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MAY/JUNE 2022

BENCH + BAR of Minnesota

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

WHAT'S YOUR WALK-UP SONG?

BY JENNIFER THOMPSON

JENNIFER THOMPSON is a founding partner of the Edina construction law firm TTLO Law. She has also served on the Minnesota Lawyers Mutual Insurance Company board of directors since 2019.

Some might recall that my first President's Page started with a baseball metaphor—"ducks on the pond." It was about feeling excitement for the work of the coming bar year. Now, as we head toward the bottom of the ninth, I want to end with one final nod to baseball: the walk-up song. For those unfamiliar, a walk-up song is music played as a hitter walks up to bat, or a pitcher takes the mound, that serves to introduce the player. The roots of walk-up music are said to lie with a 1970s organist for the Chicago White Sox who played a few bars of organ music for whoever was coming up to bat. Today, players select their own walk-up music and spend significant time planning and selecting the same.

Walk-up music tells a story and sets a stage. Maybe you've seen the movie *Major League,* where the bullpen door opens and Charlie Sheen's character, pitcher Ricky Vaughn, saunters out while the song "Wild Thing" blares over the public address system and the entire stadium erupts. "Wild Thing" charges up the crowd, which of course comes at a pivotal moment in the game, and the song describes Vaughn's fiery, untamed approach to most things. It is the gold standard in walk-up music.

> EARLIER THIS BAR YEAR, I ASKED SOME OF THE MSBA LEADERSHIP TO THINK ABOUT WHAT THEY WOULD CHOOSE FOR THEIR WALK-UP SONG. IT WAS MEANT TO BE A FUN TEAM-BUILDING EXERCISE AND AN ICEBREAKER FOR THE NEW BAR YEAR.

While not professional baseball players, we are professionals. We may not command stadiums with our batting prowess and acrobatic fielding, but we certainly command courtrooms and boardrooms and Zoom rooms. We provide bright and thoughtful counsel. We use our charisma and skills to set the tone in a court appearance, a phone call, or an email. Sometimes we knock it out of the park when everything is on the line or zing a fastball straight down the middle, paralyzing our opponent. Our work often energizes and excites those around us. It only seems right, therefore, that lawyers, too, should have their own walk-up music.

Earlier this bar year, I asked some of the MSBA leadership to think about what they would choose for their walk-up song. It was meant to be a fun team-building exercise and an icebreaker for the new bar year. It proved to be both of these things—and more than that. Remember, walk-up music sets a stage and tells a story, and the songs that were selected did just that. For instance, one of the songs set the stage for the "Respect" (Aretha Franklin) that lawyers work hard to earn. One of the songs told the story of the recognition of being so good at one's job, they were actually "Bad" (Michael Jackson). Another song shared how the trials and tribulations of our intense work, even when so difficult, make us "Stronger" (Kelly Clarkson). Some songs shared stories about our life and work outside of law, some shared details about the work we hoped to accomplish as lawyers, and some shared motivations and experiences that led us to become lawyers. Some songs were in English, while others were not. The songs were rich and diverse just like the rich and diverse backgrounds, goals, and work styles that we all bring to the profession. The playlist of these walk-up songs can be found here: ***https://bit.ly/3yyamiz*** I encourage you to give it a listen and, if you're inclined, I'd love to hear from you about what your walk-up song would be when the door opens and you walk into the room. I'd be happy to make additions to the playlist.

As this bar year comes to an end, I am thinking about the story that's been told and the stage that is set for the next year. When I walked up to the plate last July, I imagined it was to the building guitar riff of "Thunderstruck" by AC/DC. As I approach my last at-bat, I'm changing my walk-up song to Montell Jordan's "This is How We Do It." And while these days it is customary for baseball players to select their own walk-up music, I'll exercise a last moment of presidential prerogative by suggesting a song to welcome the MSBA's next president, Paul Peterson, to the plate: "Here Comes the Boom" (E-Force, Sub Zero Project). Now that's a good way to end a season.▲

MSBA Minnesota State Bar Association

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Minnesota State Bar Association is a diverse and dynamic community that you can rely on to enhance your career. The strength of MSBA lies in the power of member attorneys working together: to learn, to share, to teach, and to advocate for the interests of the profession at the courts and the Legislature.

Your Profession. Your Practice. Your Partner.

www.mnbar.org/renew

BETTER TOGETHER:
Changes coming to our Sections

When the MSBA, Hennepin County Bar, and Ramsey County Bar Associations combined staff teams in 2019, one of the goals was to identify and increase collaboration where it made sense, while maintaining strong identities and value propositions for each organization.

With a total of 60 Sections between the three bar associations, there was significant overlap in each group's membership, a duplication of efforts by volunteer members and staff, and a lack of programming distinction between many of the duplicative Sections. All of this created confusion for members regarding the offerings as well as in matters of Section registration and sign-up. After much consideration and conversation, the MSBA Council, HCBA Board, and RCBA Board each voted to approve a unified Sections model beginning with the 2022-2023 bar year. This change brings together the best of each bar's programming and combines substantive practice area Sections where there was overlap.

We are excited to move forward with a unified set of 40 Sections that are stronger and provide gains for all three organizations. These changes are designed to better serve you and support a wider variety of interests and practice areas. As part of this change, some of the Sections you may have been part of will now have slightly different names, due to the combinations. You'll also notice on your Section signup/renewal that groups are no longer prefixed with MSBA, HCBA, RCBA, and now just display the Section's name (the MSBA Criminal Law Section, for example, will now just be the Criminal Law Section). Note: The respective New Lawyers Sections will remain as they were.

As you go through your membership renewal process for 2022-2023, be sure to select any of the new Sections you want to be a part of going forward. Note that individual Section dues apply. If you have any questions on the offerings, please reach out to Section Services Director Kara Haro ***(kharo@mnbars.org).***▲

Welcome, new lawyers!

Five back-to-back bar admission ceremonies were held on Friday, May 6, at the Minnesota Supreme Court Courtroom at the Capitol. Sponsored by the Minnesota Supreme Court and the MSBA, the ceremonies welcomed Minnesota's newest attorneys, who passed the February 2022 bar exam. Chief Justice Lorie Skjerven Gildea presided over the sessions, joined by the associate justices, to administer the oath and officially welcome these new attorneys to the profession. During the program, MSBA President Jennifer Thompson (inset) spoke on the community of the MSBA—attorneys working together and providing a voice for the profession. Before and after each of the sessions, the new members of the bar had the opportunity to sign their names in the Roll of Attorneys book, a practice that dates back to 1858. (This practice was reinstated in 2018 after a 35-year break; attorneys admitted between 1983 and 2018 can make an appointment at the Minnesota State Law Library to sign the roll book for their year.) See more swearing-in photos at our online gallery: ***www.mnbar.org/bench-bar/columns/2022/05/09/Welcome-new-lawyers*** ▲








Photos from 2021 Tournament

2022 RCBF Charity Golf Tournament

We hope you can join us for a fun day on the course in support of the Ramsey County Bar Foundation (RCBF). Don't miss this great opportunity to play at Town and Country Club, the oldest club in Minnesota and the 5th oldest club in the United States.

Monday, July 25, 2022

Town and Country Club
300 N Mississippi River Blvd, St. Paul

11:30 a.m.	Registration & lunch
1:00 p.m.	Shotgun Start
5:00 p.m.	Dinner

RCBF
RAMSEY COUNTY BAR FOUNDATION

Proceeds from this event go to the Ramsey County Bar Foundation, which provides grants to legal-related nonprofits working to provide access to justice in our community.

Registration Fees:
Early Bird Registration
$225 per person

After June 24
$250 per person

Foursome Rate
$200 per person
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Register at:
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Or consider sponsoring our event

2022 MSBA CONVENTION

MSBA Minnesota State Bar Association

The 2022 Convention Is Live In Person and Online!

Choose the format that works for you!

- Attend in person at the Minnesota CLE Conference Center

- OR -

- View the presentations online

FEATURED SPEAKERS

ANNASTACIA BELLADONNA-CARRERA

Annastacia Belladonna-Carrera is the Executive Director of Common Cause Minnesota, a nonpartisan, grassroots organization dedicated to upholding the core values of American democracy.

CHIEF JUSTICE LORIE SKJERVEN GILDEA

Chief Justice Gildea has served as the Chief Justice of the Minnesota Supreme Court since 2010. Prior to that, she served as an Associate Justice from 2006 to 2010 and as a district judge in the Fourth Judicial District from 2005 to 2006.

JIM JESSE

Jim Jesse is the founder of Rock N Roll Law, and his passion is spreading knowledge of music law through his entertaining presentations. He is the author of *The Music Copyright Manual* (2016).

Stay for the Twins Game!

MINNESOTA TWINS VS. CLEVELAND GUARDIANS

WEDNESDAY JUNE 22

6:40 P.M.

TARGET FIELD – RIGHT FIELD PORCH

Individual tickets are free and will be made available on a first-come, first-served basis to those who attend the MSBA Convention in person on June 22. Ticket includes $10 in food and beverage credit.

WEDNESDAY, JUNE 22

8:00 – 8:30 a.m.

CHECK-IN & CONTINENTAL BREAKFAST

- OR -

JOIN ONLINE

8:30 – 8:45 a.m.

ANNOUNCEMENTS

8:45 – 9:00 a.m.

President's Welcome

– *Jennifer A. Thompson, MSBA President*
Thompson Lee-O'Halloran PLLC
Edina

9:00 – 9:45 a.m.

The Future of Voting Rights in the U.S. with a Spotlight on Minnesota

– *Annastacia Belladonna-Carrera*
Common Cause Minnesota
Saint Paul

9:45 – 10:00 a.m. BREAK

10:00 – 10:45 a.m.

Rock and Roll Law: The Top 10 Music Copyright Infringement Cases of All Time

– *Jim Jesse*
Rock N Roll Law
Lawrence, Kansas

10:45 – 11:00 a.m. BREAK

11:00 a.m. – 12:00 p.m.

2022 U.S. Supreme Court Update and Insights

– *Hannah M. Leiendecker*
Faegre Drinker Biddle & Reath LLP
Minneapolis

– *Aaron D. Van Oort*
Faegre Drinker Biddle & Reath LLP
Minneapolis

Welcome Back to the Bar!

12:00 – 1:15 p.m.

LUNCH PRESENTATIONS

(lunch provided to all in-person attendees)

- 12:15 – 12:45 p.m.

  State of the Judiciary Address

  – *Chief Justice Lorie Skjerven Gildea*
  Minnesota Supreme Court
  Saint Paul

- 12:45 – 1:00 p.m.

  Passing of the Gavel Ceremony

  – *Jennifer A. Thompson*
  MSBA President

  – *Paul D. Peterson*
  Incoming MSBA President

1:15 – 2:00 p.m.

2 ED TALKS

- **Is TurnSignl a Turning Point?**

  – *Jazz A. Hampton*
  TurnSignl
  Minneapolis

- **Up, Up and Away!**

  – *Richard D. Snyder*
  Fredrikson & Byron, P.A.
  Minneapolis

2:00 – 2:10 p.m. BREAK

2:10 – 2:40 p.m.

Minnesota's Demographic Trends in 2022 and Beyond

– *Eric Guthrie*
Minnesota State Demographic Center
Saint Paul

2:40 – 2:50 p.m. BREAK

2:50 – 3:35 p.m.

2022 Minnesota Appellate Case Law Update

– *Justice Natalie E. Hudson*
Minnesota Supreme Court; Saint Paul

– *Justice Gordon L. Moore III*
Minnesota Supreme Court; Saint Paul

– *Judge Diane B. Bratvold*
Minnesota Court of Appeals; Saint Paul

– *Judge Theodora K. Gaitas*
Minnesota Court of Appeals; Saint Paul

3:35 – 3:45 p.m. BREAK

3:45 – 5:00 p.m.

3 ED TALKS

- **So You Want to Run for Office…**

  – *Athena Hollins*
  Minnesota State Representative
  District 66B, Saint Paul

- **Building Systems That Lead to Thriving**

  – *Tisidra Jones*
  Strong and Starlike Consulting, Inc.
  Minneapolis

- **Behind the Music: Minnesota's Best Music Stories**

  – *Jim Jesse*
  Rock N Roll Law
  Lawrence, Kansas

5:00 p.m.

PRE-GAME PRESIDENT'S PICNIC

Sponsored by

6:40 p.m.

TWINS GAME
TARGET FIELD – RIGHT FIELD PORCH

THURSDAY, JUNE 23

8:30 – 9:00 a.m.

CONTINENTAL BREAKFAST - OR - JOIN ONLINE

9:00 – 9:45 a.m.

New Technology for the Hybrid Law Office

– *Todd C. Scott*
Minnesota Lawyers Mutual Insurance Company
Minneapolis

9:45 – 10:00 a.m. BREAK

10:00 – 11:00 a.m.

Understanding Legal Ethics and Risk Management Principles: A Scenario-Based Approach

1.0 ethics credit applied for

– *Eric T. Cooperstein*
Law Office of Eric T. Cooperstein, PLLC
Minneapolis

– *Charles E. Lundberg*
Lundberg Legal Ethics
Roseville

11:00 – 11:15 a.m. BREAK

11:15 a.m. – 12:15 p.m.

Elimination of Bias: Rethinking the Bar Exam

1.0 elimination of bias credit applied for

– *Eura Chang, Class of 2022*
University of Minnesota Law School
Minneapolis

– *Carol Chomsky*
University of Minnesota Law School
Minneapolis

– *Emily K. Eschweiler*
Minnesota Board of Law Examiners
Saint Paul

– *Leanne R. Fuith*
Mitchell Hamline School of Law
Saint Paul

– *Judge Juan G. Hoyos*
Fourth Judicial District
Minneapolis

– *Jennifer A. Thompson*
Thompson Lee-O'Halloran PLLC
Edina

Register online today at www.msbaconvention.org

TAXES, PROFESSIONAL DEBT, CHILD SUPPORT, AND LAWYER DISCIPLINE

BY SUSAN HUMISTON susan.humiston@courts.state.mn.us

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

As I write this column, income taxes are due. Did you file on time? If not, did you request an extension of the date on which to file? If you're also an employer, have you kept up with your quarterly employer withholding filing and payment obligations, both federal and state? If not, there may be professional responsibility issues to address in addition to issues raised by taxing authorities.

Since 1972, failure to file individual income tax returns is professional misconduct for lawyers warranting, in many instances, public discipline.[1] Although there is no specific ethics rule on this issue, the court has held:

> [W]e hold that the failure to file income tax returns represents a violation of a lawyer's oath of office and further represents a violation of the [Rules of Professional Conduct], and that it will be the subject of disciplinary proceedings.... Lawyers in this state should henceforth understand clearly that the type of violation under consideration here is the proper subject of consideration by the Board of Professional Responsibility and this court, and that disciplinary proceedings are mandatory in all cases of failure to file income tax returns.[2]

Neither a criminal conviction nor a specific finding of willfulness is required. Rule 10(d), Rules on Lawyers Professional Responsibility (RLPR), authorizes a Lawyers Board panel to find probable cause for public discipline on a motion (that is, without any input from the respondent attorney) for certain serious misconduct, including "repeated non-filing of personal income tax returns." So it remains incumbent on all licensed attorneys to timely file their federal and state individual income tax returns or face potential disciplinary consequences.

The Court is generally less focused on failure to pay individual taxes (as long as timely filings are made), as the Court does not want the discipline system to serve as a collection unit of taxing authorities. Lawyers who serve as employers should take very seriously, however, their obligation to make required filings *and* timely pay employer withholdings.

In 1987, the Court extended its holding concerning failure to file tax returns to include employer withholding returns.[3] Additionally, the Court subsequently made clear that failure to remit withholdings is treated more seriously than failing to pay one's own taxes, as the lawyer "essentially converts to his own use temporarily money belonging to his employees which he withheld from paychecks and placed in his business checking account."[4]

Timely filing all tax returns and promptly paying employee withholdings are important professional obligations that should not be taken lightly.

Professional debt

It is also misconduct for lawyers to fail to pay professionally incurred debt, such as court-reporter charges, interpretation services, or expert fees, to name a few. Where a judgment has been obtained against a lawyer, failure or refusal to pay the debt is considered conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d), MRPC.[5] The existence of a judgment is key, however. Absent a prior judgment, the Office will not investigate such debt—again so as not to become a collection agency. The Office also does not generally get involved in non-law, non-tax-related financial obligations (with one exception, noted below).

Maintenance or child support obligations

Rule 30, Rules on Lawyers Professional Responsibility (RLPR), provides for an administrative suspension of an attorney's license upon notice that a lawyer is not in compliance with maintenance or child support obligations, where the attorney has not entered into and become compliant with a payment plan for such obligations. This does not happen frequently, but it does occur, and suspension is mandatory upon the necessary showing. This is in accord with legislation that mandates suspension of other professional licenses for the same conduct.

Conclusion

Failure to promptly file tax returns, pay law-related judgments, and remain current with family support obligations can all lead to discipline (or an administrative suspension), as such conduct is viewed as contrary to professional obligations. While neither the Court nor this Office is interested in being overly involved in the financial lives of lawyers, there are certain financial obligations so closely tied to respect for the law and the administration of justice that discipline may be warranted. ▲

NOTES

[1] *In re Bunker*, 199 N.W.2d 629 (Minn. 1972).

[2] *Id.* at 631-32. In general, the court has held that failure to file a tax return can constitute criminal conduct under Rule 8.4(b), Minnesota Rules of Professional Conduct (MRPC), or conduct prejudicial to the proper administration of justice under Rule 8.4(d), MRPC.

[3] *In re Johnson*, 414 N.W.2d 199 (Minn. 1987).

[4] *In re Gurstel*, 540 N.W.2d 838, 841 (Minn. 1995).

[5] *In re Stanbury,* 561 N.W.2d 507, 510 (Minn. 1997).

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SMISHING ATTACKS *AND THE HUMAN ELEMENT*

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

I was recently interviewed by KARE-11[1] on the alarming prevalence of smishing attacks. Smishing attacks (also known as SMS phishing) are phishing messages sent via text. I'm sure most of us have been the unhappy recipients of these texts in the past year. The messages tell us that we have missed an important delivery, won (or could win!) some grand prize, or need to re-enter some personal information for an online account. The possibilities are endless when it comes to message content, but the goal of the scammer remains essentially the same—to get you to interact with their message, click a link, and/or provide personal information. But why has smishing in particular become so popular as of late?

In part because there's money in it. In the words of one FCC alert, "According to the Federal Trade Commission's annual Consumer Sentinel Network report, consumers lost approximately $86 million in 2020 as a result of scam texts."[2] But the timing is very opportune as well. Phishing in general has been on the rise, especially throughout the pandemic—which created a perfect storm for rampant phishing activity, from targeting stimulus money to exploiting remote work vulnerabilities to mounting covid-19 vaccine scams.

Remote working conditions have also meant a greater number of employees using their smartphones for work as well as other devices, making their phones readily available targets.[3] Hackers have certainly attempted, often successfully, to capitalize on the changing circumstances that many of us have encountered over the course of the past two years. But even as the pandemic situation begins to improve, it would seem that smishing attacks continue to proliferate. Even though a phishing email may be more dangerous in terms of clicking a link, smishing nevertheless remains a convenient method to hack into the most vulnerable aspect of cybersecurity—the human element.

Smishing texts are easy to produce and to send, and there are several ways to make them seem more legitimate. As discussed in my KARE-11 interview, it is a frequent occurrence to see a scam text or call originating from your own phone number. There is a greater likelihood of paying attention to a text sent from a familiar number and individuals will be less inclined to block their own number (although that may be recommended in some instances). The sheer number of smishing texts sent increases the likelihood that a recipient will mistakenly believe at least one has originated from a verified source. On the flipside, the problem is so ubiquitous that another issue has arisen—people ignoring "real" messages or blocking actual contacts.

To avoid becoming a victim of a smishing scam, the same tried-and-true rules apply. Act cautiously when opening messages, avoid clicking on links, and verify sources before providing any personal information. It may also be appropriate to file a complaint with the FTC, contact your wireless provider, or block any suspicious numbers (even your own number). If you happen to give away any personal information or click any suspicious links, it is advisable to keep an eye on your accounts, change passwords, and monitor for any signs of identity theft.

Preventive measures are always going to be your best bet with any cybersecurity threat. Slowing down and taking the time to verify sources is a critical step that's easy to overlook. In regard to communication methods, be sure you make the effort to establish with clients how they can expect to be contacted and what kinds of information will be requested over email or text. It should be clearly stated that information like Social Security numbers or account credentials will never be requested digitally.

The human element is a pivotal component in determining the success or failure of a cyberattack. This reality is even more pronounced when it comes to phishing attacks that seek to trick people into interacting and willingly giving valuable information. Work-from-home policies should continue to be revisited and revised as hybrid situations become the norm for many. Education, reporting, and vigilance in keeping up with best practices all go a long way toward maintaining your personal and professional cybersecurity posture. ▲

NOTES

[1] *https://www.kare11.com/article/news/local/breaking-the-news/spam-and-scam-texts-are-on-the-rise/89-19adb26a-eb49-48ef-ab79-072dfcdb92b4*

[2] *https://www.fcc.gov/covid-19-text-scams*

[3] *https://www.theguardian.com/business/2021/sep/19/smishing-the-rising-threat-for-business-owners-that-brings-scams-to-smartphones*

Mitchell Hamline welcomes three new faculty members

Jason Marisam
associate professor of law

Marisam has been an assistant attorney general in the solicitor general's division of the Minnesota attorney general's office since 2016, where he represents and defends the state of Minnesota and its agencies in constitutional, administrative, employment, and tort law cases.

Marisam says his most meaningful work was representing Minnesota's secretary of state in several court cases over how the 2020 election was administered during the pandemic. "Through this litigation, we were able to put in place measures to help ensure people could vote safely during 2020," he said.

Marisam has degrees from Princeton University and Harvard Law, where he was an editor of the law review. Before joining the attorney general's office, he worked at a firm in Boston, taught at Hamline University School of Law, and clerked for U.S. District Judge Joan Ericksen.

Kim Vu-Dinh
associate professor of law

Vu-Dinh is an assistant professor of clinical education and director of the Business Innovations Clinic at the William H. Bowen School of Law at the University of Arkansas at Little Rock. She has degrees from the University of California at Berkeley and CUNY School of Law.

Vu-Dinh's academic work has focused on finding more inclusive ways to foster economic development in underrepresented and underbanked communities. "There's so much important work law professors can do in the community to help people and share with students the opportunity to do the same," she said. "Mitchell Hamline has these opportunities in abundance."

Vu-Dinh worked in the years after Hurricane Katrina with several organizations in New Orleans to develop affordable housing and community-based commercial projects. She created an incubator called Innov-Eat Café, where a clinic she designed provides legal assistance and invites food businesses to sell their products on campus.

Forrest Tahdooahnippah
assistant professor of law

Currently a partner at the Minneapolis firm Dorsey & Whitney, Tahdooahnippah (pronounced tad-uh-nip-uh) attended Stanford University and the University of Minnesota Law School. He clerked for U.S. District Judge Ann Montgomery before joining Dorsey.

A member of the Comanche Nation of Oklahoma, Tahdooahnippah has worked on matters related to Native American law, intellectual property, and religious freedom, and hopes to grow his scholarship in those areas at Mitchell Hamline. "There are a lot of places where Native American law intersects with intellectual property and religious freedom laws. There are important deliberations that need to happen over things like cultural traditions that have existed in Native communities long before the American legal system was created."

As part of his work at Dorsey, Tahdooahnippah has served as the elected tribal attorney for the Comanche Nation of Oklahoma.

PROTECTING GIG WORKERS AND INDEPENDENT CONTRACTORS UNDER THE MHRA

BY KATHERINE ROLLINS kerollins@baillonthome.com

KATHERINE ROLLINS is a recent graduate of Mitchell Hamline School of Law and an associate attorney at Baillon Thome Jozwiak & Wanta LLP. She is passionate about protecting civil rights and represents individuals who've faced unlawful discrimination, retaliation, and harassment in the workplace and in housing.

Between 2001 and 2016, Minnesota saw a 30 percent increase in independent contractors, compared to a less than 10 percent increase in employees.[1] Nationally, in 2016, 4.9 million taxpayers reported income earned as an independent contractor as their only income.[2] That same year, the median income for a primary earner for whom independent contracting work was their primary source of income was $15,510.[3] The "gig economy" also allows workers to supplement their income through app-based work. According to Pew Research Center, 16 percent of U.S. residents have earned money from an online gig platform.[4] Approximately 4 percent of U.S. adults are currently driving for a ride-share app; delivering take-out, groceries, and packages; or performing household tasks on-call.[5]

Companies that rely on the labor of independent contractors tout the flexibility and independence those workers have, while spending millions to prevent being required to provide benefits like unemployment insurance and health care.[6] And companies are often able to evade liability for discrimination against independent contractors, as most anti-discrimination statutes only impose liability on employers who discriminate against employees.[7]

> IN *WILSON V. CFMOTO POWERSPORTS, INC.*, A SALES REPRESENTATIVE BROUGHT CLAIMS FOR EMPLOYMENT AND, IN THE ALTERNATIVE, BUSINESS DISCRIMINATION BASED ON RACE. THE COURT NOTED THE PLAINTIFF "DOES NOT NEED TO SHOW THAT HE IS AN 'EMPLOYEE' FOR THE PURPOSES OF HIS... CLAIM."

Traditionally, the "business discrimination" section of the Minnesota Human Rights Act (MHRA) has been cited by customers or businesses alleging discrimination in: insurance claims adjustment,[8] approval of a conditional use permit by a city planning commission,[9] plasma donation,[10] enforcement of Minnesota Department of Health licensing,[11] hotel accommodations,[12] foreclosure proceedings,[13] motor vehicle sales,[14] air travel,[15] awarding city contracts,[16] a joint venture agreement,[17] commercial leases,[18] contracting and provision of taxicab services,[19] and dental care.[20]

> "It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service... [t]o intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business practice."[21]

Construed liberally,[22] this section can and should be used to hold companies accountable for discrimination against their independent contractors.

Minnesota courts have only issued decisions in two cases brought by an independent contractor alleging discrimination under the business discrimination provision of the MHRA.

In *Wilson v. CFMOTO Powersports, Inc.*,[23] a sales representative brought claims for employment and, in the alternative, business discrimination based on race. Denying the defendant's motion to dismiss for failure to state a claim, the court noted the plaintiff "does not need to show that he is an 'employee' for the purposes of his §363A.17(3) claim."[24]

Hanson v. Friends of Minn. Sinfonia[25] provides the most substantive analysis of an independent contractor's claim of discrimination. There, a professional musician was terminated while on medical leave for an injury. After rejecting her claims of employment discrimination, the court considered whether the business discrimination section could provide a remedy. Without explicitly deciding whether the section applied to independent contractors, the court affirmed summary judgment in favor of the defendant because the plaintiff failed to show she was disabled under the MHRA.[26]

Despite the limited guidance, analysis of other business discrimination claims, and anti-discrimination laws more generally, can provide a framework for evaluating an independent contractor's claims of discrimination.

Independent contractors suing for discrimination in the performance of a contract must be a party to the contract,[27] but those denied a contract or whose business has been refused for discriminatory reasons will also have standing to sue.[28]

To survive summary judgment, plaintiffs can offer either direct evidence of discrimination or sufficient indirect evidence of discrimination through the *McDonnell Douglas* burden-shifting analysis.[29] Direct evidence shows "a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse action.[30] Under the *McDonnell Douglas* analysis, a plaintiff can establish a *prima facie* case of discrimination by showing their membership in a protected class, qualifications to perform or receive the anticipated or contracted services, adverse action by the defendant, and a causal connection between the adverse action and the protected status.[31] The burden then shifts to the defendant to show a "legitimate business purpose" for the alleged refusal or discrimination.[32] If the defendant meets their burden, a plaintiff can still succeed on their claim by showing defendant's "legitimate business purpose" was pretextual.[33]

If successful, a plaintiff is entitled to compensatory damages and may be awarded attorneys' fees and costs and punitive damages.[34]

The statutory language and limited case law support the application of this section to claims of discrimination brought by independent contractors. However, given the lack of case law, a number of open questions remain:

- What constitutes a "legitimate business purpose"?
- Are disparate impact claims viable under the business discrimination provision?
- Does the MHRA extend protection to independent contractors who report violations of the business discrimination provision?[35]

Independent contractors should not be excepted from the protections of anti-discrimination law. "[T]o secure for persons in this state, freedom from discrimination[,]" plaintiffs' attorneys must be willing to test the application of this provision in the courts. ▲

NOTES

[1] Katherine Lim, Alicia Miller, Max Risch & Eleanor Wilking, *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data*, U.S. Dep't Treas.: Internal Rev. Serv. 58, table 2 (July 2019), *https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf?msclkid=626ac70ca88611ecb127bc6da64b27e6*.

[2] *Id.* at 37, fig. 5.

[3] *Id.* at 61, table 5.

[4] Monica Anderson, Colleen McClain, Michelle Faverio & Risa Gelles-Watnick, *The State of Gig Work in 2021*, Pew Rsch. Ctr. (12/8/2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/.

[5] *Id.*

[6] Kate Conger, *It's a Ballot Fight for Survival for Gig Companies Like Uber*, N.Y. Times (10/23/2020).

[7] *See Midwest Sports Marketing, Inc. et al. v. Hillerich & Bradsby of Canada, Ltd. et al.*, 552 N.W.2d 254, 260-62 (Minn. Ct. App. 1996); Minn. Stat. §363A.03, subdiv. 15.

[8] *See Darmer v. State Farm Fire & Casualty Co.*, No. 17-4309 (JRT/KMM), 2020 WL 514261, at *13 (D. Minn. 1/31/2020).

[9] *See Dewalt v. City of Brooklyn Park*, No. 15-cv-4355 (PAM/KMM), 2017 WL 2178310, at *8 (D. Minn. 5/17/2017).

[10] *See Scott v. CSL Plasma, Inc.*, 151 F. Supp. 3d 961, 962 (D. Minn. 2015).

[11] *See Unity Healthcare, Inc. v. County of Hennepin*, No. 14-cv-114 JNE/JJK, 2015 WL 2097668, at *1 (D. Minn. 5/5/2015).

[12] *See Childs v. Extended Stay of Am. Hotels*, No. 10-3781 (SRN/JJK), 2012 WL 2126845, at *3 (D. Minn. 6/12/2012).

[13] *See Allen v. Bank of Am. Corp.*, No. 10-4205 (MJD/JSM), 2011 WL 2437087, at *2 (D. Minn. 5/9/2011).

[14] *See Hunter v. Ford Motor Co.*, No. 08-4980 (PJS/JSM), 2010 WL 3385225, at *12 (D. Minn. 7/28/2010).

[15] *See Shqeirat v. U.S. Airways Group, Inc.*, 515 F. Supp. 2d 984, 1006 (D. Minn. 2007).

[16] *See Borom et al. v. City of St. Paul*, 184 N.W.2d 595, 596 (Minn. 1971); *Boone v. PCL Constr. Servs., Inc.*, No. 05-24 (MJDJGL), 2005 WL 1843354, at *1 (D. Minn. 8/2/2005).

[17] *See NDN Drywall, Inc. v. Custom Drywall, Inc.*, No. Civ. 04-CV-4706DSDSRN, 2005 WL 1324056 (D. Minn. 5/4/2005).

[18] *See D.B. Indy, L.L.C. v. Talisman Brookdale LLC*, No. Civ. 04-1023 (PAM/JS), 2004 WL 1630976, at *1 (D. Minn. 7/20/2004).

[19] *See Gold Star Taxi & Transportation Serv. v. Mall of Am. Co.*, 987 F. Supp. 741, 748 (D. Minn. 1997).

[20] *See State by Beaulieu v. Clausen*, 491 N.W.2d 662, 663 (Minn. Ct. App. 1992).

[21] Minn. Stat. § 363A.17, subdiv. 3.

[22] *See* Minn. Stat. § 363A.04.

[23] No. 15-3192 (JRT/JJK), 2016 WL 912182 (D. Minn. 3/7/2016).

[24] *Id.* at *7.

[25] A03-1061, 2004 WL 1244229 (Minn. Ct. App. 6/8/2004).

[26] *Id.* at *5.

[27] *Krueger v. Zeman Construction Co.*, 781 N.W.2d 858, 863 (Minn. 2010).

[28] *See id.* at 864 ("Thus, the statute only provides a cause of action to the person who is denied a contract... because of [] discrimination."); *Scott v. CSL Plasma, Inc.*, 151 F. Supp. 3d 961, 967 (D. Minn. 2015) ("[Plaintiff's] allegation of a 'refusal to do business with' or 'refusal to contract with' discrimination claim 'constitutes sufficient injury for the law to provide a remedy.'").

[29] *Scott*, 151 F. Supp. 3d at 967.

[30] *Torgerson v. City of Rochester*, 643 F.3d 1031, 1044 (8th Cir. 2011).

[31] *See Darmer v. State Farm Fire & Casualty Co.*, – F. Supp. 3d –, 2020 WL 514261, at * 13 (D. Minn. 1/31/2020).

[32] *Id.*; Minn. Stat. § 363A.17, subdiv. 3.

[33] *Darmer*, 2020 WL 514261, at *13.

[34] Minn. Stat. § 363A.29, subdiv. 4; *see also Ginther v. Enzuri Group, LLC*, A19-1303, 2020 WL 5888024, at *2 (Minn. Ct. App. 10/5/2020).

[35] *See* Minn. Stat. § 363A.15.

Q: If you weren't in the legal profession, what would you like to be doing for a living?

Ian Taylor
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Ian Taylor is an assistant county attorney with the Ramsey County Attorney's Office. He graduated from the University of Minnesota Law School.

I consider it an honor to be in the legal profession. However, if I used my law degree in a non-traditional way, I would be a community educator. I would use my legal knowledge and experience to help people understand legal issues that are happening in current events.

The law shapes every aspect of life that we experience, but it is often intimidating for non-lawyers. Usually, lawsuits and criminal prosecutions are broken down in the media by commentators. They typically focus their perspectives on potential outcomes of a legal decision or the logic behind a trial strategy. A good commentator can educate and entertain, but education is not their primary motivation.

As a community educator, my primary motivation would be to guide the average person. My goal would be to empower people by demystifying important legal issues. I could use diverse media formats for my work, including YouTube. YouTube has become a global town square for engaging content on any topic. YouTube content creators often monetize their content, which can support their lifestyle and increase the quality of their productions. Many people (including attorneys) use the tool to build their personal brands or offer an alternative to corporate media coverage of news subjects.

There are other venues for community education as well. I used the website Anchor to create a podcast entitled "Breathless" following the murder of George Floyd. The podcast followed what was happening in the Derek Chauvin prosecution by the Minnesota Attorney General's Office. It was fascinating how many friends and family members found it helpful and entertaining. The experience showed me how exciting it was to use the law in a creative and empowering way. I believe that the traditional way the law has been used to help society can evolve, as long as attorneys are open to innovation.

Brenda Denton
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Brenda Denton, a graduate of Hamline School of Law, has been a practicing attorney since 1999. She began her career as a staff attorney with Legal Aid of Northwestern MN and later opened a solo law practice in Duluth, MN in 2007, where she practices in the areas of family law, housing (landlord/tenant) law, and basic estate planning.

Unfortunately, I'd have to give the typical lawyer response: "Well, that depends..." My interests outside the practice of law are primarily about having an active role in my community—working toward having a positive impact on the place in which I work, live, and play.

But what else would I like to do? I would love to have a small florist shop—how rare is it to actually go into a florist these days and pick your own plants/flowers? Let's add to that a tea room and warm tropical sitting space where one can read, drink, and enjoy flora and locally made crafts; especially in the middle of winter! Or who wouldn't want their own small-town bar for the locals and tourists to enjoy craft beers/cocktails, with a piano available to play and sing songs. Or maybe I would be an international travel guide/writer, living life on the run, assisting others in experiencing the wonders of our planet.

Or would it be to take charge of a community development group, encouraging and providing resources for small business entrepreneurs, connecting them with local support systems in order to help make their vision come to life? Or would it be to own a property development company (which I've just started with my spouse) and continue to purchase, update, renovate, and bring to life weathered or neglected properties in order to provide an affordable and safe home for families? Or how fun would it be to have a hobby farm and let kids/families come by to hang out with goats, geese/ducks, pigs, horses, alpacas, etc.? You get my drift, right?

One guarantee from the training I received in law school and from the day-to-day practice of law for over 20 years is that my skill set can be applied in a wide

variety of vocations. Lessons learned and experiences gained from practicing law have set me up for success should I decide to pursue something else. I guess until I make the millions of dollars I would need in order to pursue some of my other passions, I will continue to practice law. Being the best practitioner that I can for my clients is the passion I am able to keep alive for now. I'll simply keep dreaming about everything else.

Ray Beckel
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Ray Beckel is a long-time Southern Minnesota Regional Legal Services (SMRLS) attorney who has practiced entirely within legal aid organizations for the last 38 years. He is a native of the Mankato area and a graduate of Concordia College, Moorhead and the University of North Dakota School of Law.

I would have greatly enjoyed teaching at either the high school or college level. Earlier in my career working for legal aid organizations (SMRLS in Mankato, MMLA in Little Falls, and the Legal Aid Society of Omaha out of Norfolk, Nebraska), I was the attorney assigned to provide services for clients and communities with funding provided under Title III of the Older Americans Act. Starting in the mid-1980s, and less and less as the years went on, this type of funding (at least as utilized by the legal aid programs I worked for) required that the organizations do community legal education work.

For much of my time as the legal aid elder law attorney, I was my office's point person for community legal education for the elderly. In some years I did more than 75 community legal education programs per year on various topics of hopeful relevance like powers of attorney, health care directives, guardianship, and conservatorship, planning for long-term care, and dealing with debt. I have a background as a college actor (Concordia, Moorhead) and truly enjoyed making the presentations.

In more recent times, with adult children who are very politically aware, a spouse who works in public schools, and the seeming disintegration of democracy playing out in governments across the U.S., I have become painfully aware of the inadequacies of civic education in the schools. All of this leads to the thought that I would really have enjoyed being a teacher.

Artika Tyner
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Dr. Artika R. Tyner is a passionate educator, author, sought-after speaker, and advocate for justice.

I would be a school superintendent. I am passionate about education and committed to creating a better future for our children. For example, I would work diligently to address Minnesota's reading crisis. One in four American children is not reading at grade level. It is almost like we created this rule of four: If you are not reading at grade level by fourth grade, you are four times more likely to drop out of school. Based on research, we also know that if you drop out of school you are three and a half times more likely to be arrested in your lifetime. This relates directly to my work as an attorney, because there are far too many instances when my clients learned how to read in prison.

Over 80 percent of young people incarcerated in juvenile detention centers are illiterate. When we look at the adult population, we also see similarities. In addition, the vast majority of adults who are incarcerated cannot read. When we think about this, there is a real opportunity to create change. We can eradicate those pipelines into the tangled web of mass incarceration and create new pipelines to success for all students.

This is a call to action that led to the creation of our nonprofit, Planting People Growing Justice Leadership Institute. We created the nonprofit to accomplish two key goals: First, we seek to promote literacy in order to address Minnesota's reading crisis and literacy gap. We are creating new pathways for young people to reach their full potential. Second, we promote diversity in books since you are more likely to find a book with a black bear or black dog on the cover than see a cover with a Black girl or Black boy. It is important to create both mirrors and windows for children—mirrors for young people of color to see a positive reflection of themselves in the books that they read, because we know representation matters. It increases reading motivation and inspires youth to find joy in reading, hence helping to bridge that literacy gap. By creating diverse books, we create windows for all children to see each other more clearly and embrace their cultural differences and help to build cultural bridges.

My nonprofit work has compelled me to seek more opportunities to work in the educational arena. Our children are our future and I seek to invest in their lives by helping them to learn, grow, and lead.

THE SHIELD OF JUDICIAL IMMUNITY PROTECTS RECEIVERS

BY GEORGE H. SINGER ✉ *SINGERG@BALLARDSPAHR.COM*

GEORGE H. SINGER is a partner at the Minneapolis office of Ballard Spahr LLP and practices in the areas of corporate finance and insolvency, where he represents lenders, private equity firms, and corporate clients in transactional matters as well as bankruptcy and receivership proceedings. Mr. Singer is a fellow in the American College of Bankruptcy.

The United States Supreme Court declined to second-guess whether court-appointed receivers are shielded from liability for their actions due to derived judicial immunity, leaving intact a recent decision from the Court of Appeals for the 3rd Circuit that granted a receiver broad protection. The Supreme Court in *Trinh v. Fineman*[1] denied plaintiff's petition for review, which urged the rejection of the principle of absolute immunity for receivers. The 3rd Circuit determined that court-appointed receivers are entitled to quasi-judicial immunity when they act within the court's authority and, therefore, are not subject to suit under the common law.[2]

Background

A receiver manages and disposes of corporate assets that are part of the receivership under court supervision pursuant to a legal proceeding typically instituted by a creditor.[3] A receiver therefore functions as an "arm of the court" concerning the property of the receivership. In other words, a receiver is an officer of the court subject only to the court's direction and control and is a custodian whose functions are generally limited to the care, management, protection, operation and, potentially, the disposition of the property committed to its charge.

The receiver owes its allegiance to the court that appointed the receiver. A receiver is therefore accorded immunity from claims for its actions or omissions,[4] with the rationale being that the receiver is exercising judicially authorized functions and therefore should be entitled to immunity of the same degree typically accorded to judges under the doctrine of judicial immunity.[5] However, the extent and scope of a receiver's immunity is frequently challenged.

Facts

The plaintiff in *Trinh v. Fineman* was an owner of a beauty school business in dissolution. The plaintiff filed a complaint in the United States District Court for the Eastern District of Pennsylvania against a receiver appointed by the Court of Common Pleas of Philadelphia County in a matter relating to acts and omissions with respect to the dissolution of the plaintiff's business. The plaintiff alleged that the receiver was abusing his court-appointed power, failed to provide a proper accounting and committed theft, and asserted claims for deprivation of rights under 42 U.S.C. §1983, which allows individuals to sue government employees "under color of state law" for violations.

The plaintiff argued that receivers should not qualify for absolute immunity as their functions (which traditionally include investigating property ownership, running businesses, and selling assets) are not activities normally performed by judges. And none are constrained by the protections of the judicial process for which immunity is extended. The plaintiff urged the courts to limit the scope of judicial immunity to those matters related to core decision-making functions. These arguments were viewed as too narrow and rejected.

Rulings

The district court dismissed the suit and held that court-appointed receivers should be afforded quasi-judicial immunity. The 3rd Circuit affirmed the district court's decision, noting the Supreme Court has recognized certain common law immunities afforded to officials, and opined that when the nature of an official's function is akin to that of a judge, such as hearing examiners, administrative law judges, prosecutors and grand jurors, quasi-judicial immunity should apply to that role.

Since a court-appointed receiver functions as an "arm of the court," the policies underlying judicial immunity are equally applicable. The court found that "a receiver 'has no powers except such as are conferred upon him by the order of his appointment and the course and practice of that court.'"[6] Accordingly, the 3rd Circuit joined the 1st, 2nd, 5th, 6th, 9th, 10th and 11th Circuits in holding that court-appointed receivers are entitled to immunity *when acting within the authority provided by the court*.[7] Judicial immunity is intended to "protect the independence of judicial decision-making and to ensure that important decisions are made without fear of personal liability or harassment by vexatious actions" asserted by disappointed litigants.[8] Because a receiver is an officer of the appointing court, it is similarly clothed with immunity when carrying out the duties of its office.[9] Any other result could prevent the proper functioning of the judicial system.

Implications

The ruling of the Court of the Appeals for 3rd Circuit in *Trinh v. Fineman* is consistent with the developed law in Minnesota with respect to judicial immunity. In *Mike v. Perfetti*,[10] it was clear that the court-appointed receiver did not carry out his responsibilities. The receiver failed to take control of certain monetary accounts from which withdrawals were made by a spouse who was a chronic gambler during the course of the receivership and the receiver was unable to account for certain funds. The receiver was sued for breach of fiduciary duty, but the court dismissed the case based on derivative judicial immunity. The determination can be made by examining the act itself, the capacity under which the act was performed, and whether it was a judicial act.

The Minnesota Court of Appeals affirmed. While acknowledging that a receiver's judicial immunity would not extend to theft (which would be outside the scope of the receiver's duties), the court noted that the facts of the complaint related only to the receiver's mismanagement of assets and other facts that related to his duties as receiver. The court concluded that "[w]hile we do not condone [the receiver's] conduct and violation of his fiduciary duty here, we must conclude that he is entitled to judicial immunity from suit for all conduct within the scope of his appointment as a receiver."[11]

The granting of judicial immunity has been extended by courts to others, such as receivers, who perform functions closely associated with the judicial process. That immunity is derivative and applies to both federal and state law claims. Immunity can be overcome only in limited circumstances when the receiver is not acting within the judicial role and authority conferred upon the receiver by the court. A premium is therefore placed on drafting the order appointing the receiver broadly at the outset of the receivership proceeding and obtaining judicial approval for actions undertaken during the course of the receivership in order to avoid claims and, perhaps more importantly, liability. ▲

NOTES

[1] __ U.S. __, Case No. 21-981, *cert. denied* (3/21/2022).

[2] *Trinh v. Fineman,* 9 F.4th 235 (3d Cir. 2021).

[3] *See generally,* Minn. Stat. §§576.21-576.53.

[4] *See* Minn. Stat. §576.28 (providing that a receiver is entitled to all defenses and immunities provided at common law for acts or omissions within the scope of the receiver's appointment). The Minnesota statute appears to be a conscious determination by the drafters to leave the scope of a receiver's immunity to the resolution of the court with the determination to be made on a case-by-case basis. *See* Wilson Freyermuth (Reporter) & John Freese, Reporter's Background Memorandum on Receiver's Immunity to Drafting Committee (3/3/2014), Draft Model Act on the Appointment and Powers of Real Estate Receivers, at 6.

[5] *Mike v. Perfetti*, 1996 WL 33102 (Minn. Ct. App. 1996) (unpublished).

[6] *Trinh v. Fineman*, 9 F.4th 235 (3d Cir. 2021) (quoting *Atlantic Trading Co. v. Chapman*, 208 U.S. 360, 371 (1908)).

[7] *Id.* (citing *Kermit Constr. Corp. v. Banco Credito YAhorro Ponceno*, 547 F.2d 1, 2-3 (1st Cir. 1976); *Bradford Audio Corp. v. Pious*, 392 F.2d 67, 72-73 (2d Cir. 1968); *Davis v. Bayless*, 70 F.3d 367, 373 (5th Cir. 1995); *Smith v. Martin*, 542 F.2d 688, 690-91 (6th Cir. 1976); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1303 (9th Cir. 1989); *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 802 (10th Cir. 1978); *Prop. Mgmt. & Invs., Inc. v. Lewis*, 752 599, 603-04 (11th Cir. 1985)).

[8] *Capital Terrace, Inc. v. Shannon & Luchs, Inc.,* 564 A.2d 49, 51 (D.C. Ct. App. 1989). *Accord Butz v. Economou*, 438 U.S. 478, 512 (1978) ("immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation"); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for acts committed within their judicial jurisdiction").

[9] *See generally, Barton v. Barbour*, 104 U.S. 126 (1881).

[10] 1996 WL 33102 (Minn. Ct. App. 1996) (unpublished).

[11] *Id. Accord Gior G.P., Inc. v. Waterfront Square Reef, LLC,* 202 A.3d 845, 856 (Pa. Commw. Ct. 2019) (noting that "[a] receiver is considered an officer and agent of the court that appoints the receiver"); *Perry Center, Inc. v. Heitkamp,* 576 N.W.2d 505 (N.D. 1998).

HIDING IN PLAIN SIGHT

Vicarious trauma is just part of the job for many lawyers. Time to talk—and do—more about it.

BY NATALIE NETZEL ✉ *natalie.netzel@mitchellhamline.edu*

I hid crumpled on the floor sobbing, thinking I was out of view and alone at the courthouse during the lunch break from a termination of parental rights trial. When the bailiff knocked on the interview room door to hand me a roll of toilet paper, I realized I just might not be okay.

Before the break, there had been a brutal cross-examination by a merciless county attorney. My client was a woman I wholeheartedly believed to be a loving and capable mother, undeserving of her seemingly inevitable fate. Despite making every objection under the sun, I couldn't protect her. I tried and I failed. We left the courtroom. With perfect composure, I comforted and consoled my distraught client. I attended to the shell-shocked law student and ensured he was okay. I told them I would meet up with them again in just a minute. A full-blown panic attack followed. I questioned whether I deserved to have a law degree at all, let alone to be a law professor or to enjoy the life I had because of it. After a few minutes I dusted myself off, went for lunch with my client and student, and dove back into the afternoon of trial like nothing had happened. Other than that bailiff, no one had a clue.

When we, as lawyers, work with those in crisis, we knowingly put ourselves in the lives of others in moments where they are experiencing tremendous trauma. An utterly foreseeable and completely normal consequence of this is that we experience the negative effects of vicarious trauma. Despite the prevalence of vicarious trauma and its many adverse effects in our profession, lawyers rarely discuss it openly. When we shy away from these conversations, we make things worse for ourselves and each other.

Trauma defined

In order to have a meaningful discussion of vicarious trauma in the legal profession, we must ground ourselves in a shared understanding of trauma. On its most basic level, trauma occurs when an event happens to an individual, or group, over which they have no control, with little power to change their circumstances, and which overwhelms their ability to cope. When these events happen without the buffer of supportive connections, or the availability of healing practices, brain chemistry changes in fundamental ways. Understood through this lens, trauma is more than just a past event. Instead, trauma is the imprint that such an experience leaves on the mind, brain, and body.[1] Trauma can evoke feelings of fear, terror, helplessness, hopelessness, and despair. These intense feelings are often subjectively experienced as a threat to one's own survival. For many of our clients, their interaction with the legal system represents an event that overwhelms their ability to cope and over which they have little if any control, and that is traumatic in and of itself.

One cannot discuss trauma without acknowledging the research into Adverse Childhood Experiences (ACEs). This groundbreaking research showed a causal connection between experiencing specific adverse events in childhood and resulting adverse health and social outcomes. Our legal system is full of people who have extensive trauma histories. The original ACEs research shows connection between a greater number of ACEs and "high-risk" behaviors (such as substance use and alcoholism) that predispose individuals to have more interaction with legal systems. More recent research also shows a connection between increased ACE scores and criminal behavior.[2]

ACEs is a useful tool to understand the types of events that can lead to poor outcomes in several areas. At the same time, it focuses primarily on discrete events that happen in the life of an individual. It is helpful to also consider the role of environment and social systems as we think about trauma. Our legal system is certainly a contributor to adverse community experiences. For example, the destruction of families through our criminal justice, child welfare, and immigration systems oppress communities and diminish their strength. Clinicians refer to a phenomenon known as the "Pair of ACEs"—that is, a trauma double-whammy consisting of both adverse childhood experiences and adverse *community* experiences. The Pair of Aces model acknowledges that trauma, and healing from trauma, are not purely individual experiences.

As this article explains and explores vicarious trauma, it is helpful to keep in mind that, just as trauma and healing from trauma are not purely individual experiences, neither are vicarious trauma and healing from vicarious trauma. Models of communal or mutual care, rather than self-care, are essential in creating institutions and systems that truly understand and work to address vicarious trauma. The legal profession needs to adopt an approach to healing from vicarious trauma that recognizes the necessity of mutual care.

What is vicarious trauma?

Trauma affects more than just the individual who experiences it. Professionals who work with individuals with trauma histories often encounter traumatic responses as if they themselves were experiencing the trauma. This is known as vicarious trauma, which refers to "harmful changes that occur in professionals' views of themselves, others, and the world, as a result of exposure to the graphic and/or traumatic material of their clients."[3]

Vicarious trauma is not just something that *might* happen to lawyers. When lawyers work with people who have experienced or are experiencing trauma, vicarious trauma is entirely normal. It is well-documented that lawyers are at an increased risk of experiencing vicarious trauma, both because of indirect exposure to the trauma of our clients and our direct work within the systems that often yield unjust results for our clients.[4] In addition, unlike many other professions in which vicarious trauma is common, the legal profession lacks concrete and

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curricular professional education about recognizing and responding to vicarious trauma, which in turn leaves lawyers particularly vulnerable to its negative effects.

Higher levels of vicarious trauma among professionals have been associated with work characteristics such as having a heavy caseload of traumatized clients, a lack of support within the work environment, and a lack of formal trauma training.[5] In our overburdened systems, many lawyers have staggering caseloads. We are a profession that discourages vulnerability and encourages a veneer of infallibility. To the extent lawyers have had any formal training on trauma, it is most often in the form of a lunchtime CLE—not the extensive substantive training on trauma we need considering the prevalence of trauma in our work. So it should come as no surprise that lawyers are more at risk to suffer negative consequences of vicarious trauma than mental health practitioners.[6]

Experiencing vicarious trauma

Innovative scholarship on "trauma stewardship" identifies 16 warning signs of trauma exposure. Specifically:

- feeling helpless and hopeless;
- a sense that one can never do enough;
- hyper-vigilance;
- diminished creativity;
- inability to embrace complexity;
- minimizing;
- chronic exhaustion or physical ailments;
- inability to listen or deliberate avoidance;
- dissociative moments;
- sense of persecution;
- guilt;
- fear;
- anger and cynicism;
- inability to empathize/numbness;
- addictions; and
- grandiosity (an inflated sense of importance related to one's work).[7]

Any and all of these warning signs interfere with an attorney's ability to do their job well. To be effective as attorneys, we need to address these experiences when they arise in our practice. At the same time, because we want to appear competent, we are under some amount of pressure not to acknowledge the existence of these experiences in our practices. In my own law practice, nonetheless, I have experienced every warning sign on the list—and if I am being honest, there are many I still confront on a weekly basis.

Vicarious trauma can show up in surprising ways, often when you least expect it. After the birth of my daughter, I finally relaxed enough to fall asleep. Despite the warning signs posted in my room, she was in my arms. An hour later, I was awoken by my husband because a social worker was at the door. I panicked and demanded he send her away. He complied, though very confused. Through my sobs, I expressed I didn't want the social worker to take my baby. I was, irrationally, convinced the social worker was at my door to remove my darling child due to our unsafe sleeping practice. In reality, of course, the social worker was not there to take my baby. She was there for a completely routine postbirth check-in. Even after I calmed down, I worried that the hospital would somehow learn of my intense, irrational emotional response and, in turn, would question my mental health and my parental capacity.

What happened that day? Vicarious trauma. I had been a part of too many child protection cases where social workers removed newborn babies from their mothers' arms in the hospital. On that day, due to my work, I associated social workers only with the removal of children. This was true even though I had no objective reason to believe my family was at any risk of being separated or that my parental ability would be scrutinized. As a white, upper-middle class, cis-gender woman with her husband present for every moment of labor, delivery, and recovery, I was already cast by social presumption as a "good" mother (a label that others, including the majority of my clients, are unjustly forced to earn). My fears at the hospital that day were grounded not in reality, but in evoking the experiences of my clients in a confusing and surprising way. Our systems discriminate. Vicarious trauma does not.

I know I am not alone in this type of experience. I have heard from a legal aid attorney who panicked when they paid rent a day late, fearing inevitable eviction and homelessness. And a medical malpractice attorney who researches hospitals in advance of vacations because, in the event they would get injured on vacation, they need to make sure there is an acceptable hospital within a few hours' drive. And a prosecutor who has a hard time letting their children play outside unsupervised because they worry their children could be assaulted or abducted.

These experiences represent more major vicarious trauma responses. Some vicarious trauma responses are more garden-variety. Alongside Miriam Itzkowitz, I have co-led a number of trainings for lawyers on developing resilient practice in the wake of vicarious trauma. We often give lawyers an opportunity to share how vicarious trauma looks for them. Using an online, real-time feedback tool that allows participants to anonymously post answers and see others' responses on virtual "post-it notes," we asked groups of attorneys and law students "What does vicarious trauma look like for you?" We also asked participants what gets in the way of their taking care of themselves, and what they need (from themselves or others) when they experience vicarious trauma.

The responses have been illuminating. Responses range from behavioral concerns ("I wake up in the middle of the night worried about my clients; I don't return my emails or calls in a timely way; I'm unable to focus; I drink too much; I avoid jail visits.") to emotional distress ("I have a short fuse with everyone over everything; I feel completely hopeless and like nothing has any meaning; I feel incompetent and inadequate; I feel like I'm going to burst into tears or yell at someone; I cry on my way home from work every day."). Many respond with rapid-fire one-word responses: *fear, anxiety, sadness, hopelessness, avoidance, overeating, exhaustion, headaches, isolation, irritation, rage, dissociating.*

Whenever I speak with lawyers about vicarious trauma, it is abundantly clear that the negative effects are endemic, and we must work together to improve our collective well-being.

Trauma-informed lawyering

One step that lawyers can take to reduce the negative effects of vicarious trauma is to adopt a trauma-informed approach to their practice. I recommend universal precautions, meaning lawyers should treat every client as if they have a trauma history. While not all clients have experienced trauma, there is little to no harm in treating people well. Most people interact with lawyers because they have an important problem they want solved or they are otherwise voluntarily or involuntarily interacting with the legal system. In most of these experiences, stress runs high, and clients experience heightened emotions. Clients with and without trauma histories will benefit from

attorneys who operate with a trauma-informed lens.

While there is no clear definition of "trauma-informed lawyering," the Substance Abuse and Mental Health Services Administration (SAMHSA) has published more general tenets of trauma-informed care. The six key principles of a trauma-informed approach are:

- safety;
- trustworthiness and transparency;
- peer support;
- collaboration and mutuality;
- empowerment;
- voice and choice; and
- recognizing cultural, historical, and gender issues.[8]

These core principles of trauma-informed care seek to ameliorate the conditions that trauma creates by intentionally ensuring that people have access to the things they didn't when the trauma occurred. Other disciplines have adopted a trauma-informed approach through the application of these principles, which are also apt for forming a trauma-informed lawyer-client relationship.

Vicarious resilience

One encouraging concept of trauma research is the idea that the experience of vicarious trauma can also lead to positive outcomes. Vicarious resilience can occur for lawyers when we are able to tap into and connect with the resilience of our clients who demonstrate capacity to overcome adversity. And post-traumatic growth can occur when people experience positive psychological change in the context of, and despite, processing traumatic pain and loss.[9]

When we engage in trauma-informed lawyering, it contributes to our client's capacity to develop resilience. When we work with resilient clients, we are often blessed with the positive effects of vicarious resilience. I have worked with a number of clients who have overcome extreme adversity and found meaning in the face of systems that cause them immense trauma.

At times when I have felt hopeless and lacked resilience, I have been able to tap into the hope of my clients. A grandmother who did not prevail in a motion for adoptive placement comes to mind. Amid her devastation, her response was "I guess God's plan for me was to suffer this loss so I can give a voice to the problem so we can change things for other people in my situation." To date, she has worked as an advocate for families, and graciously encouraged me to share her story to help others.

I earned her trust because trauma-informed principles were the bedrock of our attorney-client relationship. Her resilience has helped me to move forward, to better serve her, and to better serve others. Vicarious resilience is actually evidence that by being good to others, we can also heal ourselves as individuals and as a legal community.

Trauma and vicarious trauma in legal education

At its core, the legal profession is a helping profession. Many other helping professions take a trauma-informed approach to education, teaching students about trauma and how to minimize the negative effects of vicarious trauma. Historically, legal education has done none of these things. And, while there is an increased awareness about the problems (we have known since the late '80s, for example, that law school is associated with a decline in mental health that persists through one's legal career[10]), we have only scratched the surface in terms of solutions. From my vantage point as a law professor, I observe how legal education impedes well-being. I believe this is a root cause of our profession's historical inability to cope with the negative effects of vicarious trauma.

Historically, legal education has placed little to no emphasis on trauma or vicarious trauma. As a professor of criminal law, every week I assign my students a copious amount of reading that, at its core, is about traumas. Murders, physical and sexual assaults, burglaries—I bombard students and desensitize them. While some students recognize this during the semester, many others, perhaps, read appellate court opinions like just another episode of Law & Order: SVU, detached and removed from the traumatic content. The desensitization sets them up for failure when they begin practicing law and encounter real people experiencing trauma.

While there is movement in the right direction, legal educators do not do a sufficient job integrating trauma stewardship into our curriculum. Conversations around trauma and vicarious trauma need to start in law school, before students are too far down the path of negative consequences. It is my hope that we can normalize the experience of coping with vicarious trauma and minimize some of the shame associated with it. These same conversations are also of the utmost urgency to have with both the bench and the bar. We should not tolerate suffering in shame-induced silence due to a foreseeable hazard of our jobs.

The path forward: Mutual care and vulnerability

We cannot leave the burden of treating vicarious trauma to the individual alone. The legal community is finally having important conversations about self-care. But self-care is not always enough; it is not enough, on its own, to combat the negative effects of vicarious trauma. Merely preaching self-care, in a profession that makes little space for it, makes it a kind of unfunded mandate—one more way lawyers fall short. One more way to fail. We need to move in the direction of "mutual care." By this I mean that we need to work together to create a profession that allows and respects the time and space needed to take care of oneself. We need to celebrate healthy boundaries and stop the glorification of toughing it out.

The skills that make us good at being lawyers are, at times, skills that make the rest of our lives hard. Perhaps we want to seem unflappable and impenetrable in the courtroom. Perhaps that serves our clients well. We are excellent issue spotters. We are phenomenal critics. We are taught from day one how to "think like a lawyer." These incredible skills serve us well. At the same time, to move forward and create a healthier legal community, we must also learn how to "feel like a lawyer." One primary solution to the issues addressed in this article is among the hardest things for lawyers to do: We need to show vulnerability.

I have been emotionally harmed by the words and actions of judges and other attorneys more than any individual who has caused the harm has realized. I believe the vast majority of the harm was not intended. On my best days, I am able to remind myself that it is not personal. Like me, those judges and attorneys are people working in this legal system with immense amounts of unattended-to vicarious trauma. This framework is helpful in offering grace where my impulse is to give none. It takes a lot of imagination, though, because few people are willing to talk openly about their very real struggles with vicarious trauma.

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And I get it. As I wrote this article, I grappled with the following questions: What am I doing putting this in print? Will I still be taken seriously as a lawyer and law professor if I share my struggles? Are my struggles even real and worth sharing—especially considering that I do not have an extreme trauma history and my vicarious trauma absolutely pales in comparison to the trauma that my clients face?

But ultimately, unexamined vicarious trauma serves no one well—not us and certainly not the people we are hoping to help professionally. When these natural doubts and thoughts pop up for us, we should reframe them by recognizing that attending to vicarious trauma is one kind of professional responsibility. Second, I believe in the power of vulnerability—that insecure feeling we get when we leave our comfort zones and reveal ourselves, which so many of us want from others but have a difficult time giving of ourselves. It is scary to put ourselves out there. It is also necessary to alleviate the shame we feel as lawyers when we experience vicarious trauma.

A hopeful future

The people who have had the greatest impact on me are those who have had the courage to be vulnerable. I'm thinking in particular of attorneys in leadership positions who, instead of making the practice of law look easy, showed me sometimes it is still hard for them. And the colleagues who have the courage to say to me, "this really awful thing happened in court today, and for today I am actually not okay." My sincere hope is that this article may serve as a catalyst for other attorneys to discuss this normal and foreseeable phenomenon openly. To feel less alone. To not only identify when they need help, but to be brave enough to ask for it.

Once, in a law school classroom, in what I thought would be a brief and simple portion of the seminar, I made reference to the known decline in mental health in law students. I mentioned that law school often demands porous boundaries in terms of one's time and demands rigid boundaries in terms of portraying perfection and avoiding the appearance of needing help. Sheepishly, one student raised their hand and said, "Thank you for saying that. This is the first time anyone has been transparent with me, and law school is really hard. I have been really struggling."

It was as if a floodgate opened. One by one the other students in class chimed in with similar sentiments. Sometimes simply naming an experience can lead to the possibility of change. In that moment I felt hopeful, like I was a part of creating a new kind of lawyer—the kind who can openly admit when they are struggling and gain the benefits of mutual care and support. The kind who is well on their way to being able to cope with the negative effects of vicarious trauma. ▲

NOTES

[1] Bessel van der Kolk, The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma 21 (2014).

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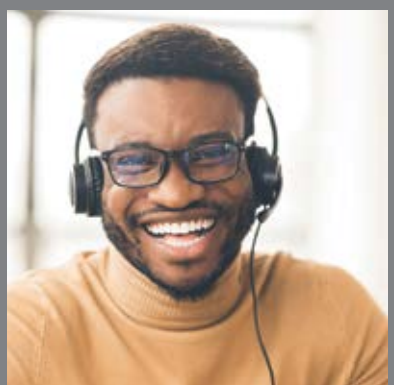

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NOT IMMUNE FROM CHANGE

A guide to approaching ADA medical accommodation requests to telework by immunocompromised employees in light of the covid-19 pandemic

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Minneapolis skyways are filling again, copy machines have resumed their hum, and pets are getting lonely as Minnesota employers have started solidifying their return-to-work plans for their employees. We all are excited to go back to our pre-pandemic lives, but this excitement may carry unpredictability for many workers, employers, and human resource professionals (as well as the employment attorneys advising them).

Prior to the covid-19 pandemic, it was rare for employees to request permission to work from home. But now many employees have experienced working from home as employers have incorporated technology and changed their business practices to facilitate telework due to a web of public health guidance and mandates. This reality may bring an increase in accommodation requests to telework by immunocompromised employees, among others. This article will briefly explore this novel, but increasingly relevant, area of law and provide some practical considerations for practitioners.

Covid-19 redefined the workplace

An astounding 70 percent of employed Americans were working from home at least part time at some point during the pandemic.[1] In Minnesota, more than 600,000 employees teleworked.[2] Notably, a survey revealed that 45 percent of companies expected to maintain a hybrid work model after the pandemic forced them to pivot and learn how to operate seamlessly with a remote presence.[3] Remote models are alluring; employers can maintain efficiency while reducing the overhead of large offices, and employees can avoid rush-hour traffic and parking contracts. Not surprisingly, the entire world has become more adept at video conferencing, and many home offices are more comfortable than fluorescent-lit workplaces. The market reflects this change. A popular video-conferencing platform increased its revenue by 369 percent in 2020, leading to an adjusted profit of almost $1 billion.[4] To put it plainly, both employers and employees have become well-adjusted to working from home.

The United States took drastic action to modify the office work model after the World Health Organization declared covid-19 a pandemic. Doctors, epidemiologists, scientists, and public health professionals responded by advising—and in some cases mandating—workers to stay home to "stop the spread" in order to reduce hospital crowding and protect high-risk individuals. Among those in this high-risk population are those who are considered "imimunocompromised."

Immunocompromised individuals

An immunocompromised individual is someone who has an impaired or weakened immune system.[5] Examples include people who have chronic diseases such as lupus or type 1 diabetes, receive medical treatments such as chemotherapy, have recently had bone marrow or organ transplants, or are of an advanced age.[6] More than 4 percent of adults in the United States have been told by a doctor that they are immunocompromised.[7] Being immunocompromised not only makes it easier to get sick, but also makes it harder to recover from sickness. Influenza viruses result in significantly more hospitalizations, ICU admissions, and mechanical ventilation for immunocompromised individuals than for those with uncompromised immune systems.[8] During the pandemic, the term "immunocompromised" has grown to include (colloquially) individuals with medical conditions that place them at an increased risk of severe illness from covid-19. For example, a few factors labeled by the U.S. Centers for Disease Control and Prevention (CDC) include pregnancy, smoking, and obesity.[9]

Weakened immune systems are not new. What is new is the growing understanding of the involved dangers. The word "immunocompromised" has gained relevance through the pandemic. In fact, at the time of the writing of this article, the term was in Merriam-Webster's top 1 percent of searched words,[10] and it is commonly found in news accounts and employer updates regarding the pandemic. It would have been difficult to go through the past two years without learning more about the transmission of viruses and the risk that they pose to the immunocompromised.

This heightened public awareness may now more strongly affect how accommodation requests are analyzed by employers (and, if it comes to litigation, by judges and juries). In addition, a large number of immunocompromised employees have experienced the convenience and safety of telework. These two factors may bring an increase in accommodation requests from immunocompromised individuals.

Americans With Disabilities Act (ADA) and Minnesota Human Rights Act (MHRA)

Many employers know that the ADA and MHRA prohibit discrimination against individuals based on their disability.[11] One form of discrimination involves an employer's denial of a reasonable accommodation to a qualified applicant or employee[12] with a disability, unless the employer can show that doing so would impose an undue hardship on the business.[13] Whether an applicant or employee is entitled to a reasonable accommodation, and what that entails, must be analyzed on a case-by-case basis. That is, there is no "one size fits all" reasonable accommodation for any disability.

Disability defined

The ADA defines "disability" as, *inter alia*, "a physical or mental impairment that substantially limits one or more major life activities of such individual."[14] If an employee's condition satisfies this definition, then the condition is considered a disability under the ADA and MHRA.[15] The definition contains three key defined terms: (1) "physical or mental impairment," (2) "substantially limits," and (3) "major life activity."

"Physical or mental impairment" means "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more bodily systems, such as... [the] immune [system]."[16] In other words, under this definition, the weakened immune system must be tied to some sort of disorder or condition, whether chronic or acute. This requirement precludes a large number of individuals with higher risk factors identified by the CDC. For example, smoking and advanced age, although linked to heightened risk of becoming severely ill from covid-19, would not meet the definition of a disability, much less an immunnocomprised disability, because neither of the risks is a physiological disorder or condition.[17] Courts have also routinely held that pregnancy is not a *per se* disability under the ADA for the same reason.[18] In contrast, the 8th Circuit Court of Appeals has held that an employee's weakened immune system that was a long-term health effect of treatment for Hodgkin's lymphoma is a disability covered under the ADA.[19]

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The next defined term is "substantially limits." This term is "construed broadly in favor of expansive coverage" and "is not meant to be a demanding hurdle."[20] But the requirement is still relevant. In 2018, the 8th Circuit determined the plaintiff had failed to show her weakened immune system, caused by a seizure disorder, substantially limited her ability to perform major life activities with regard to her sensitivity and allergic reactions to certain vaccinations.[21] The court concluded that the record established only that the woman had "garden-variety allergies to various items that moderately impact[ed] her daily living."[22] Similarly, an immunocompromised employee's fear of contracting a virus without corroboration, such as past hospitalization, documentation from specialists, or medication, may not meet this definition of "substantially limits."[23]

The final defined term is "major life activities." This term generally refers to things like "caring for oneself, performing manual tasks, seeing, hearing, eating, [or] sleeping," among other things, but "also includes the operation of a major bodily function, including but not limited to, functions of the immune system."[24] An employee generally meets the definition of "major life activities" by being immunocompromised.

An immunocompromised employee who satisfies all three definitions discussed above likely has a disability under the ADA. Of course, an immunocompromised employee who has "a record of such an impairment" or is "regarded as having such an impairment" may also meet the ADA's definition, but the latter two are outside the scope of this article.

Qualified individual

A "qualified individual with a disability" is one who "satisfies the skill, experience, education and other job-related requirements of the employment position... and, with or without a reasonable accommodation, can perform the essential functions of such position."[25]

The interactive process

At this point, it should be second nature for employers to engage the employee in the "interactive process" to determine whether the employee requires an accommodation and what types of accommodations, if any, the employer can provide.[26] This process is situation-specific. In some instances, the extent or nature of an illness may not be immediately apparent. It is important to note that employers may inquire "into the ability of an employee to perform job-related functions,"[27] but an employer is prohibited from asking about or requiring a medical examination to determine the nature or severity of the condition unless it is specifically job-related and consistent with business necessity.[28] Thus, employers may want to exercise caution with their questions or requests for medical documentation that are specifically related to the employee's ability to work.

The ADA does not require employers to provide an accommodation if doing so would impose an "undue hardship."[29] An accommodation is an undue hardship if it causes "significant difficulty or expense" to the employer.[30] This "undue hardship" requirement has traditionally been a difficult hurdle for employees requesting an accommodation to telework, as courts across the country have been previously reluctant to recognize telework as a reasonable accommodation prior to the pandemic.[31] Minnesota and the 8th Circuit were no exceptions.[32] In fact, the 8th Circuit has "repeatedly held that regular and reliable attendance is a necessary element of most jobs."[33]

Thirteen months before Minnesota's first positive covid-19 test,[34] the 8th Circuit affirmed the denial of an employee's accommodation request to telework by the Minnesota City of Oak Park Heights. Gary Brunkhorst was the senior accountant/payroll technician for the City of Oak Park Heights.[35] Brunkhorst suffered long-term injuries after having what the court described as "a rare, life-threatening disease commonly known as 'flesh-eating' bacteria."[36] Prior to contracting the disease, Brunkhorst had been able to complete some of his work from home. Among other things, Brunkhorst requested a 120-day period to telework to help him transition back to work. The city denied his accommodation request.

Brunkhorst alleged violations of the ADA and MHRA. The 8th Circuit affirmed the district court's order granting summary judgment in favor of the City of Oak Park Heights. The court concluded that Brunkhorst's request to work from home was a preference and not a need, especially since telework was not specified as a restriction by his doctor. The court also concluded that Brunkhorst could not complete the essential functions of his job remotely. This decision was based on Brunkhorst's testimony that another employee would have to scan certain documents for him and routinely bring things to his house, and the city administrator's testimony that Brunkhorst's position required physical presence at city hall to interact with the public and cover for other staff.

According to a 2019 Bloomberg Law survey, "Employers won 70 percent of the rulings over the past two years on whether they could reject workers' bids for telework as an accommodation for

a disability."[37] Many wonder how the significant increase in telework during the pandemic might change things going forward. The 7th Circuit has recognized that "[t]echnological development and the expansion of telecommuting" is making telework more common and feasible.[38] Now corporate America has shown its ability to work remotely,[39] and the courts have also experienced and seen the effectiveness of telework firsthand.[40] In addition, the case law in this area is in flux and continues to change/evolve with each passing week.

What this means for employers subject to the ADA

The primary takeaway for employers and practitioners is that, even after the pandemic, employees who are immunocompromised and meet the definition of individuals with disabilities under the ADA may be entitled to telework as a reasonable accommodation as long as teleworking allows them to perform the essential functions of their jobs.[41]

But the fact that telework is possible does not mean that employers must grant every telework accommodation request. According to guidance issued by the U.S. Equal Employment Opportunity Commission (EEOC), if the employer excused certain essential functions while permitting an employee to telework during the pandemic, the employer does not have to grant a subsequent telecommute accommodation request if doing so would continue to excuse the performance of essential functions.[42] However, the EEOC guidance states that teleworking during the pandemic "could serve as a trial period" for whether that employee "could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information."[43]

Practical considerations

With a potential wave of requests to telework on the horizon, practitioners should consider proactively preparing their clients to engage employees in the interactive process. A good first step is to encourage clients to review the company's job descriptions (or at least have them handy). Clearly defining the requirements of every position will help companies distinguish between positions that lend themselves to remote work versus those that require an in-office presence. Employers will then be prepared when confronted with an accommodation request.

Below are a few additional considerations when working with your clients on telework accommodation requests by employees. The following are merely suggestions and ideas for practitioners and are in no way intended to be legal advice.

ACCOMMODATION IDEAS

1. Review the law and agency guidance. Review the ADA and MHRA and related answers to frequently asked questions[44] (including the EEOC's covid-19-specific technical assistance questions and answers, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws"[45]).

2. Understand the company's accommodation request process. You may want to become familiar with your client's accommodation request process in order to successfully walk your client through the proper steps. Along with that, practitioners may want to refresh their recollections and review client policies and past practices to ensure the policies and practices comply with legal requirements attendant to the interactive process.

3. Create a template. Consider reminding employers of their obligations to engage in meaningful discussion toward finding a solution that works for both parties. Consider discussing the full picture of the law so the employer is careful to avoid inappropriate questions, and consider providing an outline or template of questions.

4. Determine if the employee is covered. It is generally a good idea to ask questions about the employee's ability to perform various job functions. Remind employers to ask for things that are job-related.

5. Determine whether telework would be an undue burden. Analyze the employee's responsibilities in his or her current position and whether those responsibilities can be completed remotely. In addition, consider the impact (whether financial or otherwise) that the requested accommodation may have on the business.

6. Be creative. Consult the work restrictions outlined by the employee's doctor to identify alternate accommodations that might satisfy the restrictions. Remember, an employer does not have to provide the employee with his or her *preferred* accommodation.

7. Notify the employee of the decision. If the employer plans to deny the request, it is often prudent to communicate this decision *promptly* to the employee. The employer should consider also citing the job description of the employee's position in any corresponding documentation outlining the decision. If the employer accepts the accommodation request, it may be advantageous for the employer to be clear about its expectations of the employee, including the duration of the accommodation and at what point the company plans to re-analyze the situation.

8. Document, document, document. Any discussion with the employee should be memorialized in writing. Any decision made and the reasons for those decisions should also be documented.

9. Maintain confidentiality. The law requires employers to keep the employee's medical documentation private.

In conclusion, employers may see an increase in accommodation requests from immunocompromised employees because of the safety and convenience of telework. Employees who have been working remotely during the pandemic may also expect their employers to allow telework as the default accommodation. Practitioners may want to prepare their employer clients by using the steps outlined above. ▲

NOTES

[1] Lydia Saad and Adam Hickman, *Majority of U.S. Workers Continue to Punch In Virtually*, Gallup (2/12/2021), *https://news.gallup.com/poll/329501/majority-workers-continue-punch-virtually.aspx* .

[2] Cameron Macht, *Teleworking During the Pandemic*, MN DEED (March 2021), *https://mn.gov/deed/newscenter/publications/trends/march-2021/telework-during-pandemic.jsp* .

[3] Eric Rosenbaum, *The Latest Numbers on How Many Workers Will be Returning to Offices, and How Often*, CNBC (7/8/2021), *https://www.cnbc.com/2021/07/08/how-many-workers-will-be-returning-to-offices-and-how-often.html* .

[4] Joe Swartz, Jeremy C. Owens, *Zoom Earnings Roared to Nearly $1 Billion in 2020, and the Stock is Rising Again*, MarketWatch (3/2/2021), *https://www.marketwatch.com/story/zoom-earnings-roared-to-nearly-1-billion-in-2020-and-the-stock-is-rising-again-11614633824* .

[5] Merriam-Webster, *https://www.merriam-webster.com/dictionary/immunocompromised* (last visited 11/12/2021).

[6] David Porter, *What You Need to Know About Being Immunocompromised During COVID-19*, PennMedicine (5/13/2020), *https://www.pennmedicine.org/updates/blogs/health-and-wellness/2020/may/what-it-means-to-be-immunocompromised* .

[7] Caroline Helwick, *Immunosuppression Surprisingly Prevalent in American Adults*, Medscape (11/2/2016), *https://www.medscape.com/viewarticle/871290* .

[8] Leah Molloy, Selena Warminski, *Preventing and Treating Flu in Immunocompromised Patients: 2019-2020 Update*, Healio (9/23/2019) *https://www.healio.com/news/infectious-disease/20190909/preventing-and-treating-flu-in-immunocompromised-patients-20192020-update* .

[9] *People with Certain Medical Conditions*, CDC (Updated 12/14/2021), *https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html* .

[10] Merriam-Webster, *https://www.merriam-webster.com/dictionary/immunocompromised* (last visited 11/12/2021).

[11] 42 U.S.C. §12112(a); Minn. Stat. § 363A.08, subd. 1.

[12] This article uses the term "employee" interchangably to refer to both applicants and employees.

[13] 42 U.S.C. §12112(b)(5)(A); Minn. Stat. § 363A.08, subd. 6.

[14] 42 U.S.C. §12102(1). The ADA also defines "disability" as someone with "a record of such an impairment" or "being regarded as having such an impairment." 42 U.S.C. 12102(1)(B)-(C). For the purposes of this article, we focus in on the first definition.

[15] Courts have previously held that "[t]he MHRA mirrors the ADA, and courts apply the same analysis in evaluating claims brought under both acts." *Stafne v. Unicare Homes, Inc.*, No. 97-470, 1999 WL 1068490, at *6 (D. Minn. 1999).

[16] 29 C.F.R. §1630.2(h).

[17] In fact, it may even be a form of age discrimination in certain circumstances to assume someone's advanced age as a risk factor and exclude them from various terms, conditions, and privileges of employment. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, U.S. EEOC* (last visited 1/11/2022), *https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#H* .

[18] *See McCarty v. City of Eagan*, 16 F. Supp. 3d 1019, 1027 (D. Minn. 2014) (stating that no court holds pregnancy as a *per se* disability, but pregnancy complications may constitute a disability); EEOCCM §902.2(c)(3), 2009 WL 4782107 (11/21/2009) ("Because pregnancy is not the result of a physiological disorder, it is not an impairment.")

[19] *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 750, 756 (8th Cir. 2016).

[20] 29 C.F.R. §1630.2(j)(1)(i).

[21] *Hustvet v. Allina Health System*, 910 F.3d 399, 411 (8th Cir. 2018).

[22] *Id.*

[23] *See id.* (noting that the plaintiff had never been hospitalized for an allergy, had never seen an allergy specialist, and did not carry an EpiPen).

[24] 42 U.S.C. §12102(2)(B).

[25] 29 C.F.R. §1630.2(m).

[26] *Id.* at (o)(3). Importantly, the Minnesota Supreme Court held that the MHRA does not require an employer to engage in an interactive process when determining whether reasonable accommodations can be made. *McBee v. Team Industries, Inc.*, 925 N.W.2d 222, 229 (Minn. 2019). Thus, this analysis changes for employers not subject to the ADA (*i.e.*, having less than 15 employees).

[27] 42 U.S.C. §12112, subd. 4(B).

[28] 42 U.S.C. §12112(d)(4)(A). The EEOC has defined "job-related and consistent with business necessity" as: "Generally, a disability-related inquiry or medical examination of an employee may be 'job-related and consistent with business necessity' when an employer 'has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.'" Find EEOC Technical Assistance Enforcement Guideance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA at: *https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees#5* .

[29] *Id.* at subd. 5(A). An employer also does not have to grant the employee's preferred accommodation if another accommodation would allow the employee to perform the essential functions of the position. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131 (8th Cir. 1999).

[30] 42 U.S.C. §12111(10)(A).

[31] *Solloway v. Clayton*, 738 F, App'x 985, 987-88 (11th Cir. 2018); *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 763-66 (6th Cir. 2015).

[32] *See Morrissey v. General Mills, Inc.*, 37 F. App'x 842 (8th Cir. 2002) (concluding that telework accommodation would place an undue burden on employer); *see also Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008) ("[R]egular attendance at work is an essential function of employment"); *Pickens v. Soo Line R.R. Co.*, 264 F.3d 773, 777 (8th Cir. 2001) (stating that regular, reliable attendance is an essential function of nearly all positions).

[33] *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002).

[34] *Health Officials Confirm First Case of Novel Coronavirus in Minnesota*, MN Dept. of Health (3/6/2020), *https://www.health.state.mn.us/news/pressrel/2020/covid19030620.html* .

[35] *Brunkhorst v. City of Oak Park Heights*, 914 F.3d 1177, 1180 (8th Cir. 2019).

[36] *Id.*

[37] Robert Iafolla, *Work at Home Gets Skeptical Eye From Courts as Disability Issue*, Bloomberg Law (2/21/2019), *https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue*.

[38] *Bilinsky v. American Airlines, Inc.*, 928 F.3d 565 (7th Cir. 2019).

[39] Birkinshaw, et. al., *Research: Knowledge Workers Are More Productive from Home*, Harvard Business Review (8/31/2020), *https://hbr.org/2020/08/research-knowledge-workers-are-more-productive-from-home* .

[40] Randy Furst, *Citing COVID Concerns, Minnesota courts suspend trials and in-person hearings for two months*, StarTribune (11/19/2020), *https://www.startribune.com/citing-covid-concerns-minnesota-courts-suspend-trials-and-in-person-hearings-for-two-months/573129811/* .

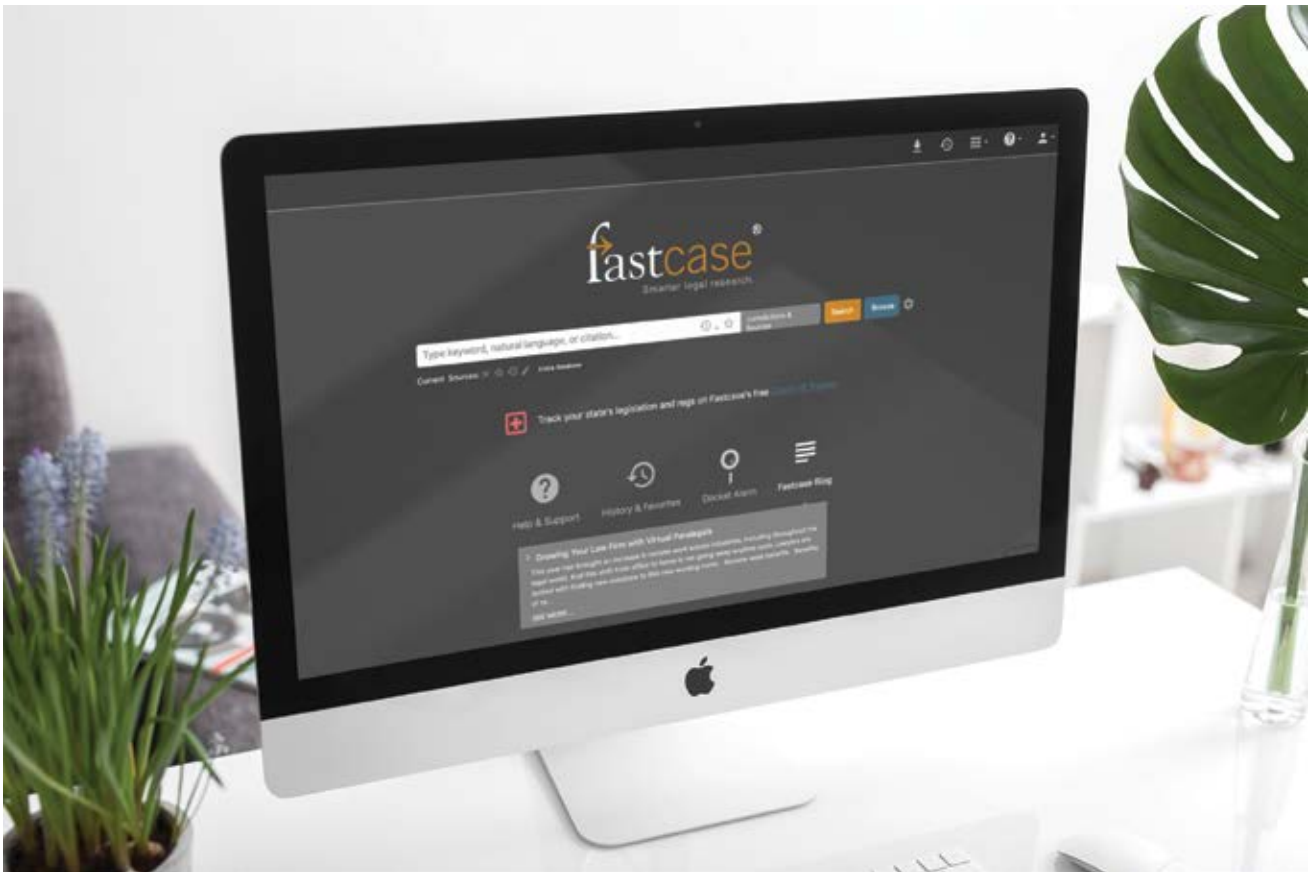
[41] A cashier, for example, likely cannot request teleworking as a reasonable accommodation given the job's responsibilities.

[42] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EEOC (last visited 11/12/2021), *https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws* .

[43] *Id.*

[44] Find ADA FAQs at *https://adata.org/top-ada-frequently-asked-questions*, and MHRA accommodation reminders can be found at *https://mn.gov/mdhr/employers/reasonable-accommodations/* .

[45] Find EEOC Technical Assistance Questions and Answers at: *https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws*



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LANDMARKS IN THE LAW

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

Criminal Law
JUDICIAL LAW

Threats of violence: Statute punishes only true threats, does not require specific intent to threaten, and does not violate the 1st Amendment. Appellant was charged with four counts of threats of violence after leaving an envelope at the Child Protection Services offices. The envelope contained a letter and four morgue toe tags, each containing the handwritten name of a different person associated with appellant's child protection matter, as well as addresses for "place of death," "TBD" for "date of death," dates of birth, and insulting names. All four named individuals subsequently changed their daily routines and took safety precautions. The district court denied appellant's 1st Amendment challenge to the threats of violence statute and the court of appeals affirmed.

Minn. Stat. §609.713, subd. 1, makes it a crime to "threaten[], directly or indirectly, to commit any crime of violence with purpose to terrorize another... or *in a reckless disregard of the risk of causing such terror*." Appellant challenges the italicized portion of the statute. "Reckless" in this context has not been previously defined. The Supreme Court concludes that a person acts recklessly under section 609.713, subd. 1, when he or she consciously disregards a substantial and unjustifiable risk that his or her words will cause terror in another and he or she acts in conscious disregard of that risk.

True threats are not protected under the 1st Amendment, so the Court considers whether section 609.713, subd. 1, prohibits only true threats or whether it reaches other forms of protected speech. Consistent with the majority of courts to have considered the issue, the Court finds that a specific intent to threaten the victim is not required for violent speech or expressive conduct to be a true threat. Thus, the Court finds that a reckless state of mind is sufficient for a defendant's violent communication to be a true threat excluded from the protection of the 1st Amendment.

The Court further holds that section 609.713, subd. 1, punishes only reckless speech that is a true threat, given the various safeguards embedded in the statute and case law interpreting the statute. As such, the statute is not facially overbroad and does not violate the 1st Amendment. ***State v. Mrozinski***, 971 N.W.2d 233 (Minn. 3/9/2022).

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Employment & Labor Law
JUDICIAL LAW

Race discrimination; arbitration rejected. A pair of employees at an assisted living facility lost their claims of wrongful termination due to racial discrimination. The 8th Circuit Court of Appeals, affirming summary judgment, held that the employer had performance reasons to terminate them, and it was not done as a pretext for discrimination. ***Walker v. First Care Management Group***, 27 F.4th 600 (8th Cir. 03/01/2022).

FLSA fee award; amount reduced for overbilling. A law firm's request for attorney's fees from the prevailing party in a successful overtime case under the Fair Labor Standards Act (FLSA) was reduced by 20% for overbilling and unreasonable actions that extended the litigation. The 8th Circuit Court of Appeals upheld the fee slice by the lower court on grounds the case was "routine" and the fee reduction did not constitute a charge of discrimination. ***Oden v. Shane Smith Enterprises, Inc.***, 2022 WL 619159 (8th Cir. 03/03/2022) (unpublished).

Whistleblower claim; no causal connection. An employee's whistleblower claim after she was terminated from the Department of Human Resources was not actionable because of a lack of causal connection between the whistleblowing and subsequent discharge. Upholding lower court rulings, the Minnesota Supreme Court rejected a claim to depart from the three-pronged standard of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and held that the absence of sufficient evidence to show a causal nexus was dispositive. ***Hanson v. Dept of Natural Resources***, 2022 WL 1021636 (Minn. 4/6/2022).

Race discrimination; dismissal reversed. A participant in a union apprenticeship program overcame dismissal through circumstantial evidence showing racial discrimination under Title

VII of the Federal Civil Rights Act, the Minnesota Human Rights Act, and the federal law barring racial discrimination in contracts. While upholding dismissal of negligence *per se* and breach of contract claims, the Minnesota Court of Appeals reversed dismissal of the federal and state statutory dismissed claims. ***Doss v. St. Paul Area Elec. JATC Apprenticeship Program***, 2022 WL 588168 (Minn. App. 02/28/2022) (unpublished).

■ **Discrimination, whistleblower claims; too late to sue.** Claims of violating the Minnesota Human Rights Act and the Whistleblower Act were barred on grounds of timeliness. The Minnesota Court of Appeals upheld dismissal of claims based on a series of adverse employment actions allegedly taken by the Department of Revenue because they were beyond the one-year and six-year limitations periods. ***Larkin v. State Dept. of Revenue***, 2022 WL 663351 (8th Cir. 03/07/2022) (unpublished).

■ **Unemployment compensation; trio of setbacks.** Three more unemployment compensation applicants concurrently lost their appeals in what is becoming a pattern of appellate setbacks.

The failure to comply with the 20-day period to seek reconsideration of an adverse ruling by an unemployment law judge (ULJ) barred the proceeding. ***Turner v. McGrath,*** 2022 WL 663164 (8th Cir. 03/07/2022) (unpublished).

An attempt to backdate benefits for an applicant who essentially filed more than four months after losing her job was denied. The appellate court affirmed because the law only allows backdating for a single week under Minn. Stat. §268.97. ***In re Peterson***, 2022 WL 663170 (8th Cir. 03/07/2022) (unpublished).

Frustrations in the workplace are insufficient to allow benefits for a resigning employee. The appeals court rejected a claim because the conditions were not so bad that an average, reasonable person would quit. ***Peterson v. St. Cloud Hospital,*** 2022 WL 663290 (8th Cir. 03/07/2022) (unpublished).

■ **Unemployment compensation; misconduct upheld.** An employee who failed to complete his work duties and was discharged on performance grounds was denied unemployment benefits. The court of appeals upheld a determination by an unemployment law judge (ULJ) of disqualifying "misconduct." ***Richmond v. Vanden Hoak Cleaning***, 2022 WL 588759 (Minn. App. 02/28/2022) (unpublished).

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Environmental Law

JUDICIAL LAW

■ **U.S. Supreme Court reinstates Trump-era CWA Section 401 rule.** In April the United State Supreme Court issued a decision staying a lower court's vacatur of the Trump-era EPA rule regarding CWA section 401 certifications. Section 401 prohibits a federal agency from

issuing a permit or license to conduct activity that may result in any discharge into waters of the United States unless the state in which the proposed discharge would occur certifies that the discharge complies with applicable state water quality requirements. 33 U.S.C. §1341. Furthermore, Section 401(d) allows the state to impose conditions upon the certification of the project if it determines the project will have a negative impact on the water quality within the state. 33 U.S.C. §1341(d).

Over 50 years ago, EPA adopted regulations addressing the standards and processes for states issuing Section 401 certifications under Section 401 of the Clean Water Act. In response to complaints that some state agencies exceeded the scope of their statutory authority when issuing 401 certifications—e.g., by allegedly imposing conditions on aspects of a proposed project other than the "discharge" that is the subject of the federal permit—the EPA, on 6/1/2020, issued a new rule regarding 401 certifications, which generally narrowed the scope of states' 401 certification authority.

Various states and other plaintiffs challenged the new rule, and in October 2021, a judge for the federal district court in Northern California issued an order—prior to hearing arguments on the merits of the new rule—that vacated the rule, pending the outcome of the litigation. The plaintiffs appealed the district court's vacatur of the new 401 rule, the vacatur was affirmed by the 9th Circuit, and the Supreme Court granted plaintiffs' petition for *certiorari*.

On April 6, a 5-to-4 majority of the Court issued an order staying the district court's vacatur of the rule—without a written opinion—which had the immediate effect of bringing the Trump rule back into effect. The district court will now proceed to hear the merits of the plaintiffs' challenge to the rule. Justice Elena Kagan wrote a dissent, joined by Chief Justice John Roberts and Justices Breyer and Sotomayor, arguing that the plaintiffs had not shown the requisite "exceptional need for immediate relief." Among other things, Justice Kagan argued the petitioners had failed to show that "proper implementation of the reinstated regulatory regime—which existed for 50 years before the vacated rule came into effect—is incapable of countering whatever state overreach may (but may not) occur..."

Notably, EPA is poised to issue a new proposed CWA 401 rule, which may be finalized before litigation on the Trump-era rule is complete. ***Louisiana v. Am. Rivers***, No. 21A539, 2022 U.S. LEXIS 1902 (4/6/2022).

■ **5th Circuit stays an injunction that banned the use of Biden administration's social cost of carbon metric in agency decision-making.** In March the 5th Circuit ruled in favor of the Biden administration's use of the social cost of carbon (SCC) metric by staying a lower court's preliminary injunction banning its use. The court stayed the injunction pending appeal in the case. The case involves a challenge by a coalition of Republican-led states arguing that use of the SCC metric would lead to increased regulatory burdens. The circuit court found that the

stay of the injunction was warranted for three reasons: 1) The administration was likely to win the appeal on the merits because plaintiffs lacked standing; 2) the agencies utilizing the SCC metric would be irreparably harmed by the injunction; and 3) the plaintiffs would suffer minimal injury.

The SCC metric is utilized when agencies consider the balance of costs and benefits for developing regulations, as well as in other agency decision-making. The SCC is a quantification of the dollar amount per ton of greenhouse gas that results from the impact on various factors such as human health, agriculture, and sea levels. The SCC metric was issued under the Obama administration in 2010. After its use was abandoned by the Trump administration, it was reissued by President Biden, with interim estimates being published in 2021.

The 5th Circuit found that the plaintiffs lacked standing because they were not challenging an actual rule or decision, just the broad use of the SCC metric. This allegation of injury did not meet Article III standing requirements because it was merely hypothetical. The court found that the injunction would cause irreparable harm because it would stop agencies from considering the social cost of carbon "in the manner the current administration has prioritized within the bounds of applicable law." Finally, the plaintiffs would suffer minimal injury unless and until there was an actual regulatory burden caused by a rule or decision based on the SCC metric, which the plaintiffs would then be able to challenge.

The 5th Circuit decision could have an impact on a challenge to the SCC metric that will be in front of the 8th Circuit Court of Appeals. A similar group of states has appealed to the 8th Circuit a lower court's decision to dismiss the plaintiffs' case challenging the use of the SCC metric. The lower court dismissed the case on the basis that the plaintiffs did not have standing and their claims were not ripe. ***Louisiana v. Biden***, No. 22-30087 (5th Cir. 3/16/2022).

ADMINISTRATIVE ACTION

■ **EPA restores California vehicle emissions standards waiver.** In March the U.S. Environmental Protection Agency (EPA) published a notice of decision rescinding its 2019 withdrawal of waiver of preemption for California's Advanced Clean Car Program, which was previously granted in 2013.

Under §209 of the Clean Air Act (CAA), Congress grants EPA the authority to waive the federal preemption of any state from adopting or attempting to enforce any auto emissions standards for new motor vehicles, if the state had adopted standards prior to 1966. 42 U.S.C. §7543(b)(1). In reality, this exemption only pertains to California, as it was the lone state to have adopted emissions standards at the time. Under §177, Congress grants any state the power to enforce any standards to control auto emissions, so long as the standards are identical to the California standards for which California has been granted a waiver. 42 U.S.C. §7507.

Since its enactment, EPA has granted California more than 100 vehicle emissions standards waivers over the past 50 years, and 16 other states have adopted California's low-emission vehicle (LEV) criteria pollutant and greenhouse gas (GHG) emission regulations and zero-emission vehicle (ZEV) regulations.

In 2013, California was granted a waiver for its Advanced Clean Car program, which set new standards for the LEV program and GHG emissions, as well as a ZEV sales mandate. But in 2019, under direction from the previous administration, EPA partially withdrew its 2013 waiver while promulgating the Safer Affordable Fuel-Efficient Vehicles Rule (SAFE-1), establishing national vehicle emissions standards. Additionally, through the SAFE-1 rule, EPA established an interpretation of CAA §177 that disallowed other states from adopting California's GHG standards.

Under the current notice of decision, EPA rescinds its previous 2019 actions in the SAFE-1 rule that partially withdrew the California Advanced Clean Car program waiver. In rescinding its 2019 withdrawal, EPA stated that the waiver withdrawal was improper and based on a flawed interpretation of CAA §209, that the administration misapplied the facts and inappropriately withdrew the waiver, and that EPA inappropriately provided an interpretive view of CAA §177.

As a result, EPA's 2013 waiver for California's Advanced Clean Car program is fully reestablished and any state may adopt California's GHG standard pursuant to CAA §177. *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision,* EPA, **87 Fed. Reg. 14332** (3/14/2022).


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Federal Practice

JUDICIAL LAW

■ **9 U.S.C. §§9 and 10; arbitration; no "look-through" jurisdiction.** Distinguishing its decision in *Vaden v. Discover Bank* (556 U.S. 49 (2009)), the Supreme Court held that the "look-through" jurisdiction rule for arbitration does not apply to actions to vacate or confirm an arbitration award under 9 U.S.C. §§9 and 10, meaning that such actions require an "independent jurisdictional basis." ***Badgerow v. Walters***, ___ S. Ct. ___ (2022).

■ **Standing; "censure;" no materially adverse action.** The Supreme Court held that an elected official lacked standing to pursue a 1st Amendment retaliation claim, finding that his "censure" was not a "materially adverse action" that could support that claim. ***Houston Cmty. Coll. Sys. v. Wilson***, ___ S. Ct. ___ (2022).

■ **Standing; waiver of argument on appeal.** The 8th Circuit affirmed an order by Judge Schiltz that had dismissed one claim for lack of standing, where the plaintiffs failed to address standing in their initial brief and devoted only one sentence to the issue in their reply brief. ***Song v. Champion Petfoods USA, Inc.***, 27 F.4th 1339 (8th Cir. 2022).

■ **Judicial estoppel; abuse of discretion.** Reviewing for abuse of discretion, the 8th Circuit affirmed a district court's grant of summary judgment based on its application of judicial estoppel, finding that all three parts of the governing test weighed in favor of judicial estoppel. ***Gustafson v. Bi-State Devel. Agency***, ___ F.4th ___ (8th Cir. 2022).

■ **Fed. R. Civ. P. 10(a); Jane Doe pleading; procedural requirements.** While acknowledging the "strong presumption against allowing parties to use a pseudonym" and that he "would have preferred" that a Jane Doe sexual abuse and sexual harassment plaintiff file a motion to proceed pseudonymously, Chief Judge Tunheim denied one defendant's assertion that the plaintiff "should be required to disclose"

her identity, finding that the plaintiff's "interest in protecting her identity outweighs the public interest in the case." ***Doe v. Innovate Fin., Inc.***, 2022 WL 673582 (D. Minn. 3/7/2022).

■ **Fed. R. Civ. P. 12(c); consideration of documents outside the pleadings.** Granting the plaintiffs' motion for judgment on the pleadings against the intervening defendants pursuant to Fed. R. Civ. P. 12(c), Chief Judge Tunheim rejected the intervenors' argument that the court's consideration of four contracts not attached to the complaint required conversion of the motion to a motion for summary judgment, instead finding that the contracts "were sufficiently alleged in and embraced by" the complaint, and that the authenticity of the documents was not in question. ***Southern Glazer's Wine & Spirits, LLC v. Harrington***, ___ F. Supp. 3d ___ (D. Minn. 2022).

■ **Fed. R. Evid. 612; deposition; refreshed recollection.** Magistrate Judge Wright denied the defendants' motion to compel the plaintiff to produce or identify privileged documents that were used to refresh the recollection of a witness prior to her deposition, finding that the defendants "had failed to cite any evidence" that the witness had relied on the documents during her testimony or that the documents had "sufficiently" impacted her testimony, and ultimately concluded that the defendants were "engaging in a fishing expedition into privileged communications." ***Sleep Number Corp. v. Young***, 2022 WL 903138 (3/28/2022).

■ **Fed. R. Civ. P. 12(h); personal jurisdiction defense waived.** Where the defendants litigated for two years before attempting to raise a personal jurisdiction defense, Judge Davis found that they had "wholly failed to comply with [Fed. R. Civ. P.] 12," and that the defense had been waived. ***Sadeghi-A v. Daimler Trucks N. Am.***, 2022 WL 769975 (D. Minn. 3/14/2022).

■ **9 U.S.C. §16; arbitration; stay pending appeal; circuit and intra-district splits.** Acknowledging the absence of 8th Circuit authority and circuit and intra-district splits as to whether a stay of district court proceedings is required when an interlocutory appeal is filed under Section 16 of the FAA, Judge Nelson followed the "majority viewpoint" and granted the defendant's motion to stay proceedings pending appeal. ***Ballou v. Asset Mktg. Servs., LLC***, 2022 WL 807606 (D. Minn. 3/17/2022).

■ **Fed. R. Civ. P. 45(f); motion to modify subpoena transferred; "exceptional circumstances."** Granting defendants' motion to transfer a motion to modify a subpoena to the District of New Jersey, Chief Judge Tunheim found that "exceptional circumstances," including the complexity of the underlying case, the case's "advanced stage," and the fact that a special master had been appointed to manage discovery, all weighed in favor of transfer. ***State v. Sanofi-Aventis U.S. LLC***, 2022 WL 986315 (D. Minn. 4/1/2022).

■ **Fed. R. Civ. P. 15(a)(2); Minn. Stat. §549.191; punitive damages.** Citing the "weight of authority in this district," Magistrate Judge Docherty found that a motion to amend a complaint to add a claim for punitive damages was governed by Fed. R. Civ. P. 15(a)(2) rather than Minn. Stat. §549.191. ***Russ v. Ecklund Logistics, Inc.***, 2022 WL 856020 (D. Minn. 3/23/2022).

■ **Fed. R. Civ. P. 26(f); motion for leave to serve pre-conference subpoenas granted.** Applying the so-called *Let Them Play* and 2nd Circuit factors, Magistrate Judge Leung granted the plaintiff's motion to conduct

early discovery intended to allow it to identify Doe defendants. ***Minnetonka Moccasin Co. v. Does 1-10***, 2022 WL 1055746 (D. Minn. 4/8/2022).

■ **Removal; remand; attorney's fees; 28 U.S.C. §1447(c).** Rejecting the defendant's ERISA preemption argument, Chief Judge Tunheim granted the plaintiff's motion to remand, but denied the plaintiff's request for fees under 28 U.S.C. §1447(c), finding that the removal "was not objectively unreasonable." ***BCBSM, Inc. v. I.B.E.W. 292 Health Care Plan***, 2022 WL 867232 (D. Minn. 3/23/2022).

Finding that the plaintiff's claims did not rely on federal law, and that the defendant had improperly removed a state court action on the basis of a preemption defense, Judge Schiltz granted the plaintiff's motion to remand. ***State ex rel. Elder v. U.S. Bank, N.A.***, 2022 WL 781089 (D. Minn. 3/15/2022).

■ **42 U.S.C. §1988; awards of attorney's fees.** Approving hourly rates as high as $615 per hour, and significantly reducing the more than $163,000 requested to account for the plaintiff's "excessive" billing and "limited degree of success," Judge Montgomery awarded the plaintiff just under $53,000 in attorney's fees in a Section 1983 action. ***Ness v. City of Bloomington***, 2022 WL 1050043 (D. Minn. 4/7/2022).

Judge Tostrud awarded one group of defendants more than $20,000 in attorney's fees incurred in obtaining the dismissal of the plaintiff's "frivolous" Section 1983 claim. ***Nguyen v. Foley***, 2022 WL 1026477 (D. Minn. 4/6/2022).

■ **Fed. R. Civ. P. 11; motion for sanctions denied.** While granting the defendants' motion to dismiss the plaintiff's amended complaint, Judge Davis denied the defendants' related motion for Rule 11 sanctions, finding that the plaintiff's "argument is not so frivolous as to warrant sanctions." ***P Park Mgmt, LLC v. Paisley Park Facility, LLC***, 2022 WL 911950 (D. Minn. 3/29/2022).

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Immigration Law

JUDICIAL LAW

■ **Migrant protection protocols (MPP) ("Remain in Mexico"): The saga continues.** As previously noted in the March 2022 issue of *Bench & Bar*, the Biden administration filed a petition for a writ of *certiorari* on 12/29/2021, seeking Supreme Court review of the 5th Circuit's 12/13/2021 refusal to vacate the injunction issued by U.S. District Court Judge Matthew Kacsmaryk, Northern District of Texas. Key issues raised: 1) Whether 8 U.S.C. §1225 requires DHS to continue implementing MPP when it states the Secretary of DHS "may" return noncitizens to Mexico to await their immigration proceedings; and 2) whether the 5th Circuit erred by concluding the DHS secretary's second memorandum terminating MPP had no legal effect. ***Biden, et al. v. Texas, et al.,*** No. 21-954 (2021). *https://www.supremecourt.gov/DocketPDF/21/21-954/206810/20211229162636127_Biden%20v.%20Texas%20-%20Cert%20Petition.pdf* On 2/18/2022, the Supreme Court granted the petition and scheduled the case for oral argument on 4/26/2022. *https://www.supremecourt.gov/docket/docketfiles/html/public/21-954.html*

■ **Credibility not an issue here: Asylum claim denied even if testimony had been found to be believable.** The 8th Circuit Court of Appeals denied the petition for review, holding the Board of Immigration Appeals (BIA) correctly determined that the immigration judge's (IJ) decision provided an alternative determination for the failure of the petitioner's claim for Convention Against Torture (CAT), even if his testimony had been believed. "The IJ found that Jama's testimony was not credible [i.e., he would disclose to Somali authorities his conversion from Islam to Christianity], and determined 'furthermore' that his claim of likely torture was based on 'speculation.'" That is, "even if the Somali government could 'make that connection,' (i.e., learn that Jama is a Christian), the IJ could not make 'a supposition upon supposition to hypothesize or speculate that the government would jail and torture him due to being Christian.'" The court, accordingly, rejected the petitioner's argument that the credibility finding was central to the IJ's decision. ***Jama v. Garland***, No. 21-1585, *slip op.* (8th Circuit, 3/30/2022). *https://ecf.ca8.uscourts.gov/opndir/22/03/211585P.pdf*

■ **Salvadoran asylum claim denied for failing to show particularized fear of future persecution.** The 8th Circuit Court of Appeals upheld the BIA's asylum denial, holding the petitioner had failed to show her fear of future persecution to be objectively reasonable, given the fact that her evidence failed to support a claim of a particularized fear based on her religious activities: "Instead, she only presented evidence of general violence." ***Rivera Menjivar v. Garland***, No. 21-1624, *slip op.* (8th Circuit, 3/3/2022). *https://ecf.ca8.uscourts.gov/opndir/22/03/211624P.pdf*

■ **Christian Chinese asylum seeker denied relief for failure to establish past persecution or well-founded fear of persecution.** The 8th Circuit Court of Appeals upheld the denial of asylum, concluding substantial evidence supported the BIA's finding that the Christian Chinese petitioner had failed to establish either past persecution or a well-founded fear of future persecution on account of his religious beliefs. More specifically, the court observed, "Here, the BIA adopted the IJ's finding that the evidence of He's two detentions, taken together and including the initial assault by a policeman, 'does not rise to the level of persecution.' That determination is consistent with our prior past persecution decisions." ***He v. Garland***, No. 20-1328, *slip op.* (8th Circuit, 2/4/2022). *https://ecf.ca8.uscourts.gov/opndir/22/02/201328P.pdf*

ADMINISTRATIVE ACTION

■ **Public health and immigration: Title 42 expulsions at the border.** As previously noted in the March 2022 issue of *Bench & Bar*, the Centers for Disease Control (CDC) on 8/2/2021 issued its third order continuing the policy of President Biden's predecessor, authorizing the expulsion of migrants from entry into the United States from Canada or Mexico, if they had arrived at or near the U.S. land and adjacent coastal borders. This expulsion could include those noncitizens not having proper travel documents, noncitizens whose entry is otherwise contrary to law, and noncitizens who are apprehended at or near the border seeking to unlawfully enter the United States between ports of entry (POE). In one point of divergence from the previous administration, however, the 8/2/2021 order made provision for exemption of unaccompanied noncitizen children. **86 Fed. Register, 42828-41** (8/5/2021). *https://www.govinfo.gov/content/pkg/FR-2021-08-05/pdf/2021-16856.pdf*

It also noted that on 2/3/2022, the CDC extended the order for an additional 60 days. *https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/cdc-keeps-title-42-expulsions-in-place*

On 4/1/2022, the CDC announced termination of the Title 42 Order on 5/23/2022, as the Department of Homeland Security (DHS) begins implementing "appropriate COVID-19 mitigation protocols, such as scaling up a program to provide COVID-19 vaccinations to migrants and prepare[s] for resumption of regular migration under Title 8." Centers for Disease Control, ***"CDC Public Health Determination and Termination of Title 42 Order."*** Media statement (4/1/2022). *https://www.cdc.gov/media/releases/2022/s0401-title-42.html* U.S. Department of Homeland Security. **"DHS Preparations for a Potential Increase in Migration."** Fact sheet (3/30/2022). *https://www.dhs.gov/news/2022/03/30/fact-sheet-dhs-preparations-potential-increase-migration*

On 4/3/2022, three states (Missouri, Arizona, and Louisiana) sued the Biden administration in the U.S. District Court of the Western District of Louisiana over its plan to terminate the order, arguing it did not follow the Administrative Procedures Act (APA) (i.e., failing to provide a comment period on the termination while seeking preliminary and permanent injunctive relief, among other things). ***Arizona, et al. v. Centers for Disease Control, et al.***, (6:22-cv-00885-RRS-CBW) (W.D. La. 4/3/2022). *https://www.azag.gov/sites/default/files/docs/press-releases/2022/complaints/1-Complaint.pdf*

On 4/14/2022, an amended complaint, adding 18 more states, was filed with the court. ***Arizona, et al. v. Centers for Disease Control, et al.*** (6:22-cv-00885-RRS-CBW) (W.D. La. 4/14/2022). *https://www.azag.gov/sites/default/files/docs/press-releases/2022/complaints/Title%2042%20FAC%20Filed.pdf*

Temporary protected status (TPS): Shelter from the storm. According to U.S. Citizenship and Immigration Services, "the Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately."

Typical scenarios include:

- ongoing armed conflict (such as civil war);
- an environmental disaster (such as an earthquake or hurricane), or an epidemic; or
- other extraordinary and temporary conditions.

The Department of Homeland Security (DHS) has recently designated (or redesignated) the following countries for temporary protected status:

Ukraine: On 4/19/2022, DHS announced that Secretary Alejandro Mayorkas had designated Ukraine for TPS for 18 months, effective 4/19/2022. Those individuals who have continuously resided in the United States since 4/11/2022 (and continuously physically present since 4/19/2022) are eligible to apply. **87 Fed. Reg. 23211-18** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-04-19/pdf/2022-08390.pdf*

Sudan: On 4/19/2022, DHS announced that Secretary Alejandro Mayorkas had designated Sudan for TPS for 18 months, effective 4/19/2022. Those individuals who have continuously resided in the United States since 3/1/2022 (and continuously physically present since 4/19/2022) are eligible to apply. **87 Fed. Reg. 23202-10** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-04-19/pdf/2022-08363.pdf*

Cameroon: On 4/15/2022, DHS Secretary Alejandro Mayorkas announced the designation of Cameroon for TPS for 18 months. Those individuals residing in the United States as of 4/14/2022 will be eligible to apply. The designation will take effect upon publication of a Federal Register notice. *Press release. https://www.dhs.gov/news/2022/04/15/secretary-mayor-*

kas-designates-cameroon-temporary-protected-status-18-months

Afghanistan: On 3/16/2022, DHS Secretary Alejandro Mayorkas announced the designation of Afghanistan for TPS for 18 months. Those individuals residing in the United States as of 3/15/2022 will be eligible to apply. The designation will take effect upon publication of a Federal Register notice. *Press release. https://www.uscis.gov/newsroom/news-releases/secretary-mayorkas-designates-afghanistan-for-temporary-protected-status*

South Sudan: On 3/3/2022, DHS announced that Secretary Alejandro Mayorkas had both extended the designation of South Sudan for TPS and redesignated it for 18 months, effective 5/3/2022. Those individuals seeking TPS under the redesignation must demonstrate continuous residence in the United States since 3/1/2022 (and continuous physical presence since 3/3/2022). **87 Fed. Reg., 12190-12201** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-03-03/pdf/2022-04573.pdf*

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Intellectual Property

JUDICIAL LAW

Copyright: SCOTUS holds mistakes of law in copyright registrations are eligible for safe harbor. The Supreme Court of the United States recently vacated an appellate court's decision holding that 17 U.S.C. §411(b), a "safe harbor" provision, excused mistakes of law and mistakes of fact in the registration of copyrights. In 2016, Unicolor sued H&M for copyright infringement of Unicolor's fabric designs. A jury found in favor of Unicolor. H&M moved to vacate the verdict, contending the copyright registration was invalid under 37 C.F.R. §202.3(b)(4) because Unicolor had registered 31 independent works within a single application. The district court denied H&M's motion, finding that because Unicolor did not know it failed to meet the "single unit" requirement, the copyright registration was not invalid.

H&M appealed the decision to the United States Court of Appeals for the 9th Circuit, which reversed the district court and held that a) a collection of works did not meet the "single unit" requirement in §202 unless published as a "singular, bundled unit" and b) failure to know of the requirement did not save the copyright. The Supreme Court vacated the 9th Circuit's decision. With a focus on §411(b)'s safe harbor provision, the Supreme Court held that the provision included both mistakes of law and mistakes of fact. The Court first interpreted "knowledge" to be broad enough to cover both knowledge of facts and law through statutory construction principles. Second, the Court cited past cases, prior to the enactment of §411(b), that held inadvertent mistakes in registration certificates were not a means to invalidate a copyright. Finally, the Court reviewed the legislative history to find that §411(b) was added to make obtaining valid copyrights easier and to eliminate loopholes for preventing enforcement of copyrights. H&M argued that "ignorance of the law is no excuse," but the Court rejected the argument, finding that the maxim applied to the *mens rea* element of a crime but not to "civil case[s] concerning the scope of a safe harbor that arises from ignorance." The Court further noted that claims of mistake are not automatically accepted, and circumstantial evidence should be reviewed for instances of willful blindness. ***Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.***, No. 20-915, 2022 U.S. LEXIS 1226 (2/24/2022).

Copyright: Copyright claims based on sovereign nation status dismissed as frivolous. Chief Judge Tunheim recently dismissed a local man's lawsuit for copyright infringement where plaintiff, a man claiming to be a sovereign citizen, alleged that Brown County, Minnesota, owed monetary damages for the wrongful use of his copyrighted name during criminal proceedings against him. The court dismissed the copyright claim as "plainly frivolous" because 37 C.F.R. §202.1(a) prohibits the copyrighting of "[w]ords and short phrases such as names." Accordingly, plaintiff could not seek monetary damages for the use of his name by state courts. The court also found that the criminal proceedings against plaintiff were not invalid due to the supposed copyright violation, because the existence of a copyright or trademark does not prevent a court from exercising jurisdiction over a civil or criminal matter. ***Gould v. Brown Cty.***, No. 21-2762 (JRT/DTS), 2022 U.S. Dist. LEXIS 27505 (D. Minn. 1/5/2022).

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Tax Law

JUDICIAL LAW

Individual income tax: Value of airline tickets provided to retired pilot's family members must be included in retired pilot's gross income. Taxpayers must include in their gross income "all income from whatever source derived." This broad understanding of gross income includes not just salaries, but also benefits unless those benefits are specifically excluded. In this case the taxpayer was a retired airline pilot and his former employer provided free airline tickets to the retired pilot, his daughter, and two of his adult relatives. The pilot argued the value of the tickets should be excluded as either *de minimus* fringe or excluded as "no additional-cost services." The court granted summary judgment to the commissioner, holding that neither exclusion applied, and the pilot was required to include the value of his family's tickets in his gross income. ***Mihalik v. Comm'r***, T.C.M. (RIA) 2022-036 (T.C. 2022).

Conservation easements: "Deemed consent" issue in this dispute cannot be decided as matter of law. Charitable deductions of qualified conservation easements are permitted even though the donation of a conservation easement is less than the taxpayer's entire interest in the property. For the donation to be qualified, however, the conservation easement must be protected in perpetuity. This "protected in perpetuity" requirement has proven vexatious. In this dispute, Pickens, a limited liability company, received a contribution of land from a separate entity; that entity had purchased the land for just shy of half a million dollars in 2015. In 2016, Pickens made a donation of a conservation easement on that land to a land conservancy and claimed a charitable contribution deduction of $24,700,000. The conservation easement recited the conservation purposes and prohibited commercial or residential development. Certain rights were reserved to Pickens, but Pickens did not reserve unconditional rights. The commissioner moved for summary judgment, asserting that the "deemed consent" provision in the easement is inconsistent with the "protected in perpetuity" requirement. In fact, a 6th Circuit case held that a deemed consent provision impaired the conservation purpose where the deemed consent provision meant that the donor could exercise rights in a manner contrary to the conservation purpose. *Hoffman Props. II, LP v. Comm'r*, 956 F.3d 832, 834 (6th Cir. 2020).

On the other hand, the tax court analyzed a deemed consent provision in another case and held that the provision was nonproblematic where it applied only when the parties exercised rights that would be consistent with the conservation purpose. *Glade Creek Partners, LLC v. Comm'r*, T.C. Memo. 2020-148, 120 T.C.M. (CCH) 285, 291 n.9. In the instant case, the court reasoned that because "the question whether the exercise of a right to which consent is deemed given would impair any conservation purpose presents factual questions ill-suited to summary adjudication," the commissioner's motion for summary judgment was denied. ***Pickens Decorative Stone, LLC v. Comm'r***, T.C.M. (RIA) 2022-022 (T.C. 2022).

■ **Employment taxes: In-home care providers employees, not independent contractors.** Pediatric Impressions Home Health, Inc. provided at-home private duty nursing services to children with special needs. Pediatric Impressions hired nurses to perform these services. (The court notes that the term "nurses" in this opinion does not indicate degrees or licenses the workers may have obtained.) Until 2016, Pediatric Impressions treated the nurses as employees for federal employment tax purposes. However, starting in 2016, Pediatric Impressions unilaterally began treating many of the nurses as independent contractors and as of 2016, failed to make deposits of federal employment taxes with respect to any of the nurses.

The commissioner examined Pediatric Impressions's returns and determined that the nurses were employees, not independent contractors, and that Pediatric Impressions did not quality for Section 530 relief (generally a safe harbor provision if the employer can show good faith effort to comply with the tax law). Pediatric Impressions was liable for approximately $2 million in federal employment taxes, additions to tax, and penalties. Pediatric Impressions disputed the notice of determination, and the tax court resolved all issues in the commissioner's favor. The tax court's application of the 5th Circuit's five-factor test to determine a worker's employment status was thorough, but it did not seem a close call. The court concluded, "[a]fter considering the record, weighing the... factors, and being cognizant that doubtful questions should be resolved in favor of employment, the relationship between petitioner and the nurses during the periods at issue is best characterized as that of common law employment. Petitioner possessed and exercised significant control over the nurses, including hiring and firing, setting hours and work schedules, assigning patients, ensuring attendance at required training, mandating how the nurses reported and potentially performed their work in accordance with a patient's plan of care, and supervising the nurses. The nurses were normally hired on a permanent basis and were integral to petitioner's business. They had no meaningful capital investment in the job as petitioner (and others) provided all necessary supplies and equipment. The nurses also bore no risk of loss and had no opportunity for profit outside of their wages and occasional incentive or performance bonuses, which the record does not show was common or substantial. Thus, the nurses cannot be said to have been in business for themselves as a matter of economic reality during the periods at issue." The court similarly rejected Pediatric Impressions's argument that it was entitled to Section 530 relief and that its challenge to the additions to tax and penalties. ***Pediatric Impressions Home Health, Inc. v. Comm'r***, T.C.M. (RIA) 2022-035 (T.C. 2022).

■ **Executive compensation; unreasonable compensation to CEO who epitomized the "American success story."** Clary L. Hood was the CEO and

shareholder of Clary Hood, Inc., a construction company specializing in land grading and excavation. Mr. Hood learned the land grading and excavation business from his father, and Mr. Hood dedicated his entire professional career to the industry. Mr. Hood owned and operated Clary Hood, Inc. with his spouse, but Mr. Hood held ultimate decision-making control over all the company's operations from its founding through the years at issue. In about 2010, Mr. Hood made several decisions that led the company from middling performance (modest growth and irregular profits) to extraordinary success (exponential growth and profits in excess of $14 million). Mr. Hood was joined in the company's C-suite by several other executives, including Mr. Hood's son, who served for a short time as president and CEO, as well as other executives. No written employment agreement existed between Mr. Hood and the company. Rather, the company's board of directors, which consisted solely of Mr. and Mrs. Hood, set the amount of Mr. Hood's annual compensation, including bonuses. Although they generally solicited and accepted the advice of accountants, Mr. and Mrs. Hood did not use any type of formula in setting these amounts during the review period except during the years at issue. Mr. Hood's annual compensation varied tremendously as the company evolved. Some years, his compensation was as low as $127,000, but in the years at issue, his compensation was close to $6 million.

Following an audit of the company's tax returns, the commissioner determined that portions of Mr. Hood's purported compensation for the years at issue exceeded reasonable compensation under section 162(a)(1) and disallowed those portions. Specifically, the commissioner disallowed over $5 million of the $5,711,105 total amount petitioner reported as compensation for Mr. Hood for its 2015 tax year and over $5.1 million of the $5,874,585 total amount petitioner reported for its 2016 tax year.

The company timely challenged the disallowance, and the tax court took up the issue of whether the compensation paid to Mr. Hood was unreasonable. Applying a multifactor test, rather than the independent investor test (favored by the 7th Circuit), the court held that some of the factors favored a decision that the compensation was reasonable, while other factors favored the opposite conclusion. After considering all the factors, the court held that the record supported reasonable compensation of $3,681,269 for tax year 2015 and $1,362,831 for tax year 2016. Interestingly, the court sustained the accuracy-related penalty for tax year 2016, but "decline[d] to sustain respondent's determination as to the accuracy-related penalty for the 2015 amount." ***Clary Hood, Inc. v. Comm'r***, T.C.M. (RIA) 2022-015 (T.C. 2022).

■ **"Service by mail" commonly misinterpreted.** In response to the covid-19 pandemic and the subsequent closure of office buildings, Hennepin County created an email inbox to accept service of property tax petitions. In June 2020, petitioners filed a petition challenging their 2019 assessments. Because the county's Minneapolis and Brooklyn Center offices were closed, petitioners sent copies of the petitions to the Hennepin County court administrator by U.S. Mail, erroneously believing that that the county attorney would also receive copies. The county moved for dismissal on the grounds that the petitions were untimely, and that petitioners did not properly effectuate service of process. Petitioners argue that the county is not prejudiced by lack of formal service because it received actual notice of the petitions when it received a copy of the filing made to the district court administrator.

The court previously addressed the effect of Session Law 74 in relation to chapter 278 property tax petitions, concluding that: 1) the plain meaning of Session Law 74 extended the deadlines in all district court proceedings, including chapter 278 petitions filed in the district court, and 2) "the suspension of deadlines provided in Session Law 74 applies not only to chapter 278 petitions invoking the jurisdiction of the district court but to those invoking the jurisdiction of the tax court." *See WMH Prop. Owner LLC v. Cnty. of Hennepin*, Nos. 27-CV-20-6274 & 27-CV-21-4306, 2021 WL 4312988 (Minn. T.C. 9/9/2021); *Timber New Ulm Props. LP v. Brown Cnty.*, No. 08-CV-20-1048, 2021 WL 5856123 (Minn. T.C. 12/7/2021). Thus, the court concluded that the petitions in the present matter were timely filed.

Minnesota Statutes section 278.01, subdivision 1 provides that a petition "must be served on the county's auditor, treasurer, attorney, and assessor." *See Kmart Corp. v. Cnty. of Clay*, 711 N.W.2d 485, 490 (Minn. 2006) (citing Minn. Stat. §278.01, subd. 1(a)). "The permissible methods of serving the pleadings that initiate a civil action in district court (and through section 271.06, subdivision 7, in tax court) are prescribed in Minn. R. Civ. P. 4." *Id.* at 489. The failure to timely file and serve a property tax petition deprives the tax court of jurisdiction. *Id.* at 488-90.

Minn. R. Civ. P. 4.05 allows a petitioner to request that the county waive personal service, but it does not specify or limit how the county may waive service of process. *See DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 270 (Minn. 2016). Rule 4.05 is commonly and erroneously interpreted to allow service by mail. In fact, it is a waiver that is requested by mailing the petition to the county, and it is necessary for the county to waive formal service and return the waiver-of-service form. "Service is accomplished and proven by the waiver, not the mailing."). S*ee* Minn. R. Civ. P. 4.05 advisory comm. cmt.—2018 amendments.

Here, petitioners argued that although they "technically did not properly serve [the County]," the U.S. Mail constituted a good faith effort during the covid-19 pandemic and the county was not prejudiced because it had actual notice of the petitions. The county contended that it was not served in any manner. The court concluded that absent evidence that the county agreed to forgo the requirements for acknowledging their waiver of personal service, petitioners "were not relieved of the separate requirement to comply with the requirements of Rule 4.05(a) when attempting to obtain service by U.S. Mail." Because petitioners, by their own admission, did not comply with the requirements, and the county did not agree to waive the requirements of Rule 4.05, service of process on the county was ineffective. The court granted the county's motions to dismiss. ***7017 Amundson LLC v. Hennepin Co.***, 2022 WL 599207 (MN Tax Court 2/23/22).

■ **Court uses discretion to depart from Rule 8100's default weighting for utility company valuation; concludes that commissioner overvalued property.** Minnegasco owns and operates a natural gas distribution pipeline system located throughout 40 Minnesota counties. The commissioner of the Department of Revenue assesses pipeline property using the unit-rule method expressed in Minnesota Rule 8100 (2021). "Unit valuation 'relies primarily upon a mix of the cost and income methods.'" The parties' dispute involved the commissioner's unit valuations in the consolidated matters of the 2018 and 2019 assessments.

Minnegasco is regulated by the MPUC, which uses a cost-of-service method by determining both a rate base and an authorized rate of return to determine the revenue necessary for a utility to collect its cost of service. The parties' dispute was over the proper application of Rule 8100. The parties disagreed about "whether rate regulation produces external obsolescence." Rule 8100's cost

approach begins with net book value, which is the historical cost of a pipeline's operating assets minus book depreciation. Regulatory rate base is net book value minus accumulated deferred income taxes (ADIT). The MPUC (which regulates Minnegasco), however, excludes ADIT from rate base, and Minnegasco does not earn a return on the ADIT portion of its net book value. Minnegasco asserted that its "inability to earn a return on ADIT produces external obsolescence under the cost approach." The commissioner objected to Minnegasco's argument, asserting instead that "regulated utility assets routinely sell for more than their book value."

Using the income approach, the parties disagreed about the proper way to determine capitalization rates. "Rule 8100 provides that a utility's net operating earnings are 'capitalized by applying a capitalization rate that is computed by using the band of investment method.'" Minn. R. 8100.0300, subp. 4. This method requires the determination of: "(1) a capital structure; (2) a cost of debt; and (3) a cost of equity." Minnegasco argued that capital structure "should be determined without regard to short-term debt, because natural gas distribution companies are not purchased with short-term debt. The Commissioner argue[d] that the exclusion of short-term debt 'improperly increases' the capitalization rate."

"Because of the unique character of public utility companies, the traditional approaches to valuation estimates of property... must be modified when utility property is valued." As such, the value of utility property is conducted under Rule 8100. Minn. R. 8100.0300, subp. 1. In a lengthy analysis, the court explained that a direct relationship exists between the cost and income approaches to valuation in cases of rate-regulated utility companies. The court agreed with Minnegasco that a departure from Rule 8100's default weighting of 50% to the income indicator and 50% to the cost indicator (as recommended by the commissioner) was necessary, but did not go as far as Minnegasco asked (85% to income and 15% to cost). The court instead used a respective 60/40 reliance to recalculate Minnegasco's valuation and determined that the commissioner overstated the unit value of the pipeline's operating system for both 2018 and 2019.

The court further concluded that, because the commissioner presented no evidence discrediting Minnegasco's conclusion that "the regulatory treatment of ADIT prevents a utility from earning a market-required rate of return on its *entire net book value*, and therefore causes economic obsolescence," Minnegasco presented "sufficient evidence to make a prima facie showing that the exclusion of [ADIT] from a rate-regulated utility's rate base causes external obsolescence." ***CenterPoint Energy Resources Corp v. Comm'r of Revenue,*** 2022 WL 995851 (MN Tax Court 3/16/22)


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MEMBER NEWS

We gladly accept announcements regarding current members of the MSBA. BB@MNBARS.ORG

Megan C. Kelly joined Northwoods Law Group, PA as a partner. Kelly focuses her practice on estate, incapacity and long-term care planning, guardianships, conservatorships, special needs planning, and probate and trust administration.

Russell S. Ponessa of Hinshaw & Culbertson LLP has been inducted as a fellow of the American College of Trial Lawyers (ACTL). Ponessa is a trial lawyer with 30 years of experience in product and professional liability, toxic torts, business and other commercial disputes, and class actions.

First Amendment litigators **Leita Walker** and **Emmy Parsons** received the Alicia Calzada First Amendment Award for safeguarding the interests of journalists during the trial of Derek Chauvin. This award is given to individuals who have worked to promote and advance the First Amendment, especially as it relates to news photographers.

Alexis McKim has joined the Eckberg Lammers prosecution group. McKim was previously an assistant county attorney in Anoka County, handling juvenile delinquency matters.

Lynae Tucker-Chellew has joined Goosmann Law Firm. Her areas of practice involve litigation, employment law, public sector law, and family law.

Gov. Tim Walz has appointed **Kevin Mueller** to the bench in the 10th Judicial District. Mueller will replace Hon. Thomas M. Fitzpatrick. He will be chambered in Anoka. Mueller is currently the criminal division chief at the Washington County Attorney's Office.

Gov. Walz has appointed **Leah duCharme** and **Heidi Schultz** as judges in the 7th Judicial District. Currently a senior shareholder at Gjesdahl Law practicing family law, duCharme will be chambered in Clay County. She replaces Hon. Amber B. Gustafson. Schultz will be chambered in Stearns County, replacing Hon. Kris H. Davick-Halfen. Schultz currently serves as assistant Todd County attorney.

Michael T. Hatting and **Olivia J. Leyrer** have joined Best & Flanagan's commercial lending and real estate practice group. Hatting joins Best & Flanagan as a partner. His practice involves commercial and residential real estate, helping real estate developers, owners, and investors. Leyrer joins Best & Flanagan as an associate in the real estate and municipal law practice groups. Leyrer has advised both city governments and private developers on complex real estate and development issues.

Matthew Resch has joined Maslon LLP. His experience is in entity formation, mergers and acquisitions, SEC filings and compliance, general counsel services, real estate transactions, and intellectual property concerns.

Gov. Walz appointed **Kathryn Iverson Landrum** to a judgeship in the 1st Judicial District. Iverson Landrum will be replacing Hon. Joseph T. Carter and will be chambered at Hastings in Dakota County. Iverson Landrum was previously a manager and assistant attorney general at the Office of the Minnesota Attorney General.

Jeremy Walls has joined Winthrop & Weinstine PA. Walls is in general corporate practice.

Gov. Walz has appointed **Elise Larson** to the Minnesota Court of Appeals. Larson will fill the vacancy that occurred upon the retirement of Hon. James B. Florey. Larson currently serves as the water program director and senior attorney at the Minnesota Center for Environmental Advocacy.

Sarah Porter has joined Spencer Fane as an associate in the firm's Minneapolis office. Porter's practice is focused on commercial transactions, real estate, and business and corporate law.

In memoriam

STEVEN ALLEN GUILLEMETTE
passed away unexpectedly late last fall at the age of 28. Guillemette was attending Mitchell Hamline School of Law.

VERDELL FREDERICK BORTH
79, passed away in Chanhassen on February 14. Borth attended William Mitchell College of Law and worked as a law clerk at both the Minnesota Court of Appeals and for Magistrate Judge Earl J. Cudd at the U.S. District Court for the State of Minnesota. He was admitted to all courts, including Minnesota State Court, U.S. District Court for Minnesota, the Eighth Circuit Court of Appeals, as well as being admitted for practice before the United States Supreme Court.

PETER J. ORPUT
died April 3 in Stillwater at age 66 after a recent cancer diagnosis. Orput, the longtime Washington County attorney, established a veterans' court and diversion programs for mental health and substance addiction, and led a statewide effort to sue manufacturers and distributors of opiate painkillers.

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ASSOCIATE ATTORNEY

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ASSOCIATE ATTORNEY

REICHERT WENNER, P.A. a general practice law firm in St. Cloud, MN has an immediate opening for an associate attorney with at least two years of experience in civil litigation, family law, real estate or corporate law. The candidate should have strong research, writing and client communication skills. Submit cover letter, resume and writing sample to: lmiller@reichertwennerlaw.com.

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ASSOCIATE ATTORNEY

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R&D TAX CREDIT ASSOCIATE ATTORNEY

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- Excellent verbal and written skills and ability to effectively communicate within a team.
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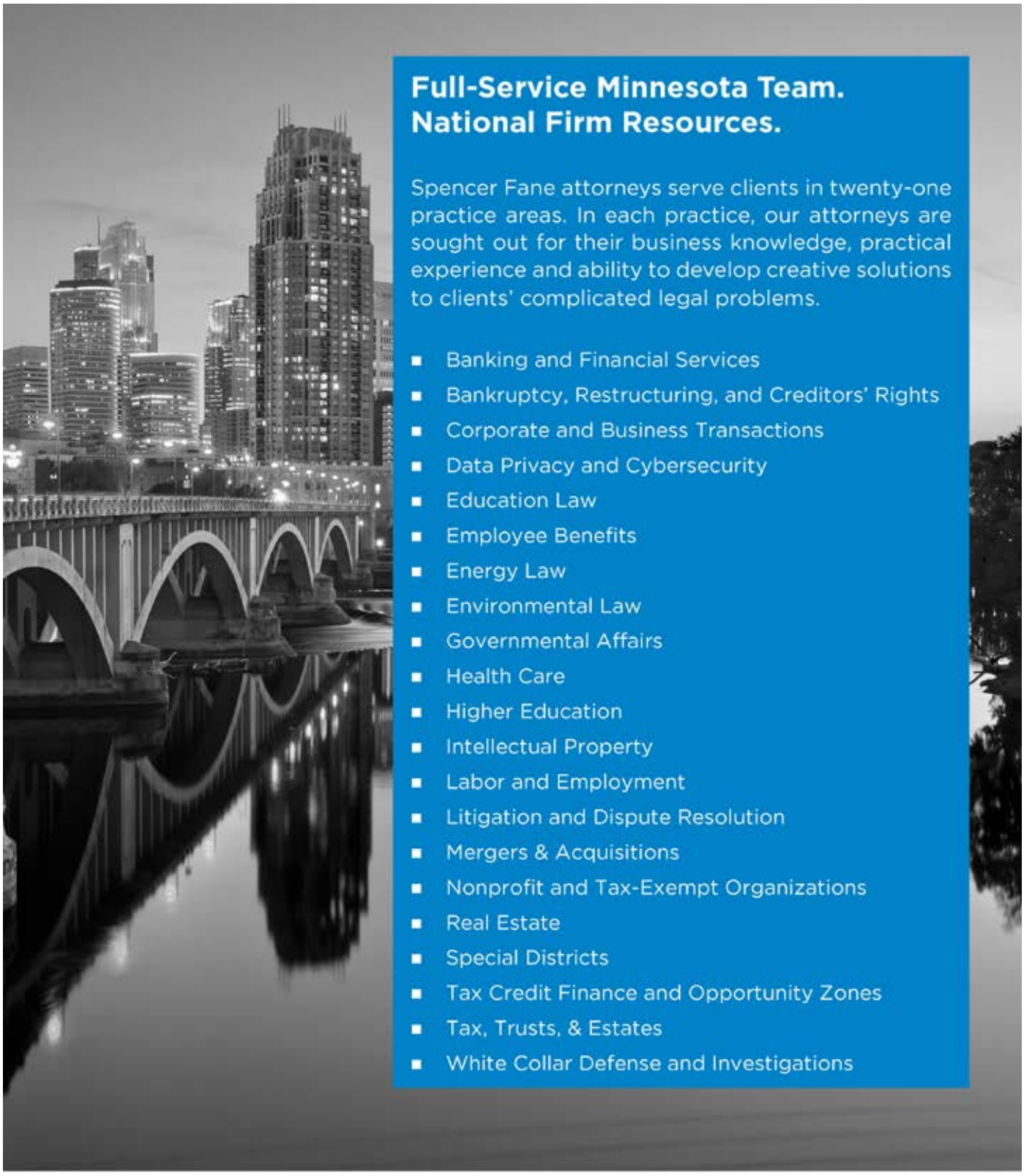

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