnesota access to justice community has taken a trusted civil legal aid website and expanded its scope. The LawHelpMN.org website has been in place for over a decade with more than 1,000 people per day accessing the site's content. The website is maintained by Legal Services State Support, whose staff has worked to upgrade its infrastructure to provide users with the best available assistance regardless of income or civil case type.

The result is an innovative navigational assistance tool: the LawHelpMN Guide. (*www.lawhelpmn.org/lawhelpmn-guide*). Designed to deliver a customized set of self-help resources and referrals tailored to each individual's specific legal issue, the LawHelpMN Guide generates curated results in response to a series of simple questions. These "guided" questions are intended to narrow a person's legal topic—and, if needed, gauge their potential eligibility for services based on a variety of factors, including location and income. The LawHelpMN Guide is intuitive and easy to use by either the person seeking information or an attorney, advocate, or anyone assisting them. On the basis of each answer, the user is presented with another small group of questions or statements that further refine the original, more general question. With each succeeding selection, the query is filtered until the resulting list of resources and referrals is the best possible match for the person and their legal concern. This branching logic takes the guesswork out of sifting through voluminous resources because the legal issue-spotting is built in. The questions are written in plain language style, so no legal knowledge is needed.

As we worked through the Justice for All research described below, the largest documented gap in services was for modest-income people just over civil legal aid income guidelines. In response, LawHelpMN now includes a new referral service created by the Minnesota State Bar Association, Hennepin County Bar Association, and Ramsey County Bar Association: the Minnesota Unbundled Law Project (*mnunbundled.org*).[4] This new online service directs people to lower-cost, limited-scope options for legal assistance. Bar association staff developed the site with input from practitioner members, created participation requirements, and designed a training program. Another expanded referral source is through a partnership with Community Mediation Minnesota (*communitymediationmn.org*), which provides free or low-cost community mediation services statewide. Users of the LawHelp MN Guide can choose community mediation services if it is a good fit for their situation.

By bringing together civil legal aid resources, court forms, law library research services, community mediation, and private bar referral services, the rebuilt site is a one-stop referral source for the legal community. The LawHelpMN Guide also provides a streamlined referral mechanism for our community partners, who can be confused on how to direct people facing a legal crisis. Legal Services State Support has conducted user testing with public libraries, social services programs, and faith community leaders, receiving very positive feedback about their comfort level in providing referrals to LawHelpMN.org.[5]

Background: A new direction for access to justice

The path to the new LawHelpMN started in 2015, when the national Conference of Chief Justices passed a resolution that was quite revolutionary for the access to justice field. Recognizing significant advances toward creating a "continuum of meaningful and appropriate services to secure effective assistance for essential civil legal needs" by courts, civil legal aid, and bar associations, they resolved that "the Conference of Chief Justices and the Conference of State Court Administrators support the aspirational goal of 100 percent access to effective assistance for essential civil legal needs and urge their members to provide leadership in achieving that goal."[6] This is often called the "100 percent access resolution." Why should this aspirational goal be considered revolutionary?

Focusing on the "continuum of services" means that we intentionally move away from measuring access to justice with a single yardstick: whether everyone has direct representation through a lawyer. The 100-percent-access resolution recognizes that there are many ways people can get "effective assistance for essential civil legal needs." There are some people for whom access to plain language legal fact sheets can answer a question and prevent a problem from getting worse. Others are able to use guided interviews to complete legal forms, especially when coupled with self-help services from court staff. And there are still many people who need full access to an attorney due to the complicated nature of their claim or the language and literacy barriers they face. This focus on "effective assistance" rather than direct representation alone moves away from a one-size-fits all approach.

By bringing together civil legal aid resources, court forms, law library research services, community mediation, and private bar referral services, the rebuilt site is a one-stop referral source for the legal community.

Another revolutionary feature of the resolution is that it includes services for people across all income spectrums. Civil legal aid programs will rightly continue to focus on the lowest-income Minnesotans,[7] but the 100-percent-access resolution applies to everyone. This means bar association lawyer referral services and other market-based approaches for people who can pay some amount for legal services are critical components of a healthy access to justice ecosystem. By putting all of civil legal services together, one quality referral can be made without extensive information about income or assets.

The Conference of Chief Justices directed the National Center for State Courts (NCSC) to provide assistance toward "achieving the goal of 100 per-

cent access through a continuum of meaningful and appropriate services." With startup funds from several private foundations, NCSC created the Justice for All project.[8] The Justice for All project recognizes that no single program or approach can suffice to provide appropriate and meaningful assistance to everyone who needs civil legal help. The project works to encourage state efforts that include all relevant stakeholders in the civil justice community—courts, legal aid, the private bar—in a partnership to implement the 100-percent-access resolution. As a starting point for the project, NCSC provided grant funds for statewide assessment and implementation. Twenty-seven states applied for funding, and Minnesota was one of seven to receive a grant award.

Minnesota used its Justice for All grant funds to assess the strengths and weaknesses of the current civil justice system, draft a Strategic Plan,[9] and support the creation of resources and referrals through the new LawHelpMN Guide. More information about the Minnesota Justice for All assessment and all ongoing projects across the access to justice spectrum can be found at *www.mncourts.gov/justice-for-all-project*.

The work is never "finished"

The LawHelpMN Guide is designed to be iterative—a word familiar to anyone working on technology projects, but one that was new to me. *Iterative*, in this context, means that the website will incorporate its learnings and data to create a feedback loop. Future iterations of LawHelpMN.org will deploy new technologies, such as machine learning and artificial intelligence, to help ensure ongoing enhancements to the content and user experience.

Working on access to justice requires a long view of how systems can be changed to better serve the public. For many years it seemed that the work was done in silos, and as a result successful efforts by one stakeholder were not easy to share with others. The LawHelpMN Guide is the culmination of true collaboration between the courts, civil legal aid, and the private bar. This collaboration reduces duplication, confusion, and frustration for people facing legal issues. With this strong and flexible tool, Minnesota has moved much closer to providing justice for all. ▲

Notes

[1] The seminal civil legal needs assessment was released by the American Bar Association in 1994. See *Legal Needs and Civil Justice: A Survey of Americans, Major Findings from the Comprehensive Civil Legal Needs Study* at *https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.pdf*. Additional civil legal needs studies from around the country are summarized in the 2017 report from the Legal Services Corporation (LSC) entitled *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* at *https://www.lsc.gov/media-center/publications/2017-justice-gap-report*.

[2] Study of turndown data collected from Minnesota Legal Services Coalition Programs in 2016. To give you a sense of the scope of the challenge in our state, a recent analysis of Minnesota Attorney Registration System (MARS) data shows we have one private lawyer for every 324 potential paying clients compared with one civil legal aid lawyer for every 6,058 clients potentially income-eligible for services.

[3] Hon. John Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 Wm. Mitch. Law Review 297 (1998).

[4] Preliminary data shows a 40 percent increase in people accessing *www.mnunbundled.org* since the LawHelpMN Guide was launched. This is an encouraging metric for the importance of bringing civil legal aid and private attorney services in to the same referral tool.

[5] *http://www.mncourts.gov/mncourtsgov/media/scao_library/documents/JFA_Trusted_Intermediary_Minnesota_Report_FINAL_23MARCH2019.pdf*.

[6] *https://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/07252015-Reaffirming-Commitment-Meaningful-Access-to-Justice-for-All.ashx*

[7] Most civil legal aid programs limit full representation services to clients at 125 percent of the poverty level or below, with some advice or brief services up to 200 percent of poverty. A limited number of programs will provide advice up to 300 percent of poverty in some case types. The range of income eligibility is another reason why having the centralized resource of *www.lawhelpmn.org* is so important. You can refer to that resource without having to do an income screening.

[8] *www.ncsc.org/jfap*

[9] *http://www.mncourts.gov/mncourtsgov/media/scao_library/documents/JFA-Strategic-Plan-FINAL.pdf*

LawHelpMN Guide

www.lawhelpmn.org

The new **LawHelpMN** at a glance

LawHelpMN.org should be the referral you give anyone who contacts your office with a civil legal issue for which you aren't able to provide representation. It covers every Minnesota county and every income level. The LawHelpMN Guide can direct users to fact sheets, forms, help with legal research, and screening for a wide range of services for which they may be eligible:

- Civil legal aid
- Community dispute resolution
- Bar association services:
  - Unbundled roster
  - Attorney referral programs

As services grow and change over time, the LawHelpMN Guide is updated regularly. This is the "no wrong door" resource for civil legal issues statewide.


X
CORP

Navigating the Benefits, Risks, and Limitations of Entity Depositions

A best-practices primer

By Tom Tinkham and Ben D. Kappelman

Your opponent in this suit is a corporation. You don't know the names of some of the corporate employees who may have the important facts and you can't tell who made the critical decisions. Do you waste your limited number of depositions and your time by noticing depositions of all the likely corporate employees? No. You use Federal Rule of Civil Procedure 30(b)(6) or the Minnesota equivalent 30.02(f) to notice one deposition and require the corporation to produce witnesses who have all of the entity's knowledge on subjects relevant to the suit.

As you are thinking about this approach, your opponent serves a 30(b)(6) notice on you that contains 70 separate topics, delves into your corporate client's document retention practices, and sets the deposition for next week. Do you produce the witnesses next week? No. This is the time to begin both preparation and negotiation so that the entity deposition is manageable and the deposition can proceed appropriately.

These descriptions illustrate some of the benefits and drawbacks of the 30(b)(6) discovery device. The purpose of this article is to describe the benefits and drawbacks of the 30(b)(6) discovery procedure in detail, discuss the current case law on this procedure, and offer suggestions for more effective ways to use the device or manage the response.

The essentials of the rule and its uses

Federal Rule of Civil Procedure 30(b)(6) and its Minnesota equivalent 30.02(f) provide for a notice of deposition to an "entity" rather than an individual. An entity can include a corporation, partnership, association, or government body. The notice can be served on a non-party by subpoena, with an explanation of the respondent's obligations.[1] The notice must identify the subjects of the deposition with reasonable particularity. The subjects can be any matters that are relevant to the suit. These can include questions requiring a factual response or a response requiring an application of law to fact as in contention interrogatories.

For the party seeking discovery from an entity, the 30(b)(6) notice avoids guessing at the identity of the entity employee who has knowledge of the relevant facts. Its use can avoid having to set multiple depositions to discover selected facts. Its use can often prevent the entity from hiding the facts by offering a series of witnesses who disclaim any knowledge.[2] It avoids the question of who is a managing agent of the entity and is thus speaking for the entity. The answers of the 30(b)(6) deponent will constitute admissions of the entity and can be used for that purpose at trial or in motions for summary judgment. Finally, the notice, when appropriately drafted, requires the entity to provide all

information "known or reasonably available" to it, thus limiting the risk of missing a significant piece of information in discovery of the entity. A party may also notice the individual deposition of an officer, director, or managing agent whose testimony may also be an admission of the organization.[3]

There are no limits on the number of subjects in a notice or on the number of 30(b)(6) notices. However, the topics identified in the notice must solicit relevant information, not be unduly burdensome, and be proportional to the needs of the case. Taking a second deposition on topics identical to those previously taken is not permitted absent agreements of counsel or a court order.[4] Some courts permit only a single 30(b)(6) deposition per entity.[5] Careful counsel should thus include all potential topics in the first, single notice, absent agreement (or court permission) for a staged approach.

The 30(b)(6) deposition is frequently used to: 1) obtain all of the evidence available to an entity on a significant fact issue; 2) understand the roles of various corporate employees in the facts of the case; 3) force the organization to commit to a position on legal and fact issues; or 4) probe the entity's compliance with retention and document production obligations. Some of these uses have become controversial.

Contention questions in a 30(b)(6) notice can be problematic. For example, the directive to a plaintiff to provide a witness to testify to "all facts supporting Plaintiff's allegations in Count I of the Complaint," when served early in the case, can be difficult to answer. These questions resemble contention interrogatories, and like those, courts have often delayed the obligation of a party to respond until after significant discovery has been concluded.[6]

Entity depositions as a discovery-about-discovery tool

"Process" discovery, or discovery about discovery, has also become controversial.[7] A typical process discovery request in a 30(b)(6) notice might be: "identify all the entity's systems and methods for storing electronic information." When a party begins discovery with questions about process rather than the substance of the dispute, it risks increasing the costs of litigation as the parties dispute the extent of process discovery. As one court put it: "[S]uch an inquiry puts the cart before the horse."[8] Some courts have noted that discovery about process stretches the concept of relevance unless there is some showing that material information is not being retained or produced.[9]

The commentators to the 2015 federal rule amendments take a different view, however. Fed. R. Civ. P. 26(b)(1) was revised to delete language expressly permitting discovery into "the existence, description, nature, custody, condition, and location of any documents or other tangible things." Far from prohibiting this discovery, the advisory committee believed that "[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples, [which] should still be permitted under the revised rule when relevant and proportional to the needs of the case."[10] The committee acknowledged that "[f]raming intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources."[11]

In situations where discovery is clearly going to be a problem or where there have been deficiencies in a party's discovery responses, process discovery is more likely to be permitted. Counsel concerned about the presiding judge's reaction to process discovery should build a strong factual record of its necessity before making requests. For example, once an individual witness admits when deposed that relevant documents were created but not produced, a court is more likely to permit discovery requests directed to why those documents were not produced.

Even in a court receptive to discovery about discovery, discretion is always advised. Serving a long list of process requests at the start of the case may appear to be good aggressive strategy but it risks a negative reaction from the court that the discovery is overbroad, burdensome, and not proportionate to the needs of the case.[12] There is also a practical reason to attempt to obtain this information through counsel-to-counsel communications and written discovery before resorting to an entity deposition—many corporate designees will be simply incapable of answering detailed questions about storage and searching of electronically stored information, no matter how demanding a deposition notice the opposing party crafts. A more effective technique is to elicit the other party's approach for finding, collecting, and producing documents in correspondence from that party's counsel and then ask a party's witness to testify to its accuracy on key points.

Preparing the 30(b)(6) notice and taking the deposition

The notice should explicitly reference Rule 30(b)(6) and it should be directed to the entity. If it is directed to a third party, it must be accompanied by a subpoena. For third party notices, the best practice is to draw the respondent's attention to the language of the rule and, particularly, the obligation to provide a witness with all information known to or reasonably available to the entity. The notice period should be sufficiently long so that the respondent has a reasonable time to locate responsive information and educate a witness. There is a presumption, absent compelling facts, that the deposition of an entity should be taken at its principal place of business.[13]

There are no limits on the number of subjects in a notice or on the number of 30(b)(6) notices. However, the topics identified in the notice must solicit relevant information, not be unduly burdensome, and be proportional to the needs of the case.

The notice can cover multiple subjects limited only by relevance, proportionality, or undue burden. It is not unusual to see reported cases with over 40 separate areas of inquiry.[14] The true art of drafting the notice is to create topics that elicit all information on a particular topic while clearly defining the topic so that the respondent can be confident about the information that must be provided. The rule requires the topics to be of reasonable particularity. This is interpreted to require discrete, specific topics that are not overbroad.[15] One court refers to the requirement as designation "with painstaking specificity" so that the respondent understands the information to be provided.[16] Despite your best efforts at specificity, it will often be the case that the respondent will have legitimate questions about the meaning of some topics. Be prepared to explain what you are looking for on those topics. Follow any explanation with a letter or amended notice.

Taking the 30(b)(6) deposition involves a somewhat different approach than with an individual deposition. At

the outset, the examiner should make clear that this is a 30(b)(6) deposition and identify the responsive entity. The 30(b)(6) notice should be marked as the first exhibit and a copy put before the deponent. The deponent should be asked if she is there on behalf of the organization. The particular items this witness will respond to should be identified. As to each item, ask the witness what she did to prepare—what people she interviewed and what documents she reviewed. Did the witness bring notes summarizing pertinent facts? When asking the most central questions it is useful to phrase them such as: "Please identify all facts known to or available to the organization relating to the claim that my client lied." This will make it clear to a jury that the testimony is not just some individual's knowledge but the knowledge of the party itself.

Frequently, the witness will be unprepared to respond on some of the issues. Indications of lack of preparation include not having previously seen the notice, not interviewing any other persons, or not reviewing any documents. Even with a witness who has done some preparation, it is often the case that the preparation is incomplete. Perhaps the notice was not clear; perhaps it was simply misunderstood; or perhaps the preparation was poor. The appropriate steps for the examiner are to ask that the deposition proceed to the extent possible; identify each inadequacy; and then request that this witness or a substitute be provided at a future reasonable time to complete the deposition.[17] Suspicions of lack of preparation should be confirmed with detailed questions. Why does the designee think he is being deposed today? For how long did the designee prepare? Did the designee inquire of other individuals to obtain relevant information? Did the designee review any documents? How long before the deposition did the designee learn he or she would be designated?

Reasonable counsel should be able to solve most of these issues without recourse to the court. In any event, a "meet and confer" is always a necessary precursor to a motion and there is no better time to have the discussion than when the issue arises. Any agreement of counsel should be documented as part of the deposition transcript. If there will be a further deposition, be clear that this deposition is expected to resume and is not terminated. Once terminated it can be difficult to resume the 30(b)(6) deposition on the same subjects.

One of the vexing problems in a 30(b)(6) deposition is whether the examiner can ask questions beyond the scope of the notice or whether the examiner must notice an individual deposition to ask these off-topic questions. There is a minority view that the examiner is limited to the scope of the notice.[18] The majority view is that the examiner can ask off-topic questions but that the witness is then testifying as an individual and not as a corporate representative.[19] The attorney for the witness should make clear that on off-topic subjects, the witness is only responding as an individual. The possibility of off-topic questions in a 30(b)(6) deposition should be considered by the respondent's attorney in designating the 30(b)(6) witness and that witness should be prepared to answer individually on any relevant topic. Since it will be difficult to schedule a second deposition of a witness who has previously testified as an individual, the examiner should make a considered choice of whether to ask the individual questions during the 30(b)(6) deposition or notice and take an individual deposition later.

Another problem often encountered with 30(b)(6) depositions is determining the number of depositions for purposes of the 10-deposition limit of the rules or other limit imposed by court order.[20] Should there be one deposition counted for each notice?[21] Should there be one deposition counted for each person designated to respond?[22] Each of these alternatives is subject to manipulation by one or the other party. And how does the seven-hour rule relate to a 30(b)(6) deposition?[23] Given the lack of guidance on these issues, counsel should attempt to reach agreement before starting any extensive 30(b)(6) deposition, ideally when the scheduling order is being negotiated, a time when cooperation is more likely (and court-supervised).

Responding to the 30(b)(6) notice

When you receive a 30(b)(6) notice directed to your client, first make sure your client understands the obligation created by the notice. Its obligation is to present a witness or witnesses who will be able to testify to all responsive facts known to or reasonably available to the organization on the identified topics.[24] This can result in a huge effort that can approximate the time necessary to prepare for trial. The expense and management disruption may be substantial, requiring a full explanation from its attorney of why compliance is necessary.

Second, make sure you have adequate time to prepare before the scheduled deposition. Being rushed to present an inadequately prepared witness can result in mistakes in testimony that will be difficult to correct or inadequate testimony resulting in multiple depositions, motion practice, or sanctions. Negotiate an adequate time to prepare. Consider taking lengthy lists of 30(b)(6) topics in stages to make preparation achievable. If negotiation fails to result in adequate time, bring a motion for a protective order documenting the need for additional preparation time.

Consider whether there are topics in the 30(b)(6) notice that are subject to legitimate objection. Think of the notice as an opening offer in a negotiation. Negotiate to achieve a reasonable set of requests to which your client can reasonably respond.[25] Of course, consider what similar requests you may want to serve on the opposition, lest your objections undermine your ability to obtain commensurate discovery. Objections can include:

1. The item is vague. The rule requires specificity so that the responding party can identify the scope of information to provide.[26] Require and document an explanation that provides that specificity.
2. The item is overbroad, seeking information that is not relevant.[27]
3. The items are directed at the respondent's "process" (e.g., document retention or document production practices) for discovery rather than at information relevant to the merits.[28] Absent a showing of some defalcation in discovery, this process discovery is likely burdensome, not proportional, and seeks irrelevant information.[29]
4. The notice fails to provide a reasonable time to prepare a witness.
5. Items in the notice are the equivalent of premature contention interrogatories and any response should be postponed until other discovery is completed.[30]
6. Items in the notice call only for legal conclusions and will invade the attorney-client privilege or work product exclusion.[31]

Objections should be made long before the deposition is set to begin. Objecting at the deposition only will be insufficient to preserve the issue(s). After sending a written objection, the proper procedure is to schedule a meet-and-confer session. If that does not settle the dispute, the objecting party should proceed with a motion for a protective order. A party is not permitted to resist a deposition notice by merely objecting and forcing the noticing party to move to compel.[32]

When circumstances narrow the issues in a case, a party may succeed in avoiding the burden of an entity deposition altogether. When a court permitted "very limited additional discovery solely to address

[remaining] issues" following appellate remand, the court rejected the plaintiff's request for a 30.02(f) deposition, reasoning "[a] Rule 30.02(f) deposition is the antithesis of the narrow, focused discovery envisaged by this court."[33]

Review each separate 30(b)(6) topic with your client representatives to learn how to gather the required information and who can best respond on each point. The respondents can be officers, directors, agents, or other consenting persons. The burden is on the entity to designate and prepare witnesses.[34] The person designated may or may not have any direct knowledge of relevant events. Since the person chosen will be speaking on behalf of the entity, the most important consideration will be to choose a witness or witnesses who are great witnesses and will represent the entity credibly. Where the subject is highly technical, it will be most important to locate a witness with the required sophistication to understand the nuances of the subject.

All information known to or reasonably available to the entity must be made available to the persons who will testify.[35] Information held by a subsidiary or an outside consultant, including counsel, is reasonably available if the entity could obtain it in the ordinary course of business.[36] The witness can be prepared by reviewing documents or interviewing persons with knowledge. Where complex testimony is necessary, consider providing the witness with summaries to use during the deposition. Of course, these summaries will then be available to the adverse party, but they will permit the witness to testify more completely.

Keep in mind that you may be asking the 30(b)(6) witness to master a great deal of information. Make it easier by preparing materials that will assist. Although these materials may become discoverable if they refresh a witness's recollection,[37] careful preparation will ensure any risk of disclosure is outweighed by the benefit of more considered and accurate testimony by your client's designee.

As you prepare the 30(b)(6) witness, consider the issues of work product and attorney-client privilege. The 30(b)(6) witness can be required to identify the source of her information even where it is her counsel. Facts discovered by counsel are part of the corporation's knowledge and must be provided when they are responsive to the notice.[38] However, when the notice is used as an indirect way to obtain work product or legal advice, it will not be permitted.[39] Questions of the 30(b)(6) witness asking for details of the preparation session with counsel will normally be subject to a work product and/or attorney-client privilege objection and an instruction not to answer. However, where counsel provides the facts for the testimony, the question requiring the witness to identify the source of the information as counsel is appropriate.

The 30(b)(6) witness often needs significant preparation. You will want to make sure the witness commits to the necessary preparation and understands the importance of her testimony on behalf of the organization. The witness may be asked questions off the 30(b)(6) topics and should be prepared to respond as an individual. The 30(b)(6) witness should become familiar with the legal issues in the case and appreciate how the 30(b)(6) topics relate to those issues. On all the 30(b)(6) topics, the witness should be comfortable with and able to articulate the organization position. If witness preparation reveals a significant disconnect between the view of the witness and that of the entity, it is necessary to find a different witness or amend the organization's position on that issue. More than with most witnesses, the preparation should include a discussion of privilege and work product. Counsel and the witness should have a common understanding of where the lines will be drawn on testifying about information provided by counsel.

The responding party and its counsel should appreciate the risks of tendering an unprepared 30(b)(6) witness. An unprepared witness can be construed by the court as no appearance at all, exposing the party to the full range of Rule 37 sanctions.[40] A corporate designee who testifies that he did "very little" to prepare and that he "would be testifying based only on his personal knowledge" leaves the entity he represents exposed to sanctions.[41] A court may limit the organization's ability to offer additional trial testimony, or deem certain facts established.[42] It may order additional preparation and a continued deposition as well as imposing monetary sanctions.[43] On the other hand, a reasonable effort is required—not a perfect effort. The inability to answer a few questions should not be considered being unprepared.[44] It should not be a surprise that disagreements will arise during the deposition concerning the scope of the questions and the extent of preparation. Most of the time these should be resolved by a refinement of the topics, some additional witness preparation, or both.

Concluding thoughts

Some discussions and some commentators take the position that the testimony of a 30(b)(6) witness is binding on the organization.[45] That paints with far too broad a brush. There are two circumstances where a 30(b)(6) witness's testimony is essentially binding. First, there is a long line of federal decisions holding that when a summary judgment motion is premised on the deposition testimony of the other party, that party cannot offer an affidavit to vary the testimony and avoid summary judgment (the sham affidavit doctrine). That same proposition has been applied to 30(b)(6) testimony.[46] Second, there are cases holding that where an entity does not provide testimony on a requested topic, it will be precluded from later providing that testimony at trial.[47]

In most situations, however, the testimony of a 30(b)(6) representative is not more binding than any other admission.[48] The 30(b)(6) testimony is an evidentiary admission and may be used for all evidentiary purposes if made by the opponent. However, it is not a judicial admission and it may be contradicted and explained.[49] The party offering the admission will ask the court to instruct the jury that the testimony was on behalf of the adverse party. The adverse party will offer testimony to clarify, explain, or refute the admission. The jury will decide whether to credit the admission or the later explanation.

Rule 30(b)(6) is a powerful tool. Able counsel can use it to efficiently reach the most significant information held by a large adverse entity. Like any powerful tool, it is subject to misuse. It can be used to force an entity to spend countless hours producing tangential information or its own legal strategy. It is up to able counsel to resist abuses of the process while accommodating the appropriate effort to obtain relevant information. ▲

***TOM TINKHAM** was a trial partner at Dorsey & Whitney LLP and head of its trial group for a number of years and today is of counsel. He is past president of the Hennepin County and Minnesota State Bar Associations. Currently he teaches trial practice and does pro bono work.*
TINKHAM.TOM@DORSEY.COM

***BEN D. KAPPELMAN** is a partner in the intellectual property litigation practice group at Dorsey & Whitney LLP in Minneapolis. He focuses on patent, trade secret, and trademark disputes.*
KAPPELMAN.BEN@DORSEY.COM

Notes

[1] Fed. R. Civ. P. 30(b)(6) expressly permits its application in a "notice *or subpoena*." (Emphasis added.)

[2] Fed. R. Civ. P. 30, advisory committee's note to 1970 amendment; Minn. R. Civ. Pro. 30.02, advisory committee's note to 1975 amendment.

[3] Fed. R. Civ. P. 30(b)(1). One Minnesota state trial court had no trouble permitting a 30.02(f) deposition of a corporate defendant even though the designee had already been deposed individually and "as a practical matter, [was] the only person with the information requested in the notice of deposition." *Jensen v. Elite Mechanical Systems, LLC*, No. 08CV1533, 2015 WL 7429944, at *2-3 (Minn. Dist. Ct. 10/8/2015). The court reasoned the entity was being deposed, not the individual, and the topics of the deposition became relevant after the individual's first deposition. *Id.*

[4] Fed. R. Civ. P. 30(a)(2)(A)(ii). *See Johnson v. Charps Welding & Fabricating, Inc.,* No. 14-cv-2081 (RHK/LIB), 2017 WL 9516243, at 12-15 (D. Minn. 3/3/2017); Rule 30(b)(6) Subcommittee, Advisory Committee on Civil Rules, Invitation for Comment on Possible Issues Regarding Rule 30(b)(6) at 3 (5/1/2017), *available at https://www.uscourts.gov/sites/default/files/invitation_for_comment_from_the_rule_30b6_subcommittee_may_1_2017_0.pdf* .

[5] *Heath v. Google LLC*, No. 15CV01824BLFVKD, 2018 WL 4491368, at *2 (N.D. Cal. 9/19/2018) (collecting cases).

[6] *Trustees of Bos. Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, at *4 (D. Mass. 9/24/2014) (holding contention topics not appropriate 30(b)(6) deposition topics); *Milwaukee Elec. Tool Corp. v. Chervon N. Am., Inc.*, No. 14-CV-1289-JPS, 2015 WL 4393896, at *5 (E.D. Wis. 7/16/2015) (permitting contention topics).

[7] Craig Shaffer, *Deconstructing "Discovery About Discovery,"* 19 Sedona Conf. J. 215 (2018).

[8] *Miller v. York Risk Servs. Grp.*, No. 2:13-CV-1419 JWS, 2014 WL 1456349, at *2 (D. Ariz. 4/15/2014).

[9] *See e.g., Orillaneda v. French Culinary Inst.*, No. 07 CIV. 3206 RJH HBP, 2011 WL 4375365, at *6-9 (S.D.N.Y. 9/19/2011).

[10] Fed. R. Civ. P. 26, advisory committee's note to 2015 amendment.

[11] *Id.* The Minnesota Rules of Civil Procedure now reflect the same amendment. *See* Minn. R. Civ. P. 26.02, advisory committee's note to 2018 amendment.

[12] Fed. R. Civ. P. 26(b)(1).

[13] *Webb v. Ethicon Endo-Surgery, Inc.*, No. Civ. 13-1947 JRT/JJK, 2015 WL 317215, at *7-8 (D. Minn. 1/26/2015).

[14] *E.g., Mallak v. Aitkin Cty.*, No. 13-CV-2119 (DWF/LIB), 2016 WL 8607391, at *10 (D. Minn. 6/30/2016), *aff'd*, 2016 WL 8607392 (D. Minn. 9/29/2016).

[15] *Johnson,* 2017 WL 9516243, at *16; *Mallak*, 2016 WL 8607391, at *7.

[16] *Klein v. Affiliated Grp., Inc.*, No. 18-CV-949 DWF/ECW, 2019 WL 246768, at *9 (D. Minn. 1/17/2019).

[17] *See Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75-76 (D. Neb. 1995); Adrian Felix et al., *Deposition, Turning the Tables on Difficult Witnesses (And Counsel)*, 48 The Brief 30, 33 (Winter 2019).

[18] Neil Lloyd & Christina Fernandez, *Refining and Then Sticking to the Topic: Making Representative Party Depositions Under Fed. R. Civ. P. 30(b)(6) Fairer and More Efficient*, 83 U.S.L.W. 1026 (1/13/2015).

[19] *Detoy v. City & Cty. of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000); Richard L. Marcus, 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed. 2018).

[20] Fed. R. Civ. P. 30(a)(2)(A)(i).

[21] *See* Marcus, *supra*; 7 Moore's Federal Practice - Civil §30.25[1] (2019).

[22] Fed. R. Civ. P. 30, advisory committee's note to 1993 amendment ("A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.").

[23] Fed. R. Civ. P. 30(d)(1).

[24] Marcus, *supra. See Concerned Citizens of Belle Haven v. Belle Haven Club*, 223 F.R.D. 39, 43 (D. Conn. 2004); *Arctic Cat, Inc. v. Injection Research Specialists, Inc.*, 210 F.R.D. 680, 686 (D. Minn. 2002).

[25] Indeed, proposed amendments to the rule would add a specific meet-and-confer requirement to Fed. R. Civ. P. 30(b)(6). *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence* at 36 (Aug. 2018) *available at https://www.uscourts.gov/sites/default/files/2018_proposed_rules_amendments_published_for_public_comment_0.pdf* .

[26] *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000).

[27] *Johnson,* 2017 WL 9516243, at *16.

[28] *Shaffer, supra* at 12; *Bombardier Recreational Prod., Inc. v. Arctic Cat, Inc.*, No. 12-CV-2706 (MJD/LIB), 2014 WL 10714011, at *14-15 (D. Minn. 12/5/2014).

[29] *See, e.g., Whitesell Corp. v. Electrolux Home Prod. Inc.*, No. CV 103-050, 2015 WL 5316591, at *1-3 (S.D. Ga. 9/10/2015).

[30] *In Re RFC & RESCAP Liquidating Tr. Actions*, No. CV133451SRNJJKHB, 2017 WL 548909, at *4 (D. Minn. 2/10/2017).

[31] *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 385 (E.D. Pa. 2006).

[32] *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 164-66 (D. Mass. 2007); *E.E.O.C. v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114 (M.D.N.C. 1989).

[33] *State v. 3M Company*, No. 27-CV-10-28862, 2014 WL 12802929, at *6 (Minn. Dist. Ct. 11/6/2014). The court continued: "This court cannot believe that, after the deposition of 70 witnesses and the production of over 6 million pages of documents, the State is not in a position to be specific as to the persons it wishes to interrogate." *Id.*

[34] *Hooker v. Norfolk S. Ry. Co.*, 204 F.R.D. 124, 125-26 (S.D. Ind. 2001).

[35] *Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, No. 01 CIV. 3016(AGS)HB, 2002 WL 1835439, at *3 (S.D.N.Y. 8/8/2002).

[36] *W. Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc.*, No. CV 13-1686 (JRT/FLN), 2017 WL 9325026, at *6-7 (D. Minn. 10/12/2017).

[37] *Sauer v. Burlington N. R. Co.*, 169 F.R.D. 120, 123 n.3 (D. Minn. 1996) (citing *United States v. Sheffield*, 55 F.3d 341, 343 (8th Cir. 1995)).

[38] Marcus, *supra.*

[39] *In re Linerboard*, 237 F.R.D. at 385.

[40] *Johnson,* 2017 WL 9516243, at 13-14; Moore's, *supra*, §30.25[3].

[41] *Menard, Inc. v. Cty. of Anoka*, 2018 Minn. Tax LEXIS 42, *6 (8/1/2018) (awarding costs and attorney fees as a sanction for an unprepared witness).

[42] *Anderson v. Premier Mgmt.*, 2012 Minn. Dist. LEXIS 79, *14 (4/26/2012) (sanctioning party's failure to tender prepared 30.02(f) witness by deeming liability established).

[43] Marcus, *supra.*

[44] *Mallak*, 2016 WL 8607391, at *7.

[45] Thomas C. Nelson, *Serving and Receiving 30(B)(6) Deposition Notices*, 27 S. Carolina Lawyer 36, 39-40 (2016); Lloyd & Fernandez, *supra.*

[46] *Daubert v. NRA Grp., LLC*, 861 F.3d 382, 392 (3d Cir. 2017).

[47] Marcus, *supra.*

[48] *R & B Appliance Parts, Inc. v. Amana Co., L.P.*, 258 F.3d 783, 786-87 (8th Cir. 2001).

[49] *Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 839 F.3d 1251, 1261 (10th Cir. 2016).

END TIMES, LEGAL CITATIONS EDITION

The "cleaned up" parenthetical and its rascally scourge

By Adam T. Johnson

According to the Apocalypse of Thomas, there are to be 15 events that occur in the fortnight before the end of the world. The "15 Signs before Doomsday," or simply the "15 Signs," are not to be taken lightly. Notably, they include (1) the earth's waters rising above the mountains, (2) the stones of the earth fighting each other, and (3) people coming out of their hiding places and no longer understanding each other. We've seen the first (starring Kevin Costner), the second has yet to be witnessed, and we presently are living through the third. But this is a serious article for serious readers.

You see, I write to reveal the 16th event, the one overlooked by Tom, and the last before the Day of Judgment. And what is this plague? It is the "cleaned up" parenthetical—a contemporary invention *ex diabolus*, an agent of confusion, a damned quixotic catastrophe noxiously heaped upon the American bar by the phantom exigencies claimed by Generation Infinite Scroll—to put all of it very, very mildly.

The "cleaned up" parenthetical is, at least superficially, as it sounds. It consists of placing the words "cleaned up" in the parenthesis following a quoted passage, and is meant to expurgate from legal writing the brackets, parentheticals, internal quotations marks, and "quoting" citations we have all come to know. Jack Metzler, a "cleaned up" enthusiast (and from my vantage, its inventor), gives the following examples of passages from *United States v. Rico* to illustrate the device:

> We have clarified that "[w]hile a PSR generally bears sufficient indicia of reliability, '[b]ald, conclusionary statements do not acquire the patina of reliability by mere inclusion in the PSR.'" *United States v. Narviz-Guerra*, 148 F.3d 530, 537 (5th Cir. 1998) (second alteration in original) (citation omitted) (quoting *United States v. Elwood*, 999 F.2d 814, 817-18 (5th Cir. 1993)).

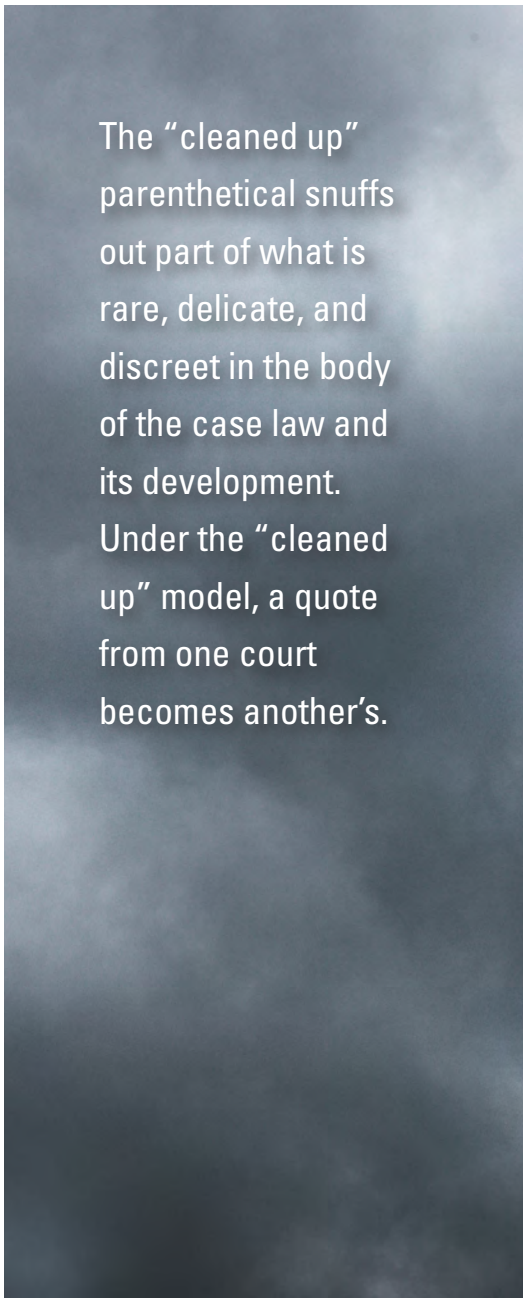
"Using (cleaned up)," says Mr. Metzler, the passage can be quoted as follows:

> This Court has "clarified that while a PSR generally bears sufficient indicia of reliability," that does not mean that "bald, conclusionary statements... acquire the patina of reliability by mere inclusion in the PSR." *United States v. Rico*, 864 F.3d 381 (5th Cir. 2017) (cleaned up).

"And it has fewer words too!" exclaims Mr. Metzler.[1]

But I'm hanged if that's not a bleach job. The former passage clearly does service to the prior decisions and has the additional utility of identifying them by way of citation. It is not overly complex, and accurately conveys sourcing. The latter passage, on the other hand, makes it seem as though the court in *Rico* was the original author of the quoted text. It is up to the reader to dig in and decipher the sweeping, "cleaned up" backstory and all of its interminable unknowns. As confoundingly, using "cleaned up" defeats the purpose of quoting material in the first instance.[2] In the words of Adam Eakman,

> It's fine to make alterations, but they need to be documented. The words matter. If I were a judge, I would never base my entire analysis of a case on a statute that has been "(cleaned up)." Instead, I'd dig into the statute to figure out its exact wording. And if you want to quote a point for emphasis, the emphasis is destroyed if the quote has been cleaned up. A judge is left with no firm conviction that another judge actually said what is in the quotes.[3]



Professor Eugene Volokh, while writing favorably of the "cleaned up" parenthetical, acknowledges its potential risks:

> To be sure, there is a risk that "cleaned up" may be used to sweep some complexities under the rug, and may sometimes be used outright dishonestly. But that's a

possibility for any alteration, especially brackets and ellipses (and for that matter the decision when to start and end quoted text). Authors know that the reader may well check the original source, and will spot such misuses; that should be deterrent enough to such a misuse.[4]

I wish I could share Professor Volokh's optimism, and that of Messrs. Eric Magnuson and Kelvin Collado, who lately wrote in Minnesota Lawyer that Mr. Metzler's parenthetical is "one of the good [parentheticals]."[5] But I can't. The "cleaned up" parenthetical snuffs out part of what is rare, delicate, and discreet in the body of the case law and its development. It boasts of getting rid of "clutter." But clutter is neither bad nor good. It simply *is*. Under the "cleaned up" model, a quote from one court becomes another's. An unpublished opinion is masked into published status. Cases are left altogether unaccounted for. "Clutter" is still present, only cloaked by a shiny label. Laziness predominates, and common law chaos prevails and compounds itself. A little bit of chaos fulfills the spirit, but too much is disastrous. Really, the "cleaned up" parenthetical is too much—a sledgehammer peroxide that has convinced itself it can fix stained glass. It is a bigger disaster than the Fyre Festival, and just as hyped.

Where are the nay-sayers, the critics? Where are the men and women of fashion to blunt this foul unraveling of axioms? Who will stand up to this abomination sprung from Twitter? Have we learned nothing from the contemporary abuses of "et seq."—that ball-of-wax so relentlessly (and daringly) abused by lawyers everywhere? Haven't we all had our fill of that one? I trow yes.

Unfortunately, it appears that the "cleaned up" parenthetical is here to stay. As of the end of 2017, it was already embedded in over 100 court filings, and employed by over a dozen judges, nine of whom are Article III. Messrs. Magnuson and Collado have identified its presence in over 60 judicial opinions. Bryan Garner has officially sanctioned it, so it has the imprimatur of the Academy. And last I checked, Mr. Metzler was personally sending "legal writing hero" awards to anyone who would send him their brief or opinion using "cleaned up," with promises of "internet fame and Twitter plaudits." Like a voracious tick, it has installed itself. ▲

Notes

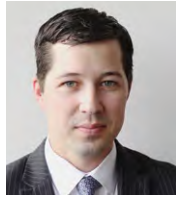
[1] Jack Metzler, "Use (cleaned up) to make your legal writing easier to read," Before the Bar Blog, American Bar Association, 10/3/2017 (*https://abaforlawstudents.com/2017/10/03/use-cleaned-up-make-legal-writing-easier-to-read/*) (last visited 04/30/2019).

[2] Adam Eakman, "Why attorneys should stop using '(cleaned up)'," Attorney Words, 4/10/2018 (*http://attorneywords.com/cleaned-up/*) (last visited 4/30/2019).

[3] *Id.*

[4] Eugene Volokh, "New Twist on Legal Citations: The '(Cleaned Up)' Parenthetical," The Volokh Conspiracy, Reason, 7/24/2018 (*https://reason.com/2018/07/24/new-twist-on-legal-citations-the-cleaned/*) (last visited 4/30/2019).

[5] Eric J. Magnuson and Kevin D. Collado, "A (new) legal citation to consider," Minnesota Lawyer (4/16/2019).



***ADAM T. JOHNSON** is an attorney at Lundgren & Johnson in Minneapolis.*
ADAM@LUNDGRENJOHNSON.COM

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.

EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Arbitration appeal denied; interlocutory action barred.** An employer's attempt to appeal a determination by the trial court that a dispute under an employment contract was subject to arbitration was rejected by the 8th Circuit Court of Appeals. They rejected an interlocutory appeal of the lower court's action to stay the lawsuit and order arbitration on grounds that the employer could obtain review of the arbitration award after it is entered and was barred from a pre-arbitration appeal. ***Webb v. Farmers of North America, Inc.,*** 925 F.3d 966 (8th Cir. 5/31/19).

■ **Pension challenge barred; action was timely.** An order by the National Labor Relations Board (NLRB) finding that an employer failed to make a contractually mandated pension fund contributions was enforced. The 8th Circuit rejected a claim by the union that the claim, arising out of an unfair labor practice charge, was untimely because the employer's conduct was ambiguous and the union did not have notice of the nonpayment until after the employer had stopped making the pension fund contributions. ***NLRB v. Anderson's Excavating Co.***, 925 F.3d 970 (8th Cir. 5/31/19).

■ **ERISA investments; breach claim rejected.** A claim by a former employee that the manager of his employer's ERISA Savings Plan breached fiduciary duties by making improper investments was denied. Affirming a lower court decision, the 8th Circuit held that the fiduciaries did not breach the duty of prudence and, therefore, the lawsuit against them was properly dismissed. ***Usenko v. MEMC, LLC***, 926 F.3d 468 (8th Cir. 6/4/19).

■ **Unemployment compensation; unavailable for work.** An employee lost her claim for unemployment compensation benefits because she was unavailable for suitable employment, as required by the Minnesota unemployment compensation law. The court of appeals affirmed a decision of the Department of Employment and Economic Development (DEED) that an employee's registration in a dislocated worker program did not constitute "re-employment assistance training." Thus, the employee did not satisfy the statutory requirement that he was seeking "suitable employment" in order to qualify for unemployment compensation benefits. ***Only v. Regency Home Healthcare,*** 2019 WL 2332496 (8th Cir. 6/3/2019) (unpublished).

LEGISLATIVE ACTION

■ **Cosmetology law.** A measure passed by the state Legislature during the past session repeals a long standing requirement of the Board of Cosmetology for the licensing of individuals engaged in hair-braiding. The decision ended a 14-year struggle, dating back to 2005 litigation spurred by the Institute for Justice, a national libertarian public-interest law firm, against the Board of Cosmetology.

Other measures have been introduced, many of them with bipartisan support, to undo regulatory requirements of the board for hair stylists, make-up artists, and eyelash technicians, along with permitting funeral homes to employ funeral planners who are not fully licensed as morticians.

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

ENVIRONMENTAL LAW

JUDICIAL LAW

■ **8th Circuit Court of Appeals hands Met Council major NEPA win.** The U.S. Court of Appeals for the 8th Circuit ordered that a citizen group's action challenging environmental review for the Met Council's proposed Southwest Light Rail Transit project (SWLRT) must be dismissed for lack of a viable

cause of action.

The underlying dispute involved alleged flaws in the environmental review conducted by the Met Council and the Federal Transit Administration (FTA) under the National Environmental Policy Act (NEPA) for the proposed SWLRT—a new light rail line that would connect downtown Minneapolis to the southwestern Twin Cities. At the time the lawsuit was commenced in 2014, environmental review was still ongoing. Among the allegations of plaintiff Lakes and Parks Alliance (LPA) was that the Met Council undertook its "Municipal Consent Process" under Minn. Stat. §473.3994 (which requires the Council to consult with all municipalities affected by the SWLRT and obtain their advance consent to the proposed project design) prior to completing environmental review, in violation of NEPA and MEPA.

In March 2015, the district court disagreed, denying LPA's summary judgment motion. The district court also granted FTA's motion to dismiss, noting that NEPA does not provide a private right of action (challenges to NEPA review must proceed under the Administrative Procedure Act, an option not available to LPA because environmental review was ongoing and there was thus no final agency action to challenge). The district court also dismissed most of the LPA's claims against the Met Council, but it ultimately denied the council's motion to dismiss in order to preserve a "narrow" cause of action under NEPA to prevent the council from taking actions that could "'eviscerate' any federal remedy later available to the LPA." *See Lakes & Parks Alliance of Minneapolis v. Fed. Transit Admin.*, 91 F. Supp. 3d 1105, 1124–25 (D. Minn. 2015) (quoting *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 331 (4th Cir. 2008).

Following the 2016 release of the Council's final EIS and the FTA's record of decision, which determined the EIS satisfied the requirements of NEPA, the council and LPA then filed competing motions for summary judgment. The LPA continued with its "narrow" NEPA claim against the Met Council, arguing the council had focused only on a preordained, politically motivated course for the SWLRT in violation of environmental review requirements. In denying LPA's motion (and granting the Met Council's), the district court held that LPA had failed to show that the council had "irreversibly and irretrievably committed to a specific SWLRT route" before the end of environmental review.

In reversing the district court's

decision, the 8th Circuit appellate court reemphasized that NEPA does not provide a private right of action and that the lower court's attempt to "circumnavigate" this fact by allowing the "narrow" cause of action was in error. The 4th Circuit *Limehouse* case the district court had relied upon in allowing the cause of action was inapposite, the 8th Circuit held, because, among other things, in *Limehouse* there was still a federal agency party to the lawsuit; here, the Met Council was the only remaining defendant. Moreover, the appellate court concluded, even if the "narrow" cause of action could be maintained, it was now moot:

"If the entire purpose of the action was to prevent 'eviscerat[ing]' a future federal remedy… that purpose no longer exists: the very federal remedy the district court sought to preserve is the very remedy the LPA declined to seek, an APA challenge to the ROD. Because there is no longer any federal remedy available, there is no cause of action to imply to protect it."

Accordingly, the 8th Circuit did not address LPA's claim on the merits but rather reversed and remanded with instructions to the district court to dismiss the case. ***Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.***, 2019 U.S. App. LEXIS 19639 (8th Cir. 7/1/2019).

ADMINISTRATIVE ACTION

Trump administration repeals Obama-era Clean Power Plan and finalizes replacement plan. On 6/19/2019, the Environmental Protection Agency (EPA) issued notice of its final rules for three separate rulemakings. The three separate actions are: (1) EPA is repealing the Clean Power Plan (CPP), which was put in place during the Obama administration; (2) EPA is finalizing the Affordable Clean Energy rule (ACE); and (3) EPA is finalizing new regulations for EPA and state implementations of ACE and any future emissions guidelines issued under the Clean Air Act (CAA).

EPA published the CPP in August 2015, finalizing the first-ever performance standards for carbon emissions from existing power plants in the U.S. under section 111(d) of the CAA. Under section 111, performance standards for pollutants such as CO2 must be based upon the degree of emission limitation achievable through the application of the "best system of emission reduction" (BSER). The CPP identified four broad "building blocks" that together constituted BSER for existing power plants (including, e.g., switching to low-carbon power sources such as natural gas, and increasing energy efficiency) and set ambitious nationwide carbon reduction goals for the power sector.

However, the CPP was to be short-lived. With Executive Order 13783, President Trump directed the EPA to review and initiate reconsideration proceedings to "suspend, revise, or rescind" the CPP. (*See* Executive Order 13783, section 4(a)-(c).) In repealing the CPP, the EPA reasoned that the plan exceeded the EPA's statutory authority. Specifically, EPA has interpreted the Section 111 of the CAA as authorizing EPA to establish BSER for a source based solely on specific measures that can be applied to or at the source, a particular facility—not on broad industry-wide mandates such as effectively requiring a change in fuel source (e.g., from coal to natural gas), as was the case under the CPP.

Consistent with the EPA's new interpretation of section 111, EPA's rulemaking finalized ACE, which consists of emission guidelines for states to utilize in their development, submittal, and implementation of state plans that establish standards of performance for CO2 emissions from certain existing coal-fired Electric Utility Generating Units (EGUs) within their jurisdictions. BSER for CO2 emissions from these EGUs, the agency determined, is not the CPP's broad "building blocks" but rather "heat rate improvement" in the form of a specific set of technologies and operating and maintenance practices that can be applied at and to certain existing coal-fired EGUs.

Finally, the EPA is finalizing implementing regulations that will be used by both the EPA and states in the implementation of ACE and any other future emission guidelines issued under Section 111(d) of the CAA. The new implementing regulations' purpose is to harmonize aspects of any existing regulations with the statute by making it clear that states have broad discretion in establishing and applying emissions standards consistent with the EPA's determined BSER. ***Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations***, XX Fed. Reg. XX (proposed 6/18/2019) (to be codified at 40 C.F.R. Part 60).

EPA extends RVP waiver for gasoline with 15% ethanol, expanding market possibilities. The EPA published a final rule adopting a new statutory interpretation and making corresponding regulatory changes to allow gasoline blended with up to 15 percent ethanol (E15) to take advantage of the Clean Air Act (CAA) 1-pound per square inch (psi) Reid Vapor Pressure (RVP) waiver, formerly available only to E10 (i.e., most gasoline sold in the U.S.). EPA first granted CAA fuel waivers allowing the introduction into commerce of E15 in in October 2010 and January 2011. The waivers provided that the fuel must have an RVP "not in excess of 9.0 psi during the time period from May 1 to September 15," a limitation designed to control emission of volatile organic compounds (VOCs) resulting from fuel evaporation, a problem that is exacerbated by warmer air temperatures. E10 is subject to the same RVP limitation. However, for E10, EPA passed a regulation providing that E10 can exceed the 9.0 psi limit by one pound. The "one-pound waiver" is designed to accommodate the gasohol industry's practice of "splash blending" 10% ethanol with conventional gasoline. When 10% ethanol is added to conventional 9.0-psi gasoline, the RVP of the

mixture will rise to about 10 psi. Absent the one-pound waiver, E10 would have required a base gasoline with a lower RVP; producing a special low-RVP blendstock, the industry successfully argued, presented prohibitive expenses and logistical problems.

When EPA granted the CAA fuel waiver authorizing the sale of E15, the agency did not extend the one-pound waiver to E15. As a result, even though producers of E15 have been able to sell the fuel blend since the fuel waivers were passed in 2010/2011, they have been significantly limited in their ability to commercialize E15, especially in summer months. EPA's new rule rectified this situation by extending the one-pound waiver to E15, an extension that required reinterpreting the underlying statutory exemption (CAA § 211(h)(4)). EPA's rulemaking also made related regulatory changes to modify certain elements of the renewable fuel standard (RFS) compliance system, in order to improve functioning of the renewable identification number (RIN) market and prevent market manipulation. ***Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations***, 84 Fed. Reg. 26980 (6/10/2019).

JEREMY P. GREENHOUSE
The Environmental Law Group, Ltd.
jgreenhouse@envirolawgroup.com
JAKE BECKSTROM *Vermont Law School, 2015*
ERIK ORDAHL *Flaherty & Hood, P.A.*
AUDREY MEYER *University of St. Thomas School of Law, J.D. candidate 2020*

FEDERAL PRACTICE

JUDICIAL LAW

■ **Confirmation of arbitration award; lack of personal jurisdiction.** Reversing Judge Magnuson, the 8th Circuit found that the existence of an agreement between Minnesota and Florida insurance companies that contained a Minnesota choice-of-law provision and a requirement that the defendant "regularly communicate" with the plaintiff in Minnesota were insufficient to make the Florida defendant subject to specific personal jurisdiction where the defendant conducted no business in Minnesota and lacked a physical presence in the state. ***Federated Mut. Ins. Co. v. FedNat Holding Co.***, ___ F.3d ___ (8th Cir. 2019).

■ **Motion for summary judgment; denial of extension of time affirmed.** Affirming a district court's denial of the plaintiff's motion for an extension of time to oppose a defendant's summary judgment motion and her subsequent motion to file her opposition out of time where she: (a) offered no explanation for her failure to complete her opposition prior to requesting an extension on the eve of the filing deadline; and (b) offered no evidence of "diligent efforts" to meet the original deadline, the 8th Circuit reiterated that "preoccupation with other hearings does not constitute excusable neglect." ***Albright ex rel. Doe v. Mountain Home Sch. Dist.***, 926 F.3d 942 (8th Cir. 2019).

■ **Denial of request for leave to amend affirmed when not accompanied by proposed amended complaint.** The 8th Circuit affirmed the denial of the plaintiff's request for leave to amend his complaint contained in his opposition to defendant's motion to dismiss, finding no abuse of discretion in the denial of his request when it was not accompanied by a proposed amended complaint. ***Soueidan v. St. Louis Univ.***, 926 F.3d 1029 (8th Cir. 2019).

■ **No abuse in discretion in setting aside default.** The 8th Circuit found no abuse of discretion in Judge Wright's decision to set aside one defendant's default where the defendant had informed the process server of a misspelling in the complaint and assumed that he would be re-served, where he immediately sought to retain counsel after learning of the default from his insurance company, and where he asserted a meritorious defense. ***Johnson v. Leonard***, ___ F.3d ___ (8th Cir. 2019).

■ **Sanctions and contempt; multiple decisions.** Adopting a report and recommendation by Magistrate Judge Rau, Judge Frank held that the defendant's discovery failures would result in the imposition of five different adverse inferences against it at trial. ***Tholen v. Assist Am., Inc.***, 2019 WL 2387109 (D. Minn. 6/6/2019).

Magistrate Judge Leung recommended that the defendant law firm and its sole owner be held in contempt where they failed to comply with a subpoena and failed to appear at a hearing on an order to show cause. Magistrate Judge Leung also ordered the law firm to pay more than $45,000 in reasonable fees and expenses associated with the plaintiff's attempts to compel its compliance with the subpoena. ***Paisley Park Enters., Inc. v. Boxill***, 2019 WL 2710703 (D. Minn. 6/28/2019).

■ **Jurisdictional discovery granted to determine citizenship of limited partnership.** After Judge Ericksen twice entered orders directing the plaintiff to correct its allegations regarding the citizenship of the defendant limited partnership, Magistrate Judge Wright granted the plaintiff's motion to stay the action pending limited jurisdictional discovery, rejecting the defendants' argument that the proposed discovery was "speculative" because it related to the issue of subject matter jurisdiction. ***Tim-Minn, Inc. v. Tim Hortons USA, Inc.***, 2019 WL 2865600 (D. Minn. 7/3/2019).

■ **Motion to remand denied where there was no state court action.** While agreeing with the plaintiff that she lacked subject matter jurisdiction over the action, Judge Brasel declined to remand a diversity action to the Minnesota courts that was alleged to have been removed, where neither party had filed its pleading with a Minnesota court and the defendant also had failed to file a copy of the notice of removal. Instead,

Judge Brasel dismissed the action for lack of subject matter jurisdiction where it did not involve the required amount in controversy. ***Wiste's LLC v. Am. Select Ins. Co.***, 2019 WL 2577901 (D. Minn. 6/24/2019).

■ **Attorney's fees; multiple decisions.** Citing the complex legal and procedural issues in the case, Judge Nelson awarded the prevailing plaintiff more than $18 million in attorney's fees and more than $5 million in costs. ***In Re: RFC and ResCap Liquidating Trust Action***, 2019 WL 2567566 (D. Minn. 6/21/2019).

After reducing the settling plaintiff's fee request by more than $71,000 for "unnecessary" work, "vague" entries, and time billed for work that was "clerical in nature," Magistrate Judge Menendez awarded the plaintiff more than $324,000 in attorney's fees. ***First Lutheran Church v. City of St. Paul***, 2019 WL 2403200 (D. Minn. 6/7/2019).

■ **Motion to dismiss for failure to effect service granted.** Where the plaintiff failed to effect service within 90 days after the action was filed, purportedly "due to an unintentional error" by plaintiff's counsel, defendant's counsel declined to waive service and the defendant moved to dismiss for failure to effect service, Judge Doty found no "good cause" or "excusable neglect" to justify an extension of the service deadline, and instead granted the defendant's motion and dismissed the action without prejudice. ***McCourt v. Carver County***, 2019 WL 2525428 (D. Minn. 6/19/2019).

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

INDIAN LAW

JUDICIAL LAW

■ **Treaty right to travel preempts state fuel-importation taxes.** Under its 1855 treaty with the United States, the Yakama Nation ceded approximately 10 million acres of land but reserved certain rights within the ceded territory, including "the right, in common with citizens of the United States, to travel upon all public highways." In 2013, the Washington State Department of Licensing assessed $3.6 million in taxes, penalties, and licensing fees against Cougar Den, Inc., a wholesale fuel-importer owned by a member of the Yakama Nation, for transporting fuel on public highways within the state. The Washington Supreme Court upheld the assessment, but Cougar Den appealed to the U.S. Supreme Court, arguing that the 1855 treaty preempted the fuel tax. Applying the rule that treaties must be interpreted as tribal negotiators would have understood them, a plurality of justices agreed with Cougar Den. The Court reasoned that the fuel tax "act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve[.]" ***Washington State Department of Licensing v. Cougar Den, Inc.***, 139 S. Ct. 1000 (2019).

■ **Treaty right to hunt unaffected by state's admission to the Union.** Wyoming convicted a member of the Crow Tribe of taking elk off-season in the Bighorn National Forrest and of hunting without a state license. On appeal to the U.S. Supreme Court, the defendant argued that the Crow Tribe's 1868 treaty with the United States, which guaranteed "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon[, . . .] and peace subsists[,]" blocked the state's regulations. The Supreme Court agreed, vacated the convictions, and remanded the case. It formally repudiated an 1896 outlier decision that held that statehood could impliedly abrogate treaty rights and reaffirmed the longstanding rules that courts must construe treaties liberally and as their tribal negotiators would have understood them, and that Congress may only abrogate treaties expressly. Because the Crow negotiators would have understood "unoccupied lands" to mean lands without non-Indian settlement, because the treaty conditions of game and peace still subsist, and because Wyoming's admission did not expressly abrogate the 1868 treaty, the 1868 treaty right to hunt on unsettled lands remains in effect. ***Herrera v. Wyoming***, 139 S. Ct. 1686 (2019).

■ **State defendant may not receive custody credit for time served for tribal offense.** Minnesota courts have two tests for awarding custody credit against criminal sentences: one for intrajurisdictional custody, and one for interjurisdictional custody. The Red Lake Tribal Court convicted the defendant of two tribal offenses while she was on probation for a separate state conviction. When the state court executed the sentence for the state conviction, it denied the defendant's request for custody credit for time served in the Red Lake Detention Center for the tribal offenses. The Minnesota Supreme Court affirmed, concluding that because the Red Lake Band of Chippewa Indians is a separate sovereign, the interjurisdictional test applied. Under that test, the defendant was not entitled to custody credit. ***State v. Roy***, 928 N.W.2d 341 (Minn. 2019).

■ **Tribal officer may detain and deliver non-Indian suspected of on-reservation state-law victimless offense to state authorities.** A tribal officer who suspected that a driver was impaired on the Red Lake Reservation confirmed intoxication through field-sobriety and breath tests. The officer detained the non-Indian suspect and transported him to the reservation boundary, where a state sheriff arrested him. On appeal from his resulting state-law conviction, the defendant argued that the evidence against him was obtained through an unlawful arrest by the tribal officer and should have been suppressed, and that even if the arrest was proper, Minnesota lacked jurisdiction over his on-reservation crime. The Minnesota

Court of Appeals disagreed, ruling that Minnesota has jurisdiction to prosecute non-Indians' on-reservation victimless crimes, including driving while impaired. It further held that tribal officers may detain and deliver on-reservation non-Indian suspects to authorities with jurisdiction over the offense. ***State v. Thompson***, ___ N.W.2d ___ (Minn. Ct. App. 2019).

JESSICA INTERMILL
Hogen Adams PLLC
jintermill@hogenadams.com

PETER J. RADEMACHER
Hogen Adams PLLC
prademacher@hogenadams.com

INTELLECTUAL PROPERTY

JUDICIAL LAW

Patent: The government is not a "person." The U.S. Supreme Court recently held that the United States Postal Service is not a "person" under patent law and could not use a covered-business-method review to challenge the validity of a patent. Return Mail sued the Postal Service for infringing a method patent for processing undeliverable mail. The Postal Service asked the Patent Office to institute a covered-business-method review of the asserted patent. The Patent Office instituted review and invalidated all of the claims in the patent. Return Mail appealed arguing government agencies, such as the Postal Service, are not "person[s]" under the America Invents Act (AIA). The patent statutes do not define the term "person," so the Court applied the longstanding presumption that "person" does not include the government or government agencies. The Postal Service made several arguments attempting to rebut the presumption but failed to persuade the Court. The Court explained that the government's long-established ability to obtain a patent does not indicate that Congress meant to allow it to participate in proceedings under the AIA. The Court also found no issue with limiting the government's ability to challenge the validity of patents to only a defense in court because the government's liability is also limited (to a patent owner's "reasonable and entire compensation"). Nongovernmental defendants, in contrast, face injunctions, jury trials, and treble damages. ***Return Mail, Inc. v. United States Postal***, 139 S. Ct. 1853 (2019).

Trademark: Ban on the registration of "immoral or scandalous" trademarks is unconstitutional. The U.S. Supreme Court also recently held that the ban on the registration of "immoral or scandalous" trademarks violates the 1st Amendment. Erik Brunetti sued the government to challenge the ban after his application to register the trademark FUCT was denied. This decision comes two years after the Court invalidated the ban on the registration of "disparaging" trademarks in *Matal v. Tam*. Mirroring the *Tam* decision, the Court found the ban on "immoral or scandalous" marks also unconstitutional because it discriminated on the basis of viewpoint. The "immoral or scandalous" ban allowed the registration of trademarks that agreed with society's sense of morality and banned the registration of marks that did not. The government suggested limiting the statute to remove the viewpoint bias and save the statute. The proposal was to limit the ban to "marks that are offensive or shocking because of their mode of expression, independent of any views that they may express." The Court rejected the proposal. While the Court can interpret ambiguous language to avoid constitutional issues, it cannot rewrite a law to make it constitutional, as the government requested. ***Iancu v. Brunetti***, No. 18-302, 2019 WL 2570622 (U.S. 6/24/2019).

TONY ZEULI
Merchant & Gould
tzeuli@merchantgould.com

JOE DUBIS
Merchant & Gould
jdubis@merchantgould.com
MATT METCALFE *Merchant & Gould*

PROBATE & TRUST LAW

JUDICIAL LAW

Capacity and undue influence. Appellant lived with his mother and father and provided care for a number of years. Following the death of appellant's father in 2013, appellant hired an attorney to draft an employment agreement between himself and his mother. The agreement stated that appellant would receive $25 per hour for 24-hour-per-day care, from 2007 through the date of his mother's death. Appellant's mother signed the agreement in January 2015 and died a year later in January 2016.

Appellant's sister was appointed personal representative of appellant's mother's estate. Pursuant to a will and trust executed by appellant's mother in

1991, each of her four children were to receive an equal share of her assets. Appellant filed a claim for $1,829,700 against the Estate based on the employment agreement. The personal representative denied appellant's claim. At the time of her death, appellant's mother's assets totaled less than $1,800,000, and therefore, allowance of the claim would have effectively undone her estate plan.

After a bench trial, the district court found that appellant's mother lacked capacity to contract at the time she signed the employment agreement and that the agreement had been the product of undue influence. The court of appeals noted that capacity and undue influence are questions of fact and that a district court's determinations will be overturned only if they are clearly erroneous. The court of appeals affirmed the district court's finding of incapacity by noting that medical records indicated that appellant's mother had capacity issues going back to 2013 and that there was testimony that at the time the agreement was signed she could not read a newspaper. Similarly, the court of appeals affirmed the district court finding of undue influence, noting that appellant served has his mother's attorney-in-fact, denied her access to other people, and orchestrated the drafting and signing of the employment agreement. The court of appeals specifically cited a communication from appellant to his attorney in which he stated:

Next time I will awaken [my mother] in advance of your arrival. I will get her out of the easy chair and to the kitchen table where all can be marshaled on a flat surface and the document will be closer to the limits of her vision and less a handicap to her signature to [be] engaged with a swipe of a blue ballpoint pen. I have a crosscut shredder for the existing [e]mployment [a]greement. I need a document that will stand up to scrutiny by opposing forces right down to the last colon. I will scrub the document for any other weakness.

The court of appeals affirmed the district court decision in total. ***In re the Estate of: Irene B. Horton, Deceased***, No. A18-1477, 2019 WL 3000756 (Minn. Ct. App. 7/1/2019).

CASEY D. MARSHALL
Bassford Remele
cmarshall@bassford.com

TAX LAW

JUDICIAL LAW

Constitutional law: States' power to tax trust limited. In a unanimous decision announced by Justice Sotomayor, the Supreme Court held that North Carolina is not permitted to tax the income of a trust based solely on the trust beneficiary's presence in the state. The Court, applying tax due process principles articulated in the 1945 case *International Shoe v. Washington*, 326 US 310 (1945) (this is a different *International Shoe* case from the one assigned in most first-year Civil Procedure classes). The Court held that a beneficiary's mere presence in a state is insufficient to establish the requisite "minimum connection" between the taxpayer and the state when that beneficiary has no right to demand distributions and had no guarantee of a distribution. The Court did not hold that a beneficiary's in-state presence would never establish jurisdiction to tax. Rather, where a beneficiary has sufficient right to control, possess, enjoy, or receive trust assets, a state might satisfy the "minimum connection." The Court emphasized the narrow nature of its ruling and seemed to locate the decision in trust law and steered clear of adding to its due process jurisprudence as that jurisprudence relates to challenges to state tax regimes. ***N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.***, 139 S. Ct. 2213 (6/21/2019).

Record insufficient; parties granted additional time to support respective positions. In a dispute centered on whether gains realized by a taxpayer are subject to Minnesota corporate income tax, the Minnesota Tax Court denied the parties' cross motions for summary judgment. The court concluded that the record was insufficient to support the parties' joint stipulation and to resolve the motions. The court, however, granted the parties additional time in which to attempt to properly support their positions. The appellant, YAM Special Holdings, Inc., operates GoDaddy.com, which provides internet domain names and web hosting services. In 2011, YAM sold a portion of its interest for approximately $2 billion. YAM reported the gain to the Minnesota Department of Revenue, but YAM denies that the transaction is subject to Minnesota tax. YAM argues, instead, that the income is exempt from taxation in Minnesota because the gain is "nonbusiness income" and therefore cannot be apportioned to Minnesota because, as Minnesota statute provides, the income was "derived from a capital transaction that solely serves an investment function." The Department of Revenue argued that the transactions at issue were not "nonbusiness income" and therefore that the proceeds are subject to Minnesota tax. In its Memorandum, the court sets out several examples of disputed issues of material fact that prevent the court from granting the parties' motions. The parties have 120 days to renew their motions. ***YAM Special Holdings, Inc. v. Comm'r***, No. 9122-R, 2019 WL 2519414 (Minn. Tax 6/12/2019) (citing Minn. Stat. §290.17, subd. 6 (2018)).

Enbridge Energy; commissioner ordered to increase value of EELP's pipeline. In an opinion spanning over 50 pages and addressing a dispute spanning multiple years, the Minnesota Tax Court ordered the commissioner to increase the system unit-value of Enbridge Energy's pipeline operating system, as of 1/2/2015, to $7,347,862,000 (from $7,129,548,100) and to increase the 2015 Minnesota apportionable value to $1,628,329,000 (from $1,556,965,700).

Similarly, the commissioner was ordered to increase the 2016 value to $8,144,171,700 (from $7,950,754,500) and to increase the 2016 Minnesota apportionable value to $1,734,982,000 (from $1,684,893,200). For both tax years, the commissioner must also reapportion the value accordingly among the affected counties. ***Enbridge Energy, Ltd. P'ship, v. Comm'r***, No. 8858-R, 2019 WL 2853133 (Minn. Tax 6/25/2019).

■ **Consolidated property tax refund claims denied as untimely.** A New Hope taxpayer communicated by telephone with the Department of Revenue in approximately 1996 and was told she did not qualify for any property tax refund. About 20 years later, the taxpayer learned that the information she received may have been incorrect. The taxpayer corresponded further with the department, and she was informed that she had missed the statutory filing deadline for most of the property tax refund claims she hoped to receive. The taxpayer then filed 19 property tax refund claims. The taxpayer argued that she was not treated fairly by the Department and therefore should be entitled to the refunds. The commissioner denied the claims as untimely, and the taxpayer appealed. The tax court noted that a court may not extend a statutory time limit specified by the Legislature, but construed the self-represented taxpayer's argument as one of equitable estoppel: in other words, the court interpreted the taxpayer as arguing that "the Department's allegedly erroneous 1996 advice equitably estops the Commissioner from *enforcing* the statutory deadlines." Since equitable estoppel against a government agency requires a showing of malfeasance (not just negligence or mere inadvertence), the equitable estoppel claim failed. Crediting the taxpayer's recollection of the erroneous advice, as the court must do for purposes of summary judgment, the erroneous advice was not sufficiently wrongful to satisfy the equitable estoppel standard, and the commissioner was entitled to summary judgment. ***Carol N. Halonen, v. Comm'r***, No. 9274-R, 2019 WL 2932260 (Minn. Tax 7/2/2019).

■ **Self-employment tax: Author's brand is her business.** In a case sure to reverberate with YouTube stars everywhere, the tax court held that a successful author's brand was part of her trade or business and, as a result, all of the income from her publishing contracts was derived from her trade or business of being a writer and was subject to self-employment tax. Karin Slaughter is a popular American crime novelist. She has sold over 35 million copies of her 37+ novels, which are published in upwards of 30 languages. In the tax years at issue, Slaughter earned substantial royalty income pursuant to several publishing contracts. Like many authors, Slaughter did not spend all her time writing, but also spent time and money on building her personal brand. Slaughter's contracts with publishing companies reflected this duality: The publishers contract for the rights to print, publish, distribute, sell, and license the works and manuscripts written, but they also secure the right to use her name and likeness in advertising, promotion, and publicity for the contracted works. The contracts also contain various noncompete clauses and an exclusive option for the respective publishers to negotiate the contract for petitioner's next works. Slaughter hired a CPA to help her prepare her taxes. The CPA concluded that any amount paid to petitioner for the use of her name and likeness was "investment income," i.e., payment for an intangible asset beyond that of her trade or business as an author, and therefore not subject to employment tax. The Service took the position that all of Slaughter's income was subject to self-employment tax. After summarizing the parties' positions, the court concluded that Slaughter's brand was part of her trade or business. The court reasoned that "trade or business" is to be construed broadly. Examining all of the facts, it found that her trade or business included her brand since she was engaged in developing her brand with continuity and regularity for the primary purpose of income and profit. Slaughter, however, was not liable for accuracy-related penalties. ***Slaughter v. Comm'r***, 117 T.C.M. (CCH) 1323 (T.C. 2019).

■ **Individual income tax: No limitations period where taxpayer fraudulently understates income.** The tax court affirmed the commissioner's deficiency finding and upheld significant penalties where a dentist fraudulently understated his taxable income by $366,185 in one tax year and $380,124 in another. The taxpayer, a dentist working in Queens (New York), did not maintain separate records for his personal and business banking accounts. The taxpayer claimed he did not know much about business, and that he instead relied on his bookkeeper (who had no training in tax or accounting) and his CPA (to whom he did not provide accurate records) to file his returns. The taxpayer also claimed that he did not think he was making much money in the tax years at issue. The tax court found this and other aspects of the taxpayer's testimony incredible. The court pointed to the taxpayer's deliberate steps to conceal assets and income, including transferring title of the building in which the dental practice was operated to a shell corporation once he understood he was being investigated. The taxpayer also frequently wrote large checks to himself on his bank account, held those checks for a few days, and then used a check-cashing service to convert the checks to cash. An employee testified as to her understanding that the purpose in doing this was to artificially reduce the bank account balance that would be visible to his creditors. The tax court recited these and numerous other steps the taxpayer took to conceal income.

Section 6501(a) generally requires the IRS to assess a tax within three years

after the filing of a return. The period of limitations is extended to six years where the taxpayer omits from gross income an amount "in excess of 25 percent of the amount of gross income stated in the return." Sec. 6501(e)(1)(A)(i). Because the notices of deficiency in this case were issued more than seven years after the period of limitations began to run, the taxpayer argued the Service was barred from pursuing the notices. However, where a taxpayer has filed "a false or fraudulent return with the intent to evade tax," there is no period of limitations, and the tax "may be assessed… at any time." IRC 6501(c)(1).

The Service has the burden of establishing fraud for civil fraud penalty, which must be proven by clear and convincing evidence. IRC 7454(a); Rule 142(b). Two elements are required: (1) an underpayment and (2) at least some portion of the underpayment for each year was due to fraud. The court focused its analysis on the second element since the taxpayer conceded the underpayment.

Fraud, for these purposes, means intentional wrongdoing designed to evade tax believed to be owing. Because fraud can rarely be proven by direct evidence, the factfinder is permitted to rely on circumstantial evidence to establish fraud. The court discussed the "badges of fraud" that are often referenced to establish fraudulent intent. These "badges" include but are not limited to: (1) understating income, (2) keeping inadequate records, (3) giving implausible or inconsistent explanations of behavior, (4) concealing income or assets, (5) failing to cooperate with tax authorities, (6) engaging in illegal activities, (7) supplying incomplete or misleading information to a tax return preparer, (8) providing testimony that lacks credibility, (9) filing false documents (including false tax returns), (10) failing to file tax returns, and (11) dealing in cash.

In this case, the court noted that while three of the badges were inapposite—i.e., the taxpayer did not engage in illegal activities, did not himself deal extensively in cash, and did not fail to file returns—the court concluded that "the other eight badges of fraud overwhelmingly demonstrate that Dr. Kohan acted with fraudulent intent for both tax years at issue." The taxpayer (and his spouse) were liable for the tax deficiencies they had conceded and Dr. Kohan was liable for section 6663 civil fraud penalties for both years. ***Shahram Kohan and Yonina Kohan v. Comm'r***, T.C.M. (RIA) 2019-085 (T.C. 2019).

ADMINISTRATIVE ACTION

■ **Guidance published on private college and university "endowment tax."** Treasury released long-awaited guidance intended to clarify the impact of the so-called endowment tax included in the Tax Cuts and Jobs Act of 2017. The law imposes a 1.4 percent excise tax on net investment income at certain private colleges and universities. Colleges with fewer than 500 tuition-paying students and assets of at least $500,000 per student are not required to pay the excise tax. Note that those assets which are used directly in carrying out the institution's exempt purpose are not included in the $500,000 per student calculation—the tax is designed to impact only colleges and universities with significant assets held in endowments. Estimates vary, but commentators suggest only about 30 of the nation's private college and universities will be subject to the tax. (Grinnell College in Iowa is likely to be impacted, but it is unlikely that any Minnesota private college or university will be subject to the tax.) New information in the guidance provides information on how to calculate the number of students an institution has, and how to determine whether a particular item of income is net investment income. For example, the guidance provides that, using the federal rules governing private foundations, student loan interest and rental income would be included as taxable investment income for colleges and universities under the endowment tax. This suggests that rental income that colleges receive from students in residence halls is not currently included in income related to a school's educational missions. These are proposed, not final, regulations, and the comment period will expire 90 days from the July 3 publication date. 84 FR 31795, ***Guidance on the Determination of the Section 4968 Excise Tax Applicable to Certain Private Colleges and Universities*** (REG-106877-18).

■ **Private letter ruling: Tax-exempt status not permitted for organization serving private interests.** Organizations that are organized and operated exclusively for charitable, religious, or educational purposes are permitted to be exempt from federal income taxation under Sec. 501(c)(3). However, if any of an organization's earnings inure to the benefit of any private shareholder or individual, the organization is not entitled to the exemption. Reg. §1.501(c)(3)-1(a)(1) (explaining exempt organizations must be operated exclusively for exempt purposes). To qualify for the exemption, then, the organization must serve a public rather than a private interest and must not be operated for the benefit of designated individuals. In this private letter ruling, the IRS denied exempt status under Code Sec. 501(c)(3) to an organization created to host a fundraiser to offset the living expenses of five siblings whose parents died within one year of each other. In the PLR, the IRS determined that the purpose of the organization was to benefit five designated individuals, rather than the general public. Since the organization was operated to serve private rather than public purposes, its application for exempt status was denied. ***PLR 2019-23026.***

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


SPENCER

Lisa Spencer was elected President of the Minnesota Chapter of the American Academy of Matrimonial Lawyers. Spencer is a shareholder at Henson Efron practicing family law.


MALDONADO

Lariss Maldonado has been appointed co-chair of the Minnesota Hispanic Bar Association's Judicial Endorsements Committee by the MHBA board of directors. Maldonado is an attorney at Stinson LLP.


NOVACHECK

Ann Novacheck has joined Nilan Johnson Lewis, expanding its nonprofit and foundation practice as a shareholder within the corporate & transactional services group. Novacheck has over 30 years of experience.

Pa Houa Vue recently joined the firm of Morrison Sund PLLC as an associate attorney after practicing three years with her previous firm. She will continue to focus her practice on corporate and transactional matters.


SEBO SAVICA

Courtney Sebo Savica has joined Wendland Utz, Ltd as a senior attorney focusing on litigation, estate planning, and probate.

Leah Indrelie and Matthew Goldfine have joined Bernick Lifson, PA as associate attorneys. Indrelie has joined the commercial litigation group and will be representing firm clients in all facets of commercial litigation. Goldfine will be practicing in the areas of landlord/tenant services and commercial collections. Both Indrelie and Goldfine are graduates of William Mitchell College of Law.

Matthew R. Veenstra has joined Saul Ewing Arnstein & Lehr as an associate. Veenstra assists clients with commercial litigation matters, including shareholder disputes and disputes involving contracts.


WILLIAMS

Stuart Williams, a litigation attorney with Henson & Efron, PA, has been elected chair of the Minnesota Client Security Board. The board administers the Client Security Fund, which was established by the Minnesota Supreme Court to aid parties who suffer a loss because of dishonest conduct by a lawyer. Williams was also appointed by Gov. Walz to a third four-year term as a public member of the Minnesota Board of Pharmacy. Williams continues to serve as a public member of the Minnesota Board of Medical Practice.


BAGCHI

Shauro Bagchi has been appointed to serve as co-chair of Maslon LLP's business & securities practice group. In this capacity, Bagchi joins co-chair Marty Rosenbaum to help shape the strategy and direction of the practice group, with particular attention to client service, attorney training and development, and competitive effectiveness.


HARTNEY

Tyler Hartney has joined Meagher & Geer PLLP as an associate attorney in the firm's mass tort/toxic tort and products liability practice groups.


GOGGINS

Gov. Walz appointed Patrick Goggins as district court judge in Minnesota's 1st Judicial District. Goggins will be replacing Hon. Martha Simonett and will be chambered at Le Center in Le Sueur County. Goggins is a partner at Wornson Goggins law firm in New Prague.


ENGELKING

Gov. Walz appointed Matthew Engelking as district court judge in Minnesota's 7th Judicial District. Engelking will be replacing Hon. Frederick L. Grunke and will be chambered at St. Cloud in Stearns County. Engelking is a senior attorney in the Stearns County Attorney's Office.

Adina Florea has joined Fafinski Mark & Johnson, PA as an associate in its litigation and appellate practice groups. Florea's practice will focus on clients in a variety of litigation contexts, including matters in commercial litigation. Florea is also a Certified Information Privacy Professional/United States (CIPP/US).


IBTESAM

Rayeed M. Wendt Ibtesam has joined Yost & Baill ias an associate attorney. He will be lead attorney for the firm's auto subrogation practice.

In Memoriam

DR. RONALD L. MCGINNIS of Lakeville passed away in June 2019 at the age of 82. He was an attorney and professor.

THE HON. TAMMI FREDRICKSON of Coon Rapids passed away June 3, 2019 at the age of 53. Appointed as a judge in the 10th Judicial District by Gov. Tim Pawlenty in 2006, Fredrickson served her community until her death. She is a former city attorney for Coon Rapids.

DANIEL HOMSTAD of Apple Valley died on May 28, 2019 at the age of 51. He worked as a public defender and county prosecutor. He had started his own firm in 2016.

Former U.S. Attorney **JEROME G. ARNOLD** died on June 6, 2019 at age 78. He was still hearing cases as a workers' compensation judge until a week before his death. President Ronald Reagan appointed Arnold as U. S. attorney for Minnesota in 1986, and he continued serving under President George H.W. Bush until 1991.

SIDNEY MAX SCHWARTZFIELD died May 19, 2019 at age 93. He retired in 1979 from his law practice and enjoyed his retirement years in both Minneapolis and San Diego, CA.

Classified Ads

For more information about placing classified ads visit: www.mnbenchbar.com/classifieds

ATTORNEY WANTED

ASK LLP, a nationally recognized law firm involved in major commercial bankruptcy cases throughout the U.S., is looking for an associate attorney with at least two years' experience. We value excellent academic credentials, writing and negotiation skills and ability to manage a large case load. We expect impeccable references and a strong work ethic. Prior bankruptcy law experience a plus. This is a unique opportunity to gain national bankruptcy and litigation experience. Our attorneys are given front line experience and the opportunity to interact with the top bankruptcy professionals both in court and at major bankruptcy conferences. We provide excellent benefits, opportunity for travel, and continuing education. Please send resume and cover letter along with salary expectations to: wpansegrau@askllp.com.

▲▲▲▲▲

CORPORATE Attorney – Securities. Larkin Hoffman, one of the largest full-service business law firms in Bloomington Minnesota, is seeking a highly motivated associate with four plus years of experience to join our Corporate team. Candidates should have a background in business transactions and mergers and acquisitions, with experience in counseling privately-held businesses with respect to federal and state securities laws and exemptions from registration, private placement offerings, Regulation D offerings, solicitation safe harbors and Regulation A+ crowdfunding as well as traditional financing transactions. We are looking for an attorney with outstanding academic credentials, drafting skills, communications skills, a dedication to client service and a commitment to excellence in the practice of law. Candidates with a book of business is preferred. Larkin Hoffman offers a collegial and energetic work environment with attorneys who are recognized leaders in their areas of practice. We are motivated to attract and retain talented and diverse attorneys into our growing firm and are committed to the training and professional development of our attorneys. Working at Larkin Hoffman has the benefit of being located in a prime office location outside the downtown core at Normandale Lake Office Park for easy access and complimentary parking. If you are interested in joining our team, please send your resume and cover letter to: hr@larkinhoffman.com.

▲▲▲▲▲

DUNLAP & SEEGER, PA, a 24-attorney full-service law firm located in Rochester, Minnesota, is seeking a commercial litigation attorney with five plus years of experience. Candidates should have commercial litigation experience, strong academic credentials, excellent writing skills and the ability to build client relationships. Please send your resume and cover letter to: Dunlap & Seeger, PA, P.O. Box 549, Rochester, Minnesota 55903, or email to info@dunlaplaw.com.

▲▲▲▲▲

DUNLAP & SEEGER, PA, a 24-attorney full-service law firm located in Rochester, Minnesota, is seeking associates. Candidates should have strong academic credentials, excellent writing skills and the ability to build client relationships. Please send your resume and cover letter to: Dunlap & Seeger, PA, P.O. Box 549, Rochester, Minnesota 55903, or email to info@dunlaplaw.com.

▲▲▲▲▲

MINNESOTA Continuing Legal Education, a nationally recognized, award-winning CLE organization, is seeking candidates for the position of program attorney. Program attorneys are responsible for designing, coordinating and evaluating continuing legal education seminars utilizing a variety of delivery methods. They collaborate with attorneys and other professionals to develop, manage and market continuing legal education seminars and products. Visit: https://www.minncle.org/Employment.aspx for complete posting. Application deadline: August 15, 2019.

▲▲▲▲▲

MUNICIPAL LAW Attorney – Eckberg Lammers, PC represents cities and townships in civil municipal and prosecution law. We also represent financial institutions, businesses and individuals in several other areas of the law such as Banking and Finance, Commercial and Residential Real Estate, and litigation matters. Description of position: We are seeking to hire an experienced civil municipal attorney to represent existing clients as well as grow this area of law. This position includes legal work assisting municipalities with economic development and redevelopment transactions, plus civil municipal counsel to the Firm's existing clients in both Minnesota and Wisconsin. Preferred Qualifications: Seven or more years of legal experience and a long-term interest in representing municipalities. Existing experience in real estate and transaction-based practice areas helpful. Minnesota and Wisconsin licensure preferred but all applicants will be considered. In addition to the experience identified, candidates should have excellent interpersonal, analytical, communication and writing skills along with strong academic credentials. For consideration, please send resume, transcript, and a writing sample to: Kim Pepera, Eckberg Lammers, PC 1809 Northwestern Ave, Stillwater, MN 55082 or kpepera@eckberglammers.com

▲▲▲▲▲

TRANSACTIONAL Associate: Johnson, Killen & Seiler, PA, Duluth, northern Minnesota's oldest law firm, seeks an associate attorney with up to two years' experience in transactional law, including business, banking, benefits, probate, trusts, or estates. Must have an interest in making a legal career in northern

Minnesota. Please send a cover letter, resume', law school transcript, and writing sample to: Joseph J. Roby, Jr., jroby@duluthlaw.com, or to 230 West Superior Street, Suite 800, Duluth, MN 55802.

▲▲▲▲▲

WELL-ESTABLISHED southeastern Minnesota law firm seeks attorney. Opening is for civil litigation and the firm will provide on the job training, if necessary. Resumes can be sent via email to: courtnotices@the-trial-lawyers.com or to Price Law at 59 West Third Street, Winona, MN 55987 to the attention of JP Plachecki.

▲▲▲▲▲

WITTWER SYVERSON, PA is seeking an attorney with one to five years' experience litigating workers' compensation cases. We represent major health care providers as intervening parties in the workers' compensation forum. Qualified candidates must be highly motivated by a high volume fast-paced practice in a collegial atmosphere. Legal/medical research and proficient communication skills required. Please send confidential cover letter, resume and salary expectations to: Kwittwer@wittwerlaw.com or jsyverson@wittwerlaw.com.

OFFICE SPACE

BRAINERD Office sharing arrangement with three other attorneys in historic downtown building serving clients since 1978. Near Courthouse and Judicial Center. Private office and secretarial work station. Rent $600 per month plus share of overhead. 510 Maple Street. Call Glen or Jim at: (218) 829-1719.

▲▲▲▲▲

DOWNTOWN Minneapolis offices available for sublease with a seasoned, independent group of attorneys in the Class A rated Canadian Pacific Plaza. Offices with 20th floor views, furnished if needed. Cubicle available for support staff. Convenient location close to all courthouses and light rail. Full amenities in both our suite and building. Better than an executive suite! Please contact Melissa at (612) 573-3660 for further information. https://minneapolis.craigslist.org/hnp/off/6939496139.html

IDEAL FOR SOLO attorney, or business person tired of downtown prices and congestion. Vaulted ceiling, bright lighting with great view to large pond and nature right outside walkout deck. Includes: reception, utilities, hi-speed internet, secretarial, two conference rooms, kitchenette, drive up parking. Furnishings include: executive desk, credenza, two eight-foot book shelves, floor lamp, glass top meeting table and four matching leather chairs, art work (optional), 10 mins to courthouse, ideal location Highway 100 and 55. Immediate availability. Call Ron: (612) 210-7557 for appointment and info.

▲▲▲▲▲

OFFICE AVAILABLE in the heart of the business district in downtown Minneapolis; just steps from the Government Center and light rail. Located in space shared with a strong and vibrant law practice in Minnesota since 1952 with a wide array of practice areas. Systems in place, including phones, internet, copy room, supplies, receptionist, etc. Shared assistant time also available. Lean overhead, established office processes, and connection to deep-rooted firm make this a great place to grow and sustain a practice! Class A building. Call or email Deborah with inquiries: (612) 294-2178 or deborah@speeterjohnson.com.

▲▲▲▲▲

ROBERT ESPESET / ESPE LAW has office space available for lease at 4525 Allendale Drive in White Bear Lake. All-inclusive pricing (rent, internet, copier, scanner, fax, receptionist, utilities, conference room and parking). Contact Nichole at: (651) 426-9980 or nichole@espelaw.com.

▲▲▲▲▲

SOUTHEAST METRO (494 & Hwy 52) — 1 or 2 offices each 208 sq feet in town office building with established attorneys. Includes broadband internet, Wi-Fi, copier, PDF scanner, kitchenette, conference room, and free parking. Call (612) 275-5969.

▲▲▲▲▲

ANOKA OFFICE space across from courthouse, starting at $300/month including utilities and parking. Referrals available. Tim Theisen: (763) 421-0965 or tim@theisenlaw.com.

POSITION AVAILABLE

OUTREACH Coordinator. Lawyers Concerned for Lawyers (LCL) seeks an outreach coordinator. This individual will enhance and manage LCL's robust educational efforts. See: www.mnlcl.org for details.

PROFESSIONAL SERVICES

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

▲▲▲▲▲

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

▲▲▲▲▲

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

▲▲▲▲▲

PARLIAMENTARIAN, meeting facilitator. "We go where angels fear to tread.™" Thomas Gmeinder, PRP, CPP-T: (651) 291-2685. THOM@gmeinder.name.

▲▲▲▲▲

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

MSBA

The Minnesota State Bar Association is committed to increasing access to legal representation for low and moderate income Minnesotans and connecting them with attorneys interested in meeting their legal needs.

Working with the HCBA and RCBA, we developed two initiatives:

Low Fee Family Law Project

The Statewide Low Fee Family Law Project began in September 2017, in collaboration with the Hennepin County Bar Association (HCBA) Lawyer Referral and Information Service (LRIS). The MSBA helped expand the LRIS Low Fee Family Law Project to cover clients statewide and increase the number of participating attorneys. Clients serviced through the panel agree to pay a modest fee ($30) for the referral, a $500 retainer and $55/hour for service by a project attorney. Since the expanded initiative began, we have increased the number of participating attorneys and service to clients.

For more information and to participate, please see the LRIS website at *hcbalawyerreferral.org* or contact Dana Miner at *dminer@mnbars.org.*

Minnesota Unbundled Law Project

The Minnesota Unbundled Law Project represents the first collaboration between the MSBA, HCBA and Ramsey County Bar Association (RCBA) to expand service to modest income Minnesotans. Attorneys participating in the project agree to offer unbundled, or limited scope, representation to referrals through the project website – *www.mnunbundled.org.* Since the website went live in October 2018, over 250 individuals have sought referrals through the project from throughout the state and in a variety of legal matters from family to housing to employment. Attorneys set their own fee structures, but agree to participate in required training and maintain malpractice insurance.

If you are interested in joining or learning more, please contact Steve Marchese at *smarchese@mnbars.org.*

THANK YOU TO THE ATTORNEYS WHO SIGNED UP TO PARTICIPATE AND TAKE REFERRALS FROM THE LRIS:

Stephen Abanise
Betsy Anding
Carl Arnold
Ahmed Bachelani
Luke Bellville
Nicole Billings
William Fehn
Diane Gerth
Roderick Hale
Christopher Heuther
Lisa Hill
Kevin Hollman
Taylor Kaspar
Douglas Kluver
Matthew Ludt
Carlotta Navarette
Alicia Norby
Kellie Pantekoek
Shawn Reinke
Vanessa Rybicka
Laurie Savran
Kristafer Skjervold
Perry Smith
Jon Stanek
Rachel Stein
Jessica Wassenberg
Deja Weber
Robert Weiner

THANK YOU TO THE ATTORNEYS WHO HAVE PARTICIPATED IN THE PROJECT THUS FAR:

Carl Arnold
Tim Baland
Jeff Brown
Mark Carpenter
Karin Ciano
Emily Cooper
Tygve Egge
Philip Freeman
Mimi Hasselbalch
Audra Holbeck
Corwin Kruse
Ryan Langsev
Jennifer Lewis Kannegieter
Kari Losee
Zachary Marsh
Marie Martin
Inti Martinez-Aleman
Kellie McConahay
Danielle Mercurio
John Meyer
Kirsten Mickelson
Jared Nusbaum
Ronald Ousky
Amanda Porter
Amy Rotering
Nathan Snyder
Rachael Stein
Cassandra Suchomel
Tayva Taylor
Derek Thooft
Claire Tralle
Thomas Witt

THE REVIEWS ARE IN...

Minnesota CLE's Season Pass Program Is a Winner!

Now 50% off for lawyers in their first three years of practice!

"A Season Pass makes the cost of earning your CLEs so much more affordable. I highly recommend you give it a try.
Catherine Krisik; DeWitt, Ross & Stevens; Minneapolis

The purchase of an Unlimited Season Pass has obvious advantages in saving money, but also provides a lot of flexibility to fit CLEs into your schedule conveniently.
John Hottinger; Hottinger Consulting LLC; Saint Paul

The Season Pass is an excellent value that makes far more sense than paying for CLEs on an individual basis. I have been very satisfied and feel it's the only way to go.
John J. Leunig; The Law Office of John J. Leunig; Minneapolis

The Season Pass almost pays for itself just on the publications' discount alone.
Bryan W. Huber; Law Offices of Bryan W. Huber; Chaska

Best value in any state, convenient and useful, like having a really good friend who understands you in your pocket!"
Bonnie Humphrey; Humphrey Law Office, P.C.; Minot, North Dakota

94% of Season Passholders indicate that they are satisfied with their Season Pass purchase.

and

97% would recommend a Season Pass to a colleague!

FIND THE PASS THAT WORKS BEST FOR YOU!	LIMITED	UNLIMITED	WEBCAST	SUPER
Live In-Person Seminars and Video Replays	Up to 10*	Unlimited	50% off	Unlimited
Live Webcast Seminars	50% off	50% off	Unlimited	Unlimited
On-Demand Seminars	50% off	50% off	50% off	Included
Minnesota CLE Publications	50% off	50% off	50% off	50% off
Online Library	50% off	50% off	50% off	Included
Skills Training	50% off	50% off	50% off	Included
$50 or $100 Discount for Current or Previous Season Passholders**	Yes	Yes	Yes	Yes
My CLE Credit Tracks Minnesota CLE courses attended.	Yes	Yes	Yes	Yes

** Purchases of webcast, on-demand, and skills training programs at 50% off do not count against the 10-course limit of the Limited Season Pass.*
*** Depends on previous Pass expiration date and purchase date of new Pass.*

Minnesota Continuing Legal Education

Minnesota CLE has a Season Pass with your name on it. Visit www.minncle.org today to activate your Season Pass!

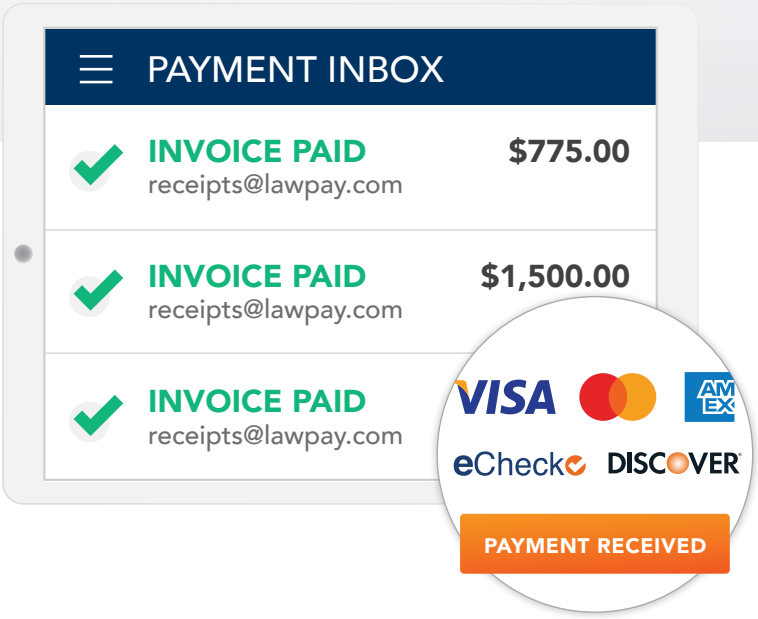
LAWPAY IS FIVE STAR!

★★★★★

In our firm, it's actually fun to do our billings and get paid. I send our bills out first thing in the morning and more than half are paid by lunchtime. **LawPay makes my day!**

– Cheryl Ischy, Legal Administrator
Austin, Texas

Trusted by more than 35,000 firms and
Rated **'5-Star'** on ★ Trustpilot



LawPay®
AN AFFINIPAY SOLUTION

THE #1 PAYMENT SOLUTION FOR LAW FIRMS

Getting paid should be the easiest part of your job, and with LawPay, it is! However you run your firm, LawPay's flexible, easy-to-use system can work for you. Designed specifically for the legal industry, your earned/unearned fees are properly separated and your IOLTA is always protected against third-party debiting. Give your firm, and your clients, the benefit of easy online payments with LawPay.

888-515-9108 or visit **lawpay.com/mnbar**

Now accept check payments online at **0% and only $2 per transaction!**

MSBA
Proud Member Benefit Provider