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Mitchell Hamline professor's forthcoming article cited in briefs in crucial Supreme Court case

BY TOM WEBER

The authors of three briefs in an important election-related Supreme Court case cited a forthcoming law review article by Mitchell Hamline Associate Professor Jason Marisam.

Oral arguments in the case, Moore v. Harper, were heard in December. Marisam's forthcoming article focuses on what's called the independent state legislature theory. It's the crux of the case over redistricting maps in North Carolina. Legal experts contend if the conservative-leaning court backs the theory, it will have important ramifications on elections throughout the country. Marisam's article, entitled "The Dangerous Independent State Legislature Theory," explains and exposes its "flaws and dangers." It will be published by the Michigan State Law Review.

Mariam's piece is cited in three briefs filed in the case. One was filed by a bipartisan group of former public officials, former judges, and election experts from Pennsylvania; another was filed by the Lawyers' Committee for Civil Rights under Law, along with fourteen additional organizations; and the third was filed by former Republican elected and executive branch officials. In all three cases, the briefs support the respondents, meaning they oppose the idea of the independent state legislature theory.

"I'm heartened these organizations have looked to this article for inspiration in their work on this case," said Marisam. "This case is incredibly important to elections and voting, and I hope the justices take the time to fully understand the implications of the independent state legislature theory."

In short, theory contends that the U.S. Constitution delegates authority to regulate federal elections in a state to only the state's elected lawmakers in the legislative branch, and that no checks and balances exist from state judges. The ramifications are far-reaching beyond federal elections, as states usually regulate elections at all levels of government in the same or similar ways.

If a legislature were to change a law over how to regulate elections, the theory implies that a judge could not strike it down for violating the state constitution—as can currently happen. For example, if the Supreme Court were to adopt the strongest version of the theory, judges could not strike down gerrymandered congressional districts drawn by state legislatures.

"The independent state legislature theory would effectively eliminate state-level constitutional protections for voting rights," Marisam writes, in the article. "However, the justifications for the theory are undertheorized, flawed, and unsupported.

"The theory cannot do the work that should be required before gutting a civil right as important and fundamental as voting."

Marisam joined the Mitchell Hamline faculty in 2022 from the Minnesota Attorney General's office. His work there included representing Minnesota's secretary of state in several court cases in 2020 over how the election was administered during the pandemic.

Family, it's time we had a talk

BY PAUL D. PETERSON

PAUL PETERSON represents families in personal injury and wrongful death cases. His office is in Woodbury and he is licensed in both Minnesota and Wisconsin. He is the proud papa of four above-average children and one outstanding dog.

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

On October 28, 2022, I heard hundreds of new admittees swear this oath to the ranks of our newly licensed attorneys in Minnesota. I was blessed with the opportunity to speak at the induction ceremonies for our newest members of the bar. The event was held in the beautiful chamber of the Minnesota House of Representatives. Spending that day with the members of our Supreme Court and the leaders of our bar admission process was one of the highlights of my first six months as your president. It was inspiring to see all these new professionals take the next step in their careers. Throughout that day I was reflecting on my own career and the oath that I took several years ago—the same one I heard hundreds pledge that day. The same one you took.

In my initial President's Page, I described our association as a family. But we are first and foremost a profession. Well, fellow professionals, it's time we had a talk about our association and our profession. This is the first of just a few more President's Pages I can share with you. We need to discuss several different points over these final months. The first thing we need to talk about, as a family, is that our association is strong. We have a very dedicated and talented CEO and staff that have worked hard to deliver services in a cost-effective manner. Our reserves are strong, and the future of the association looks bright for years to come. But that's not what we need to talk about today. While our association is in strong shape, we can be so much better and even more effective in our work on behalf of the profession. So what we need to talk about now, and going forward in the coming years, is membership. Simply, the more members we have, the stronger our association.

I routinely get to deliver remarks on your behalf and on behalf of our organization. I accurately describe it as the voice of the profession. But it pains me to say that over the past two decades we have seen the percentage of licensed attorneys who are members of our bar association decreasing. What was once a penetration rate of members to total licensed attorneys of upwards of 70 percent has dropped below that mark over the years. As most of you know, we are a voluntary association. Membership in our organization and the related district bar associations is not required to practice law in Minnesota. But it's vital to our individual practices and careers and to our profession as a whole.

I have heard many reasons offered for why our membership numbers aren't stronger as a percentage of all licensed lawyers. Some of those reasons involve an assertion that bar association membership is not a good "value." I must admit I have a hard time understanding when I hear those comments. I don't understand because my own experience has been the complete opposite. Membership in the MSBA and related bars has delivered value for me personally again and again. Value that is far greater than my cost. My experience has been so fulfilling and helpful to my practice that I can't imagine not being a member.

continued on next page

North Star LAWYER

NORTH STAR LAWYERS: CERTIFICATION IS OPEN

The MSBA is proud to recognize its members who have completed the aspirational goal of contributing at least 50 hours of pro bono work in our community. More than just a recognition, it shows that pro bono work is possible and valued. It is a way for our community to come together and demonstrate how we have shown up for those most vulnerable to injustice.

North Star has always been a partnership between lawyers and the organizations that make much of our pro bono work possible. And we're happy to announce that beginning this year, when you certify as a North Star Lawyer, you have the option to enter the organization where you completed your pro bono legal services. If that was through a non-profit funded by the Minnesota State Bar Foundation (MSBF) or eligible for CLE credit for pro bono, the organization will be entered for a chance to win a $5,000 grant from the MSBF.

"In my previous role as a pro bono manager," notes MSBA Access to Justice Director Katy Drahos, "I had the privilege of connecting pro bono lawyers with those who were in crisis and seeing the direct impact of those pro bono hours. I will never forget the relief I heard in voices of those who received representation, nor the phone calls after representation where I got to hear how that lawyer changed their life for the better. North Star is about all those generous lawyers who walked alongside clients, meeting them in their time of need. Whether it's in a clinic, by helping with paperwork, mentoring a new pro bono attorney, or litigation, we all have important skills to offer."

KATY DRAHOS

To certify as a North Star Lawyer, visit ***www.mnbar.org/NorthStar*** or check with your firm about sending in all your colleagues' contributions. If you didn't hit the 50-hour mark in 2022, now is a great time to start for 2023. Visit ***www.projusticemn.org*** for a full listing of pro bono organizations or reach out to Katy Drahos (***kdrahos@mnbars.org***) for personal recommendations and connections. ▲

Call for nominations

2023 BECKER AWARDS

Do you know a non-profit legal services staff member or law student who deserves to be recognized for their outstanding work with low-income Minnesotans? If so, nominations are open for the 2023 Bernard P. Becker awards! Through four awards for legacy of excellence, emerging leader, advocate, and law student, we are able to honor those who are on the front lines of injustice for low-income Minnesotans. Anyone can nominate by visiting ***www.mnbar.org/becker-awards.*** ▲

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Chief Justice Gildea and Justice G. Barry Anderson of the Minnesota Supreme Court provided thoughtful remarks that October day, and each of them emphasized to our newest lawyers the incredible opportunity and responsibility that comes with being granted a license to practice law in the state of Minnesota.

Opportunity and responsibility. We'll come back to those in a minute.

I consider myself an optimistic and enthusiastic person. We are all aware of the many inspirational quotations about the importance of enthusiasm. As we begin this journey together to talk about membership and other important issues facing our profession and our association, I want to let you know that I don't view life as a zero-sum game. I don't believe that the other person must lose for me to win. To quote the late Sen. Paul Wellstone, "We all do better when we all do better." That's my outlook. I want you to know those things about me if you don't already, because I believe that if our members set a goal to increase membership, put a plan in place, and then invest in and work that plan, we will be successful. I'll also let you in on another secret—our greatest selling point is our members, their talents, their enthusiasm. Now we need you, the current membership, and all your collective talent to help us sell the association to more of our potential members.

We have responsibility to use this license we've been granted to make our system the best it can be. We are at our best when a large percentage of the licensed lawyers are members and active in the bar association. More importantly, we all have an opportunity. We can connect and impact the people in our social network and our sphere of influence. In my next column I will be describing, with more specifics, the membership plan that we are putting in place. This plan is intended to become a core function for the association in the years to come. Our goal is to have all our members thinking and acting about increasing membership in the bar associations. We want our members to help sell the benefits of membership to others in their respective spheres of influence. We are asking each member to become an ambassador for membership in the MSBA. Our Ambassador Program will be introduced in the coming weeks and months, and there is a commitment from our leadership through the next number of years to implement and develop this program. We see it as a great opportunity for the MSBA and its individual members to "Step Up, Step In and Stand Out"! We'll talk again soon. ▲

MSBA

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Join your colleagues for a day of presentations, panel discussions, and conversations with attorney thought-leaders. Each One Profession event is a unique event with custom CLEs, tailored to reflect the interests and concerns from each region.

We look forward to seeing you.

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APRIL 28
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2023 RESOLUTIONS—ETHICS EDITION

BY SUSAN M. 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.

The new year presents an opportunity to take a fresh look at many aspects of our lives and practices, which is why resolutions are so popular. I love resolutions but try not to leave them to the new year—every day is a new day, right? But if you enjoy reflecting and resolving to make some changes in your life at the start of this new year, might I suggest a few ethics-related resolutions to integrate into your practice?

No. 1: Read the ethics rules

When was the last time you pulled out the rules and looked at them? They do change periodically, you know. For example, I didn't even know there was a rule dedicated to prospective clients (Rule 1.18) until I was hired for this job and reviewed the rules. The rule was adopted in Minnesota in 2005, long after I graduated from law school and last really looked at the rules (except for occasionally reviewing the conflict rules). It's a handy rule to know, one that comes up frequently on our ethics hotline.

In 2022, the Minnesota Supreme Court made several changes to the advertising rules, including elimination of the requirement that advertising must be labeled "Advertising Material." Did you know that? Other changes included the ability to provide nominal gifts as an expression of appreciation for a referral or recommendation. Sometimes changes are permissive and something you long thought to be required or prohibited isn't anymore.

Other times, lawyers learn some of the finer points of the rules when they are responding to an ethics complaint. Trust me, one hour reading through the rules and comments is time well-spent. And remember to read Minnesota's rules, not the ABA model rules. There are differences and I'm still surprised by how many people cite to us the model rules. You can find Minnesota's rules on our website or in your Minnesota Rules of Court (if you like hard-copy rule books). Resolve to read the ethics rules.

No. 2: Update your retainer agreement

I'm sorry to report that too few lawyers are familiar with the ethics rules that apply to retainer agreements. Every month we issue discipline for lawyers who are surprised to find that their retainer agreement (likely one they borrowed from a friend or pulled from the internet) is non-compliant. Does your agreement say that some form of payment is "non-refundable"? How about "earned upon receipt"? Both descriptions are prohibited under Rule 1.5(b)(3), Minnesota Rules of Professional Conduct (MRPC).

Do you accept flat fees? Do you always have a retainer agreement *signed by the client* (not the person who might be paying the flat fee) when you receive those funds? Is the retainer agreement compliant with the requirements of Rule 1.5(b)(1), MRPC? Do you know what the requirements of Rule 1.5(b)(1), MRPC, are? If you do not have a signed (and compliant) fee agreement, those unearned flat fees should be going into your trust account. The ethics rules (Rule 1.15(c)(5), MRPC) require that all funds received in advance of services being performed must go into trust—with only a limited exception for when you have a compliant and signed retainer agreement.

And those advance costs you get for filing fees or miscellaneous expenses? I cannot emphasize enough that those cost advances must go into your trust account. The ethics rules require you to safekeep other people's money that you hold (Rule 1.15(a), MRPC), and costs that are dedicated for use for a particular purpose are never the lawyer's money. Those dollars belong in trust until the expense is incurred.

Do you do contingency-fee work? If so, you must always have a written fee agreement in place, and you might want to look at it to make sure it clearly denotes whether expenses will be deducted before or after the contingency fee is calculated. Do you always issue written statements showing the outcome of the contingency matter, the recovery, and the method for determining the client's remittance? Rule 1.5(c), MRPC, explains these requirements.

What about fee-sharing with a lawyer who's not in your firm? There are specific requirements to follow in Rule 1.5(e), MRPC. Do you want to charge clients for copying their file? Make sure you include that in your retainer agreement. (*See* Rule 1.16(f), MRPC.) Resolve to review your retainer agreement and make sure it is easy to understand and compliant with the ethics rules.

No. 3: Talk to your team about ethics

Most lawyers work with some staff. Even many solo practitioners utilize non-lawyer staff periodically. Can you remember the last time you reminded everyone you work with of their obligation to comply with the ethics rules just as you do? As lawyers, we have a duty to make reasonable efforts to ensure we have in place measures to ensure lawyers and staff we work with know, and are complying with, the rules. (*See* Rules 5.1 and 5.3, MRPC.) If you really have your act together, you may have policies and procedures you can cite to your team about their obligations, but what if you don't actually do it? It is always a good idea to reiterate core precepts: confidentiality, honesty, communication and diligence, recordkeeping, dealing with unrepresented or represented parties, speaking up if you see an issue or make a mistake. Too often we assume that individuals understand the requirements because they work for a lawyer—but unless your team is taught and reminded, how can they really understand and comply with the various ethics rules that govern your practice? Resolve to talk to your team about ethics.

No. 4: Try to prioritize your well-being

This one is perhaps the most challenging. Being a lawyer is stressful. It demands a lot from us, and there is never enough time in the day to get everything done. Adding to the challenge, we also have high expectations for ourselves and others. Conflict is also often present.

I know you know this, but the law is also very enticing. Whether it's a matter of money or influence, the rewards can cause us to deprioritize family and ourselves. I have no magic solutions for this well-known and insidious aspect of our profession, but I do know that you will never regret taking small steps to refocus on yourself and those you love. Just before Christmas, a friend and mentor passed away. He was a talented and successful lawyer, but his superpower was the ability to be present for others, and to take time for family, friends, and activities he enjoyed. He found balance and encouraged others to do the same. Are there small ways that you can work in time for yourself, family, and friends into your day? It may be difficult to find balance, but small steps really do add up. Resolve to try to prioritize your well-being in 2023.

Conclusion

Resolutions may not interest you, but we all set personal and professional goals. My resolution (goal) for 2023 is remembering that small steps forward are the key to lasting change. Perhaps one of the above suggestions will help you take a small step toward including the ethics rules in your practice. And do not forget: We are here to help you answer your ethics questions, at *www.lprb.mncourts.gov* or 651-296-3952. Best wishes for 2023. ▲

Thinking about the future of CYBER INSURANCE

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.

A few years ago, I wrote an article titled "Is cyber liability insurance important for law firms?" (May/June 2018) that explored the benefits and limitations of cyber liability insurance and the need to resist relying on coverage as a cyber "get out of jail free" card. In any circumstance, cyber insurance should be viewed as one piece of a complete cybersecurity strategy; these policies are valuable not only for the coverage they offer, but as a starting point for organizations to assess and improve upon their current postures. A policy can help an organization visualize the monetary losses incurred by cyber threats. However, when it comes to collecting on a policy in the aftermath of an attack, organizations are often uncertain when it comes to determining what is covered. In recent years, the problem has only gotten worse as insurers try to combat a growing number of cyber losses.

Since the time I wrote that article, changes have been made to how providers address the complicated task of quantifying the risks of cyber events. Cyber attacks have short-term and long-term consequences and can produce multifaceted ongoing risk (for example, the Log4j vulnerability—which not only had an immediate effect but created the potential for future hacking events); furthermore, issues can arise when attributing an attack. To counteract this, insurance companies have adopted increasingly specific coverage language to limit what is included in policies.

For example, in my article, "Social engineering or computer fraud? In cyber insurance, the difference matters" (October 2022), I discussed *SJ Computers, LLC v. Travelers Casualty and Surety Company* (21-CV-2482 (PJS/JFD) (D. Minn. 8/12/2022)). This case clearly demonstrated the power of policy language, with the court ruling that the definitions contained within the Travelers policy clearly differentiated between social-engineering and computer fraud, limiting SJ Computers' coverage following a phishing attack. Organizations are frequently surprised to learn what is actually covered in their cyber policies, especially when assumptions are made about how different types of attacks are defined. The ways in which attacks are categorized can sometimes seem counterintuitive, and it is important to periodically review your policy to avoid any last-minute surprises. It's also important to recognize that the proliferating number of cyber attacks organizations now encounter, paired with the possible ripple effects of a single attack, may soon cause insurance companies to reconsider their ability to insure cyber attacks at all.

Recently Mario Greco, the CEO of Zurich Insurance Group Ltd., one of Europe's biggest insurance companies, asserted that the potential for cyber attacks to cause major disruption may soon preclude them from insurability.[1] Simply put, the unpredictable losses associated with even one cyber attack make the task of quantifying damages difficult, if not impossible. Consider an attack on critical infrastructure that impacts the healthcare sector, resulting in an inability to care for patients—or the disaster that could be wrought by a nation-state-sponsored ransomware campaign. Even as we start 2023, the war in Ukraine continues to highlight concerns regarding nation-state cyber campaigns, especially when a single event could cause a complex wave of catastrophic loss.

In response, insurance providers have worked to tighten policy language, set coverage limitations, and reduce ambiguity as much as possible. "Spiralling cyber losses in recent years have prompted emergency measures by the sector's underwriters to limit their exposure. As well as pushing up prices, some insurers have responded by tweaking policies so clients retain more losses... In 2019, Zurich initially denied a $100mn claim from food company Mondelez... on the basis that the policy excluded a 'warlike action.'"[2] Organizations often only discover gaps in their coverage when an event has already occurred.

Cyber liability insurance is sometimes responsible for creating a false sense of security in organizations and it is likely that drastic changes will continue to be made in how these policies are written and obtained. "Increased ransomware events have caused elevated losses; cyber insurance companies have responded by increasing premiums and have required better cyber hygiene requirements for policyholders such as multifactor authentication... [C]yber insurance will have to evolve in kind to keep pace with the drivers of losses."[3] Organizations will be held to a higher security standard to meet the requirements of their cyber insurance policies; rather than being viewed as a safety net, cyber policies should serve as a driving motivator for enacting proactive measures and maintaining best practices.

Cyber insurance policies can be a valuable tool in giving organizations a real-life perspective on cyber risk and the need for consistency in maintaining a strong security posture. Like any component of a healthy cybersecurity plan, cyber insurance is only one aspect of how an organization should prepare itself for the worst. And organizations must bear in mind that cyber insurance policies have inherent limitations, creating confusion for organizations when they are most needed.

As cyber threats evolve, it is likely that cyber insurance will change in turn, accounting for the immense losses that can characterize even a single attack. As Mario Greco put it, "there must be a perception that this is not just data... [T]his is about civilization. These people can severely disrupt our lives."[4] Indeed, the ramifications of an attack often extend beyond a matter of mere inconvenience. To match this risk, proactive measures to protect our cyber environments (including striving to improve internationally through governmental intervention and cooperation) should continue to be top priorities. ▲

NOTES

[1] *https://www.swissinfo.ch/eng/business/cyber-attacks-set-to-become–uninsurable-–says-zurich-chief/48161718?utm_campaign=swi-rss&utm_source=multiple&utm_medium=rss&utm_content=o*

[2] *Id.*

[3] *https://www.fitchratings.com/research/insurance/russian-cyberattacks-may-test-insurer-war-exclusion-policy-language-01-03-2022*

[4] Supra note 1.

Q: Are there any life skills or personality traits you didn't expect to use in practicing law—but find yourself using often?

TOM BERNDT

Tom Berndt is a partner in Robins Kaplan LLP's business litigation group. He represents both plaintiffs and defendants in high-stakes business disputes and is currently serving as secretary of the MSBA Business Law Section.

Before I started my legal career, I didn't appreciate how important it is for lawyers to be able to think and communicate like non-lawyers. As an aspiring lawyer, I imagined myself making complicated, multi-faceted arguments to an audience that understood (and was genuinely interested in) the topic. If only this were reality. In practice, I'm constantly working to streamline arguments, simplify complexities, and brighten dry subjects. A judge's or juror's attention is a limited resource. And people aren't persuaded by arguments they don't understand or relate to. I've found that the most effective advocates write and speak like non-lawyers.

Another skill I didn't expect to use as often as I do is adapting to change. A senior partner at my firm used to say: "No plan survives first contact with the enemy." Over the years, I've found that the best lawyers can roll with the punches and pivot on the fly. In my practice (commercial litigation), cases last years and involve dozens of battles along the way. There will be surprises and some will force you to make "halftime adjustments" à la Bill Belichick. This is particularly true in the courtroom, where you have to react in real time. While it's impossible to anticipate every eventuality, I find that planning for a few surprises makes them less stressful when they inevitably occur.

DEMETRIA DYER

Demetria Dyer is an attorney at Sapientia Law Group, where she assists clients in resolving a wide variety of commercial disputes and provides general counseling to small and emerging businesses.

To become an attorney, I not only had to overcome the obstacles of entering a white-male-dominated industry as a Black woman, but also had to overcome poverty. I boldly tell folks that I grew up in a poor, single-parent household. The only lawyers I saw were on TV. I used to think my background was a vulnerability, but now I know it is a source of strength. My upbringing has molded me into a tenacious person. And this trait shows up daily in my legal practice. I am tenacious when fighting hard for my clients in complex commercial disputes, and I am tenacious when I advise small or emerging businesses on how to best protect their brilliant business ideas or when they are faced with adversity. I never would have thought that my upbringing would someday help me practice law, but it has served as a consistent reminder that I have beaten the odds and I can continue to do so on behalf of my clients.

MELISSA STULL

Melissa Stull is a founding partner and trial lawyer at Soule & Stull in Minneapolis. She focuses her practice on commercial litigation and product liability defense. Her community activities include service on the Minnesota Commission on Judicial Selection, MSBA Civil Litigation Section Governing Council, and as an MSBA mock trial judge.

I decided I wanted to become a trial lawyer when I was 12 years old, but I had few real-life role models to shed light on the traits needed to become an effective attorney. I assumed I would need to work hard, listen and communicate well, and be agile—able to think on my feet. I hoped I would practice law with diligence, reliability, and integrity. Those assumptions proved to be true and are skills and traits I draw on daily. Other, less obvious skills I use often are creativity, teamwork, sense of humor, and patience.

Creativity is perhaps the skill I expected to use the least. However, I find that creative problem-solving is essential to serving our clients well. We should not always look at problems through the same lens and take the same approach to each case. Rather, our clients benefit from creative thinking that takes into consideration the many unique facets of each case, including business decisions at play, long-term impacts of testimony and evidence-gathering, and the precedential value of settlements or jury verdicts.

"FUNNY" MIGHT NOT BE A TRAIT PEOPLE ASSOCIATE WITH TRIAL LAWYERS, BUT I HAVE FOUND THAT HAVING A GOOD SENSE OF HUMOR AND BEING ABLE TO BRING A LITTLE LEVITY TO SERIOUS SITUATIONS CAN GO A LONG WAY.

Teamwork is something that comes naturally to me but is a skill that I thought would be less utilized after my days of competitive sport were behind me. Little did I know that I would be working on complex cases with teams of talented legal professionals, expert witnesses, clients and company employees, court staff, and more. I love working on a team and am thrilled this trait can be put to good use in my legal career.

"Funny" might not be a trait people associate with trial lawyers, but I have found that having a good sense of humor and being able to bring a little levity to serious situations can go a long way. I recall making a joke during *voir dire* about being from out of state that endeared the jurors to me and our client, when all of the lawyers before me had made it a point to tell the jury they were good old southern boys.

Patience is not a personality trait *or* life skill that comes naturally to me. But complex litigation is a marathon, not a sprint, and cases often span many years. It takes time to reveal the relevant facts, engage in discovery, work up expert testimony, and prepare a case for trial. The case themes and big picture take time to develop, and patience is required to work a case up well.

BUILDING A MORE ACCESSIBLE BAR

A roundtable conversation featuring members of the Minnesota Disability Bar Association

MODERATED AND INTRODUCED BY ANN MOTL

In early 2022, I connected with attorneys interested in forming a Minnesota disability affinity bar association. Since that time, we have incorporated and obtained nonprofit status. The Minnesota Disability Bar Association (MDisBA) is an organization of Minnesota legal professionals including attorneys, judges, staff, and students with disabilities as well as nondisabled allies. We seek to educate the legal community about professionals with disabilities, provide a supportive and inclusive community for professionals with disabilities, and elevate professionals with disabilities to create a more diverse and equitable profession.

I am so pleased to moderate this conversation about disability in the legal profession by my fellow MDisBA directors. At a time when disability disclosure still can carry professional risk, I am proud of and grateful for their openness. Although we all have different disability experiences and perspectives, you will see a common thread of resilience and a desire to imbue disability pride in the profession. Disability can bring great challenges, but I am thrilled it has brought us together and we look forward to supporting and elevating the disability community in the legal profession.

HOW HAS YOUR DISABILITY AFFECTED YOUR LEGAL CAREER?

BRIANNA CHAMBERLIN:

My network is much broader than it used to be. After my diagnosis with multiple sclerosis, I have found an entire community of legal professionals to connect with that I may not have found otherwise. Additionally, I have learned to care even more about my time. I try to be as efficient at work as possible to ensure I have time to invest in myself and my health.

GORDON KNOBLACH:

I was diagnosed with Crohn's Disease, an immune system disorder, when I was a 20-year-old undergraduate student. I underwent nearly two dozen surgeries and numerous medical diagnostic interventions while my doctors worked to get my symptoms in check. The surgeries were so frequent I had to withdraw from coursework for a semester. I underwent several surgeries during law school as well, affecting my ability to participate in classes and be a fully engaged student.

These days I am in remission and have not suffered any flare-ups for about seven years, but the looming possibility of severe symptoms returning has affected my career trajectory. Right out of law school, I turned down a unique offer to clerk for the High Court of American Samoa because I could not receive my refrigerated medication while on the island. I have had to keep a keen eye on insurance offerings of employers due to the high cost of medication to keep my symptoms in remission. It also means I've not been able to take breaks when switching jobs because a lapse in insurance is an impossibility for me. That said, I have been able to devote my career thus far to public service and couldn't be happier about it. I have worked with tremendous colleagues and managers who have been nothing but supportive.

ELEANOR FRISCH:

My legal career was all going according to plan. I had completed a federal appellate clerkship and was in my third year of litigating class actions. Then I got really sick. I suddenly had frequent breathing issues, nausea, chronic pain, fatigue, mood swings, weird rashes, and more. For years, no one knew why. When people think about disabilities, they usually don't consider that sometimes disability occurs before a medical diagnosis is reached. I spent four years in diagnostic limbo. While I sought a diagnosis, I had to take several health sabbaticals and ultimately change firms to achieve more accessible hours. Then, about a year ago, a smart and compassionate doctor started treating me for a mast cell disorder—a condition involving over-sensitive immune cells. Thanks to treatment, I have made incredible strides.

The years I spent advocating for a diagnosis and treatment for myself have only improved my resilience and problem-solving skills and have made me a better lawyer in many ways, but I still deal with flare-ups regularly. Fortunately, my firm and my team are very understanding, and I work a 75 percent schedule. Without the ability to work these reduced hours, I would have had to leave the legal profession altogether.

LAUREN CLEMENTS:

In some ways, I do not believe my disability, Arthrogryposis Multiplex Congenita, has affected my legal career at all. But that is largely because I have downplayed my disability for a majority of my career and have worked to address any issues stemming from my disability in the privacy of my personal life and on my own time. I also rarely found that I needed to request any formal accommodations—perhaps I wanted to believe my disability wasn't severe enough to need any—so I felt that my disability didn't affect my career.

In reality, my disability affects my legal career in many ways, including accessibility of courthouses and law firms, fluctuations in energy and pain levels, or the pressure to "look" like a lawyer. You will not catch me in high heels, carrying binders and racing to keep up with everyone around me. For many years, I thought that made me a lesser attorney because I couldn't wear high heels or a perfectly tailored pencil skirt. Now I'm grateful to have had extremely supportive colleagues who are teaching me that my disability can also be viewed as a strength. I am a creative, persistent, and dedicated advocate for my clients, and I have greater empathy for my clients, colleagues, or others I come across in my career. In fact, having a disability is now opening new doors, such as the Minnesota Disability Bar Association and Littler's Affinity Group for Individuals with Disabilities, that would not have been available to me without sharing about my disability.

WHY IS THE MINNESOTA DISABILITY BAR ASSOCIATION IMPORTANT TO YOU?

Gordon Knoblach: It took a long time to come to terms with my disability. I struggled with the idea of labeling myself as disabled, or even believing that my illness qualified as a disability. I felt that having a disability that others could not see would make me less deserving of identifying as disabled, or that I would be intruding upon a space that was not meant for me. With the Minnesota Disability Bar Association, I am excited to be around other individuals with visible and invisible disabilities, as well as allies and supporters. These are people who understand my journey because they, too, have faced similar journeys. MDisBA has shown me a new side to persons I had already known professionally and introduced to me others I may not have otherwise met. It is empowering to see and feel that you are not alone, that others understand you, and that others support you. I want that for myself, I want to provide that for my colleagues in MDisBA, and I want MDisBA to be a beacon for anyone else who may be just starting their own journey.

Eleanor Frisch: Part of the goal of MDisBA is simply to raise awareness of people with disabilities in the legal profession. It is important for lawyers with disabilities to make ourselves visible, to stand up and show the legal community that we're here and have a lot to contribute. In fact, we have unique contributions to offer. Many people with disabilities have to problem-solve, advocate for ourselves, and overcome obstacles just to function in society. The resulting skills serve us well as lawyers. These experiences can also give us a better capacity to empathize and connect with clients who are enduring hardship.

MDisBA also provides a way for legal professionals with disabilities to find and help each other. This can be more difficult than it seems, especially for those of us with invisible disabilities.

Lauren Clements: The Minnesota Disability Bar Association is important to me because navigating the legal field with a disability presents challenges that my other colleagues, friends, and family simply cannot understand. Through the Minnesota Disability Bar Association, I am gaining an entire new network of individuals who understand a part of me, a part of my life, that no one else is able to relate to. It also brings a new sense of comfort and confidence in knowing that I am not navigating this field with a disability on my own. By developing the Minnesota Disability Bar Association, we are creating a new network that can provide support, encouragement, and understanding.

Brianna Chamberlin: When I was diagnosed with multiple sclerosis in my fourth year of practice, I didn't know where or who I could turn to. I was lucky to connect with another lawyer who had been through something similar. His advice ended up pushing me through the first few months after my diagnosis and gave me the confidence that my diagnosis didn't have to affect my professional career. It is important to me that I pay that forward. The Minnesota Disability Bar Association, through our mentorship program, will be able to provide similar support and mentorship to legal professionals who either have or develop a disability.

HOW CAN THE LEGAL FIELD BECOME MORE ACCESSIBLE FOR PROFESSIONALS WITH DISABILITIES?

Eleanor Frisch: People with disabilities are seriously underrepresented in the legal profession. Less than 2 percent of lawyers identify as disabled, even though 1 in 4 adults in the United States have a disability. This is largely due to the long hours and lack of flexibility in the legal profession, but it doesn't have to be that way. There's no reason the legal profession can't become more flexible. Firms could offer a partnership track with a 75 percent schedule and 75 percent compensation, for example. This kind of schedule can greatly benefit those with disabilities—and of course others as well. Personally, I am not only happier and healthier working reduced hours, but also *more efficient* and *a better lawyer*. As another example, many firms are now insisting that workers return to the office—without considering how their return-to-office policy might affect those of us with disabilities. Allowing legal professionals with disabilities to continue to work from home is an easy and inexpensive accommodation.

Lauren Clements: The legal field can become more accessible in many ways, but I think the key is getting the conversation started—opening the doors for individuals to feel more comfortable about sharing their disability and what they need in order to be their most successful. From there, we can all have a better understanding of how we can assist each other, including by providing accommodations. I'm amazed by how the barriers to disabilities often shatter once a conversation gets started. It is not often that colleagues, opposing counsel, or courts do not want to help—it's merely a matter of not knowing what they can do to help. With that, it is also important to continue educating the legal field about disabilities and how to navigate conversations in a productive, respectful manner.

Beyond getting the conversation started, I think it is also critical to take a look at the physical surroundings we are working in. Is your law firm, courthouse, or other workplace accessible? Do you have information on your website about who to contact for accommodations? Do you have accessible parking? Is your website easily navigated by someone using other software to do so? Overall, we need to close the gap between what is merely ADA-compliant and what is truly inclusive of individuals with disabilities.

Brianna Chamberlin: Often the barriers for those with disabilities are in plain sight, but still may be difficult to identify. The pillars of the legal field, including courts, law firms, and governments, should consult with people who have disabilities to identify those barriers and how best to fix them. Further, implicit disability bias is still highly relevant. I believe education specific to implicit disability bias should be offered in the hope of promoting a culture where those with disabilities feel seen by, respected by, and trusting of their colleagues.

Gordon Knoblach: When you encounter a disabled legal professional, know that they have persisted not only through school and the legal field, but also their own disability. Disabled professionals are strong and capable. Disabled professionals can enrich your team, the legal field, and the community at large. Communicate with your colleagues with disabilities; figure out what everyone can contribute.

HOW HAS THE PANDEMIC CHANGED YOUR VIEW OF DISABILITY?

Lauren Clements: When we first started working from home, I felt I finally achieved "equity." Not only was I working from home, which meant my physical limitations were a non-issue, but all my colleagues were also working from home. In fact, even the courts were working from home. We were all in the same boat—all dealing with similar challenges. But now that we are returning to a hybrid model, I can't say I believe an accommodation of remote work is the perfect answer for someone with a disability. Sure, I am able to focus on my job more and less on the pain of the day or whether my shoes are comfortable for walking, but remote work also isolates me from the majority. If I'm working from home, I'm missing out on the hallway conversations, the unplanned lunches, and the inevitable mentorship and camaraderie that develops in an office setting. The pandemic has brought me a new perspective on the pros and cons of certain accommodations for disabilities, for both myself and others.

On a separate note, the pandemic also helped me to realize that absolutely everyone is dealing with *something* that is affecting their career. For me, it might be my physical disability; for another, it might be caring for their children, having a sick dog, assisting an elderly parent, or dealing with anxiety or depression for the first time. I also believe that attention to disabilities is gaining more traction as a result of the pandemic. As a collective, more people are facing mental health and physical challenges. We are seeing more anxiety, depression, long covid, and other areas that are affecting professionals in the legal field. This is allowing us all to be more comfortable with sharing our perspectives and experiences so that we can help one another better navigate the legal field successfully. Although the pandemic was extremely hard on those with disabilities, I think there are some benefits we are also starting to see arise because of what we all faced the last few years.

Brianna Chamberlin: Disability as defined by the ADA is a very broad term, and personally, the pandemic helped me understand why. The pandemic had disabling effects on many, especially those with mental health issues that are highly prevalent in our field, such as depression and anxiety.

Gordon Knoblach: The pandemic really shed light on how many immunocompromised persons live among us and how those persons are affected by the choices of society as a whole. Please get your vaccinations, get boosted, and keep up healthy hygiene practices. You not only protect yourself, but you also protect your immunocompromised colleagues. Another side-effect of the pandemic is that I think we are going to see the rise of more invisible disabilities, particularly with persons experiencing long covid. I am hopeful that research into long covid will lead to further understanding and treatments for a wide range of disabling conditions. The pandemic showed that investment in medical research and public health pays off, so please continue supporting a robust public health system.

Eleanor Frisch: The pandemic was a mass-disabling event that grew the number of people with disabilities. Millions of people who were previously perfectly healthy now have an invisible long-term condition—long covid. Many legal professionals who are now dealing with long covid require ongoing accommodations. If there has been any silver lining to the pandemic, it's that it has led to certain accommodations becoming readily available, like working from home and taking remote depositions. All of this makes things considerably easier for many people with disabilities. Ironically, the pandemic—the largest mass-disabling event in recent history—also created an opportunity for change that led to the legal profession being more accessible for people with disabilities and chronic illness.

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MINNESOTA SUPREME COURT RECOGNIZES THE COMMON INTEREST DOCTRINE

What you need to know and what remains to be settled

BY ANDY DAVIS AND CONNOR SHAULL ✉ andrew.davis@stinson.com ✉ connor.shaull@stinson.com

Common interest agreements have long been used by Minnesota practitioners to share otherwise privileged information among parties with a common interest. It therefore came as a surprise to many Minnesota lawyers to learn recently that Minnesota was among a small group of states that had *not* adopted the common interest doctrine.[1]

That changed with the Minnesota Supreme Court's recent decision in *Energy Policy Advocates v. Ellison*.[2] In that case, the Court formally recognized the common interest doctrine, announcing a six-part test to determine whether and under what circumstances the doctrine applies.

All federal appellate courts, and most states—including, at long last, Minnesota—have now recognized the doctrine. Yet despite its wide acceptance, the common interest doctrine varies in important ways across jurisdictions.

And while the Minnesota Supreme Court has provided needed clarity regarding the existence and scope of the doctrine in Minnesota, application of the doctrine will necessarily be case-specific, with a number of issues likely to be litigated following the Court's decision. Ultimately, it will be up to trial courts to work through those issues and further define the scope of the doctrine in Minnesota.

A very brief history of the common interest doctrine in federal and state courts

The common interest doctrine[3] was developed by courts to solve a frequent problem among co-counsel in litigation: How can privileged information be shared between parties with a common interest to advance those parties' respective positions in litigation, without also waiving the privilege as a result of the disclosure beyond the narrow confines of the attorney-client relationship?

THE COMMON INTEREST DOCTRINE WAS DEVELOPED BY COURTS TO SOLVE A FREQUENT PROBLEM AMONG CO-COUNSEL IN LITIGATION: HOW CAN PRIVILEGED INFORMATION BE SHARED BETWEEN PARTIES WITH A COMMON INTEREST TO ADVANCE THOSE PARTIES' RESPECTIVE POSITIONS IN LITIGATION WITHOUT ALSO WAIVING THE PRIVILEGE AS A RESULT?

The common interest doctrine thus created an exception to the general rule of waiver, permitting parties to share privileged information outside the attorney-client umbrella without risking waiver, so long as certain conditions are met.

Generally, the common interest doctrine applies to privileged communications made in furtherance of a common interest that is legal in nature.[4] The Federal Rules of Evidence do not address the doctrine, but Proposed Rule 503(b) applies the attorney-client privilege to communications made "by the client or the client's lawyer to a lawyer representing another in a matter of common interest."

This broad formulation has not been adopted by Congress, but federal courts often rely on the proposed rule when analyzing privilege.[5] Many state courts have also modeled their common interest doctrines after Proposed Rule 503(b).[6] For example, Delaware Rule of Evidence 502(b)(3) extends the attorney-client privilege to communications made "by the client... or the client's lawyer... to a lawyer... representing another in a matter of common interest...."

On its face, the Proposed Rule 503(b) approach appears broad in scope. It requires that the shared interest be legal in nature; it requires an identity of interests; and it does not require a written common interest agreement.

The Restatement of Law Governing Lawyers takes a similarly broad approach. It extends the doctrine beyond traditional litigation to non-litigated matters and interests that are legal, factual, or strategic in character.[7]

Even under these broad approaches, however, courts have narrowed the doctrine in unique ways. For example, Delaware itself has declined to apply the common interest doctrine to communications that deal primarily with business interests.[8]

States that have not modeled their common interest doctrines after Proposed Rule 503(b) have also taken varying approaches to the doctrine. For example, states like California[9] and Massachusetts[10] do not require active litigation—that is, the common interest doctrine can apply in a transactional or regulatory context when active litigation is not contemplated. On the other hand, New York[11] and New Jersey[12] have required

pending or reasonably anticipated litigation in order for the common interest doctrine to apply. At least one state, Texas, even more restrictively requires *ongoing* litigation.[13]

These differing approaches to the doctrine turn on several key issues: which interests are "legal"; whether a communication is "in furtherance of" the interest; whether active litigation is required; and how close the shared interest between the communicants must be.

The common interest doctrine in Minnesota

Prior to the Minnesota Supreme Court's decision in *Energy Policy Advocates v. Ellison*, the Minnesota Court of Appeals twice declined to recognize the common interest doctrine.

First, in September 2020 the Minnesota Court of Appeals, in *Walmart Inc. v. Anoka County*, stated that Minnesota had not expressly adopted the doctrine.[14] There, the court assessed whether the Anoka County attorney waived the work-product protection by sharing a legal presentation relating to tax appeals with other county attorneys.[15] The court observed that Minnesota had not expressly adopted the doctrine.[16] Therefore, the court looked to other jurisdictions' definitions of the doctrine, including the Eighth Circuit,[17] Seventh Circuit,[18] D.C. Circuit,[19] and New Jersey Supreme Court.[20] Under each version, the court concluded that the doctrine was inapplicable because the county had allowed the presentation to be accessed by numerous individuals who did not share the interest of defending tax appeals, and because adequate safeguards did not exist to ensure that the presentation was not disclosed to adverse parties.[21] Still, the court did not address whether the exception "has been or should be adopted in Minnesota."[22]

Second, the court of appeals, in *Energy Policy Advocates v. Ellison,* concluded that Minnesota had not recognized the common interest doctrine.[23] The court noted that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court,"[24] and thus held that "the district court erred by applying the common-interest doctrine" to certain documents disclosed by the Attorney General's Office to other parties.[25]

These two court of appeals decisions created uncertainty for Minnesota practitioners, most of whom assumed the doctrine applied in Minnesota and have long shared communications pursuant to joint defense and common interest agreements.

The adoption of the common interest doctrine in *Energy Policy Advocates v. Ellison*

The Minnesota Supreme Court unanimously recognized the common interest doctrine in *Energy Policy Advocates v. Ellison*,[26] providing needed clarity on this issue. In announcing the doctrine, the Court relied heavily on the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum*,[27] as well as the Minnesota federal district court's decision in *Shukh v. Seagate Tech., LLC*[28] and the Restatement's variation of the common interest doctrine.[29]

Specifically, the Court laid out six elements that must be met for the doctrine to apply to either attorney-client privileged or work-product protected communications: "(1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy."[30]

The Court noted that this formulation is "generally consistent with the common-interest doctrine's requirements in the federal courts for Minnesota, as well as the Restatement."[31] The Court also held that the doctrine applies only to legal interests, but that application of the doctrine does not require litigation.[32] While the Court did not define "legal interest," its decision was clear that "purely commercial, political, or policy" interests are "insufficient for the common interest doctrine to apply."[33] Finally, the Court noted that the party asserting the doctrine has the burden of proving its application.[34]

Minnesota's formulation takes a fairly broad approach to the common interest doctrine. Unlike more restrictive states such as Texas (which requires ongoing litigation for the doctrine to apply) or New York and New Jersey (which require pending or reasonably anticipated litigation), Minnesota does not require litigation for the doctrine to apply. Additionally, the Minnesota Supreme Court made clear that the doctrine applies equally to work-product protection and attorney-client privilege. And the Court relied on arguably broad variations (such as the Restatement's approach) in its adoption. But the Court also imposed a critical limitation on the doctrine: The shared interest must be legal in nature, and cannot be "a purely commercial, political, or policy interest."[35]

Key issues after *Energy Policy Advocates*

Energy Policy Advocates provides needed clarity regarding the existence and scope of the common interest doctrine in Minnesota. But in applying the doctrine, trial courts will need to address a number of key issues.

Is the common interest a "legal" interest?

A key question after *Energy Policy Advocates* is what constitutes a shared "legal" interest. According to the Court, a "legal" interest is not a "purely commercial, political, or policy interest." But the Court went no further in drawing these lines.

Federal and state courts have split in their definition of "legal interest." For example, a federal district court recently rejected the doctrine's application to a group's shared business interest and desire for the plaintiff to prevail,[36] while California courts have noted that the doctrine may extend to interests far removed from traditional litigation, such as the desire to see a shopping center development succeed.[37]

In *In re Grand Jury Subpoena Duces Tecum*, which was relied on by the Court in *Energy Policy Advocates*, the Eighth Circuit recognized the doctrine, but declined to apply it based on the White House's asserted interest in protecting Hillary Clinton's "personal liberty."[38] This, the court found, was more in the nature of a political interest, and not a protectable legal interest.[39] Adopting a similar approach, a federal district court found a sufficient common interest between parties negotiating a patent acquisition because the parties sought the patent's validity, enforceability, and infringement.[40]

It remains to be seen how Minnesota courts will define "legal interests," and how courts will address situations where a legal interest is intertwined with a commercial, policy, or other non-legal interest. A likely approach is that, following the law of privilege, Minnesota courts will evaluate which interest—legal, commercial, or policy—predominates in the communication.[41]

Is the communication "in furtherance of" the legal interest?

Another issue that was not addressed in *Energy Policy Advocates* concerns when a communication is "in furtherance of" of the common interest. Under the Court's formulation, the communication must be "in furtherance of formulating a joint legal strategy."[42] A close nexus to the joint legal strategy could invite judicial scrutiny of the intent or purpose behind any particular communication made under a common interest agreement.

Federal courts have split on what constitutes "in furtherance of" of the common interest. Even where parties have sufficiently demonstrated the existence of a common interest, not every communication related to the common interest will be protected.

For example, in *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, a federal district court refused to apply the doctrine to communications concerning a business strategy—even though the communications shared concerns about litigation that were sufficient to invoke the doctrine.[43]

Thus, trial courts may scrutinize communications to determine whether they seek to further the common legal interest, or are instead furthering some other objective. The line between legal and non-legal objectives is likely to be blurred, and courts will need to draw that line based on the specific facts and circumstances of the communications at issue.

Is the underlying communication "otherwise privileged"?

Because the common interest doctrine is merely an exception to waiver, courts are clear that the doctrine does not stand alone and is not a separate privilege.[44] The Minnesota Supreme Court's decision is in agreement: For the common interest doctrine to apply, the shared communication must itself be attorney-client privileged or work-product protected.[45] Therefore, the communications or documents the parties seek to protect from disclosure must satisfy the requirements of either the attorney-client privilege or the work-product doctrine.[46]

Interestingly, the minority of courts that have required the existence of litigation as a condition of the common interest doctrine effectively impose a requirement that the communication at issue be work-product protected. Such a narrow formulation would mean that attorney-client privileged communications, if shared under a common interest agreement but at a time when litigation was not contemplated or pending, would be waived. Fortunately, *Energy Policy Advocates* does not take such a narrow approach. Accordingly, co-counsel in Minnesota could enter into a common interest agreement for transactional or regulatory matters where litigation was not expressly contemplated, and still be protected as long as the communications are "otherwise privileged."

The "otherwise privileged" requirement means counsel should carefully consider the nature of the communication before sharing it via a common interest agreement. The existence of a joint defense agreement or common interest agreement, by itself, does not confer any privileged status on a document or communication. Thus, routine correspondence that strays from a core legal purpose may not be protected from disclosure by the common interest doctrine, if a reviewing court were to carefully scrutinize the communication in question.

How close must the shared interest be?

A final issue not addressed by *Energy Policy Advocates* relates to the definition and alignment of the shared interest. Again, other courts have diverged in their application of the doctrine on this point. Some courts require that the interests be substantially the same,[47] while others require interests to be identical.[48] A third line of cases requires the interests to be "nearly identical."[49]

Whether these are distinctions without a difference remains to be seen. But there is room for argument on either side. It is possible that co-parties to litigation have interests that are not sufficiently aligned. As one example, an insurer's and insured's interests may substantially change once it becomes apparent that the insured's alleged actions would take the claim out of the applicable policy.

These and other questions will need to be clarified, likely in the trenches of district court litigation, and eventually, to the rarefied air of the appellate courts, where the rules of decision will crystallize.

Conclusion

At long last, and to the relief of many, Minnesota has joined the vast majority of states in formally recognizing and adopting the common interest doctrine. The Court's decision in *Energy Policy Advocates* is a welcome development for Minnesota practitioners, and the Court's formulation of the doctrine provides much needed clarity regarding when the doctrine applies.

But key issues will be litigated in the wake of the *Energy Policy Advocates* decision. When is the asserted interest "legal" in nature, and when it is a mere policy or commercial interest? What happens when those interests overlap or intertwine? When is a communication "in furtherance of" a joint legal interest, and when is it something else? How similar must parties' interests be for the doctrine to apply? While *Energy Policy Advocates* has announced the broad contours of the common interest doctrine, it will be up to trial courts to address these issues and provide further definition. ▲

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NOTES

[1] Though the Minnesota Supreme Court expressly adopted the joint defense doctrine (applicable to parties represented by the same counsel), it had not addressed the broader common interest doctrine. *See Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn. 1942) (expressly adopting a joint defense privilege, not an all-encompassing common interest exception to waiver).

[2] No. A20-1344, 2022 WL 4488489 (Minn. 9/28/2022).

[3] The common interest doctrine is also known as the "common interest arrangement," "common legal interest doctrine," "joint litigant privilege," "pooled information privilege," "allied lawyer doctrine," "community-of-interest privilege," and "allied litigant privilege." The common interest doctrine is an extension of the joint defense doctrine.

[4] *See Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350, 1360 (Fed. Cir. 2017) (requiring a party to "demonstrate the elements of privilege and then... demonstrate that the communication was made in pursuit of common legal claims including common defenses").

[5] *See, e.g.*, *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 (8th Cir. 1981).

[6] *See, e.g.*, Alaska (ALASKA R. EVID. 503(B)(3)); Delaware (DEL. R. EVID. 502(b)(3)); Nebraska (NEB. REV. STAT. §27-503(2)(C) (West 2009)); Nevada (NEV. REV. STAT. §49.095(3) (West 2004)); New Mexico (N.M. R. EVID. 11-503(B)(3)); Oregon (OR. REV. STAT. §40.225(2)(C) (Supp. 2014)); Wisconsin (WIS. STAT. ANN. §905.03(2) (West Supp. 2013)).

[7] Restatement (Third) of the Law Governing Lawyers §76, cmts. A–G (Am. Law Inst. 2000).

[8] *See Glassman v. Crossfit, Inc.*, No. 7717-VCG, 2012 WL 4859125, *3–4 (Del. Ch. 10/12/2012).

[9] *See Citizens for Ceres v. Super. Ct.*, 159 Cal. Rptr. 3d 789, 811 (Cal. Ct. App. 2013).

[10] *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1110, 1112 (Mass. 2007).

[11] *See Hyatt v. State of Cal. Franchise Tax Bd.*, 962 N.Y.S.2d 282, 295–97 (N.Y. App. Div. 2013).

[12] *See JNL Mgmt. LLC v. Hackensack Univ. Med. Ctr.*, No. 2:18-CV-5221-ES-SCM, 2019 WL 2315390, at *9 (D.N.J. 5/31/2019).

[13] *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 51–53 (Tex. 2012).

[14] No. A19-1926, 2020 WL 5507884, at *2 (Minn. Ct. App. 9/14/2020).

[15] *Id.*

[16] *Id.*

[17] *Id.* at *3 (citing *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (exception applies when "two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter" (quotation omitted)).

[18] *Walmart Inc.*, 2020 WL 5507884, at *3 (citing *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007) (exception applies when "the parties undertake a joint effort with respect to a common legal interest" and is limited "to those communications made to further an ongoing enterprise")).

[19] *Walmart Inc.*, 2020 WL 5507884, at *3 (citing *United States v. Deloitte LLP*, 610 F.3d 129, 140–41 (D.C. Cir. 2010) (work-product protection is waived when information is disclosed "to an adversary or a conduit to an adversary" and explaining existence of common interest could help determine "whether disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential")).

[20] *Walmart Inc.*, 2020 WL 5507884, at *3 (citing *O'Boyle v. Borough of Longport*, 94 A.3d 299, 317 (N.J. 2014) (exception applies "to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest, and the disclosure is made in a manner to preserve the confidentiality of the disclosed material and to prevent disclosure to adverse parties")).

[21] *Walmart Inc.*, 2020 WL 5507884, at *3.

[22] *Id.* at *4.

[23] *Energy Pol'y Advocs. v. Ellison*, 963 N.W.2d 485, 501 (Minn. Ct. App. 2021).

[24] *Id.* (quoting *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987)).

[25] *Energy Pol'y Advocs.*, 963 N.W.2d at 501.

[26] No. A20-1344, 2022 WL 4488489, at *1 (Minn. 9/28/2022).

[27] 112 F.3d 910, 922 (8th Cir. 1997).

[28] 872 F. Supp. 2d 851, 855 (D. Minn. 2012).

[29] Restatement (Third) of the Law Governing Lawyers §§76, 91 (Am. L. Inst. 2000).

[30] *Energy Pol'y Advocs.*, No. A20-1344, 2022 WL 4488489, at 4.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *In re Dealer Mgmt. Sys. Antitrust Litig.*, 335 F.R.D. 510, 515 (N.D. Ill. 2020).

[37] *See Citizens for Ceres v. Super. Ct.*, 159 Cal. Rptr. 3d 789, 809-11 (Cal. Ct. App. 2013).

[38] *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir.1997).

[39] *Id.*

[40] *Crane Sec. Techs., Inc. v. Rolling Optics, AB*, 230 F. Supp. 3d 10, 20 (D. Mass. 2017).

[41] *In re Polaris, Inc.*, 967 N.W.2d 397, 407-08 (Minn. 2021) (adopting the predominant purpose test and holding that "when a document contains both legal advice and business advice, for the attorney-client privilege to apply to the document in its entirety, the predominant purpose of the communication must be legal advice").

[42] *Energy Pol'y Advocs.*, No. A20-1344, 2022 WL 4488489, at 4.

[43] 215 F.R.D. 466, 471 (S.D.N.Y. 2003); *see also Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007) (rejecting the common interest doctrine for communications in pursuit of business or commercial interests).

[44] *See In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012).

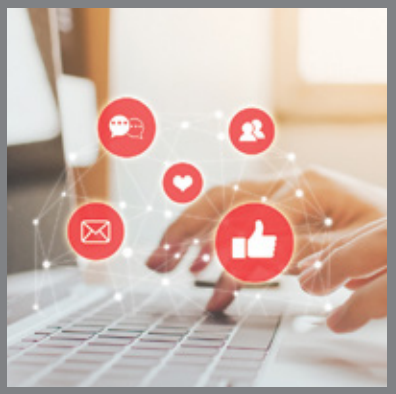
[45] *Energy Pol'y Advocs.*, No. A20-1344, 2022 WL 4488489, at 4.

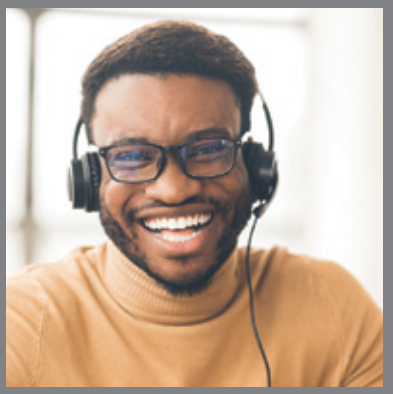
[46] *See In re Mod. Font Applications LLC*, No. 2021-138, 2021 WL 1749755, at *2 (Fed. Cir. 5/4/2021).

[47] *See, e.g.*, *United States v. Gonzalez*, 669 F.3d 974, 980 (9th Cir. 2012); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007) (requiring "at least a substantially similar legal interest").

[48] *See, e.g.*, *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 705 (10th Cir.1998); *Lawson v. Spirit AeroSystems, Inc.*, 410 F. Supp. 3d 1195, 1209 (D. Kan. 2019); *United States v. Doe*, 429 F.3d 450, 453 (3d Cir. 2005); *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974).

[49] *See, e.g.*, *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 390 F. Supp. 3d 311, 326 (D.P.R. 2019).





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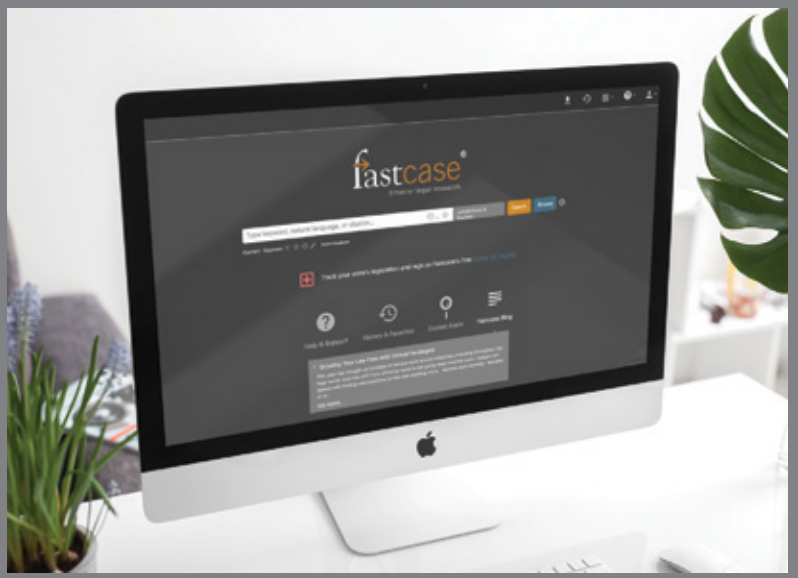

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LIVE WIRE

The law, Orthodox Judaism, and Minnesota's eruvim

BY JUDAH A. DRUCK judah.druck@maslon.com

What is a "domain"? As an insurance coverage attorney often tasked with interpreting individual policy terms, I would answer by looking at the usual suspects: the dictionary ("a region distinctly marked by some physical feature"); case law ("'Domain' is ordinarily understood to refer to 'region' or 'area.'")[1]; or simply common usage (a clearly demarcated territory).

For hundreds of thousands of Orthodox Jews, the question is not merely one of semantics, but of tangible religious practice. That's because every Sabbath—Saturday, the seventh day of rest—Jews are prohibited from performing "work," a term interpreted over thousands of years to encompass activities like gardening, cooking, and using electronic devices. One additional prohibition forbids Jews from carrying an object between a "private domain" and a "public domain," such as from a house to a sidewalk. As a result, those observing the Sabbath are prohibited from carrying their house keys, pushing a baby stroller, or even using a walking cane outside of the home.

Given the significant difficulty of observing the Sabbath with such restrictions, rabbinic decisors introduced the *eruv*, a wire that encompasses a large area in order to create a symbolic "private domain." Thus, Jews can treat Manhattan as a "private domain" for purposes of carrying on the Sabbath because of an *eruv* wire circling the entire island. Closer to home and somewhat more modestly, the Saint Louis Park *eruv* spans approximately one square mile, servicing four different synagogues and their nearby members.

What is this odd tradition? How does it work? And given that the wire often encroaches upon public land and requires government approval, how can the *eruv* function without violating the First Amendment? This article explores and answers these questions, including the ways in which the *eruv* has been litigated and how it might impact Minnesota's own *eruvim*.

The prohibition of carrying

"Remember the Sabbath day and keep it holy. Six days you shall labor and do all your work, but the seventh day is a Sabbath of the Lord your God: you shall do no work." Thus begins the fourth of the Ten Commandments given to Moses at Mount Sinai, referring to the prohibition against *melacha* (work) on the Sabbath. Subsequent rabbinic commentaries in the Talmud and elsewhere have defined "work" to encompass 39 categories of conduct that correspond with the 39 types of work performed in the desert following the exodus from Egypt. These categories include, *inter alia*, field work (e.g., plowing); garment crafting (e.g., weaving); and writing/erasing.

Thousands of years of additional commentary have shaped how these 39 *melachot* affect observance of the Sabbath today. For example, the prohibition against igniting a fire is why observant Jews do not use electronics on the Sabbath, including phones, computers, or even light switches. The prohibition against cooking is why Jews do not cook, bake, or boil water on the Sabbath. The prohibition against separating wanted and unwanted items is why gefilte fish became a stereotypical Sabbath dish, as it contains no bones that one may not permissibly pull out (thereby "separating"). And so on.

One of the most impactful of the *melachot* is the prohibition against carrying from one domain to another (*hotza'ah*). Based on the biblical prohibition against collecting manna on the Sabbath (per Exodus 16:29), *hotza'ah* prohibits the transferring of an object from a private domain (such as a home) to a public domain (such as a street or courtyard) and vice versa. While the specifics of what constitutes a "public" and "private" domain (or even what "carrying" entails) are subject to numerous discussions, *hotza'ah* ultimately means that Jews observing the Sabbath today are prohibited from such basic acts as carrying items in their pockets to synagogue, pushing strollers and wheelchairs, and even carrying an infant. Thankfully, worn items of clothing are not considered "carrying" for purposes of *hotza'ah*.

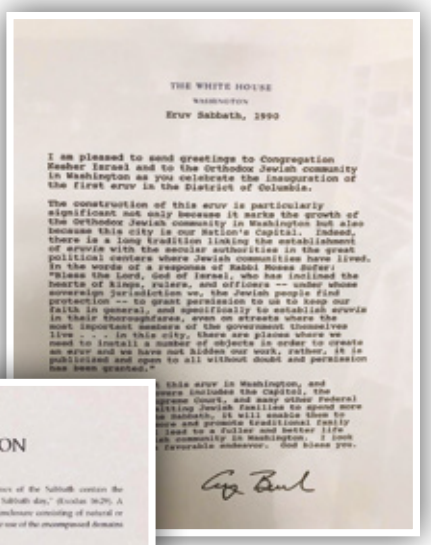
Enter the *eruv*

Early rabbinic commentators recognized the significant impact *hotza'ah* would have on Sabbath observance. The response was to create the *eruv*, which is short for "*eruv chatzeirot*," literally meaning "merger of domains." The specifics of an *eruv* are incredibly complex, so much so that an entire tractate of the Talmud is dedicated to the subject. At its most basic, the modern *eruv* is a continuous piece of wire connected to poles that encompass a piece of territory, thereby creating "walls" around the area. A strip called a *lechi* is additionally affixed to the structures holding the *eruv* wire, thereby representing "doorposts." Minnesota's first *eruv*, completed in 1990 through communal efforts, spans the Fern Hill neighborhood of Saint Louis Park, while a second *eruv* was subsequently erected in St. Paul.[2]

Construction of an *eruv* necessarily includes overlap with civil government, for at least two reasons. First, the *eruv* wires are often placed on already existing utility poles and other public property (such as a tree in a park), thereby requiring permission from the local government for their use. Second, by Jewish law, construction of an *eruv* requires a formal lease from the local government (or governments, depending on the jurisdictions encompassed by the *eruv*) in order to convert what was previously a "public domain" into a "private" one. Such leases are largely ceremonial: The lease agreement with the City of Saint Louis Park for its *eruv*, for example, included payment of $1.

Because the *eruv* is subject to innumerable technicalities and prerequisites, its installation takes months of planning and often requires the hiring of rabbinic specialists. There are also more

Your author's best attempt at capturing the Saint Louis Park *eruv* on an iPhone. The *lechi* is clearly visible running vertically along the tree, with the *eruv* wire itself hanging slightly above.



THE WHITE HOUSE
WASHINGTON
Eruv Sabbath, 1990

I am pleased to send greetings to Congregation Kesher Israel and to the Orthodox Jewish community in Washington as you celebrate the inauguration of the first eruv in the District of Columbia.

The construction of this eruv is particularly significant not only because it marks the growth of the Orthodox Jewish community in Washington but also because this city is our Nation's Capital. Indeed, there is a long tradition linking the establishment of eruvin with the secular authorities in the great political centers where Jewish communities have lived. In the words of a responsa of Rabbi Moses Sofer: "Bless the Lord, God of Israel, who has inclined the hearts of kings, rulers, and officers -- under whose sovereign jurisdiction we, the Jewish people find protection -- to grant permission to us to keep our faith in general, and specifically to establish eruvin in their thoroughfares, even on streets where the most important members of the government themselves live . . . in this city, there are places where we need to install a number of objects in order to create an eruv and we have not hidden our work, rather, it is publicized and open to all without doubt and permission has been granted."

this eruv in Washington, and
covers includes the Capitol, the
Supreme Court, and many other Federal
visiting Jewish families to spend more
the Sabbath. It will enable them to
more and promote traditional family
lead to a fuller and better life
the community in Washington. I look
favorable endeavor. God bless you.

> President George H.W. Bush providing the necessary *reshut* (secular permission) for the construction of the Washington D.C. *eruv*. Courtesy of the National Jewish Outreach Program.

PROCLAMATION

Whereas, In accordance with the Jewish religion, the laws of the Sabbath contain the commandment, "Let no person go out of his place on the Sabbath day," (Exodus 16:29). A person's "place" is defined by (1) Specifying a continuous enclosure consisting of natural or artificial boundaries (referred to as an *eruv*), and (2) Letting the use of the encompassed domains by mutual agreement; and,

Whereas, The Office of the Mayor of the City of New York has been petitioned by representatives of the Vaad Hakfar of Brooklyn, which established an eruv encompassing the entire borough of Brooklyn, on behalf of those of the Jewish faith who reside within the boundaries of said eruv, to grant, for a period of ninety-nine years, at a rental of one United States dollar ($1.00), the rights to the domains within the aforesaid boundaries for the specific purpose of carrying on the Sabbath and other Jewish holidays; and,

Whereas, The Office of the Mayor of the City of New York deems it to be in the public interest that those of its residents of the Jewish faith for whom the request has been presented be granted the rights requested, and likewise deemed to be of no detriment to the rights and general welfare of other members of the public.

Now, therefore, I, Eric L. Adams, Mayor of the City of New York, do hereby proclaim a grant of the rights requested to the representatives of Vaad Hakfar of Brooklyn, for a period of ninety-nine years, at a rental of one United States dollar ($1.00), in hand paid, in order to allow carrying in the boundaries of the eruv in accordance with Jewish religious law.

I affix my signature to this proclamation on November 28th, 2022.

Eric L. Adams
Mayor of the City of New York

< Proclamation issued by New York City Mayor Eric Adams renewing the Brooklyn *eruv* lease for another 99 years (at the cost of $1).

fundamental challenges: Because a downed tree branch or strong wind gust can break the *eruv*, weekly inspections are required, and repairs must be implemented immediately lest the *eruv* be unavailable come Saturday. This, in turn, raises the pecuniary element of an *eruv*. Between repairs, the hiring of contractors and inspectors, and the need to procure liability insurance,[3] maintenance of the *eruv* can cost tens of thousands of dollars a year. Nevertheless, the existence of an *eruv* serves as a major boon for the Jewish community, and its existence is often one of the most basic questions an observant Jew will ask about before moving to a new area. (Because it also makes houses inside its boundaries more desirable, an *eruv* often has the added effect of increasing property values, colloquially known by prospective buyers as an "*eruv* tax").

If you read my previous article on kosher food ("What is Kosher? From Moses to Minnesota," Bench & Bar, December 2021), you would know that there is no such thing as a unified "Jewish view" on anything, and the *eruv* is no different. Many Jews do not accept—or "hold by"—an *eruv* at all, with varying bases offered. For some, the confinement of Jews into specific geographic territories evokes memories of the ghettos of pre-war Europe, whose liquidation by the Nazis causes some today to reject all notions of territorial demarcation. Others worry that the numerous possibilities of damage to the *eruv*, even assuming its proper construction, may lead one to inadvertently violate the Sabbath by carrying at a time that the *eruv* is down. Still others simply reject the notion that one can create a "private domain" containing thousands or even millions of people. These debates often spill over beyond the realm of philosophy: In 2016, for example, a new *eruv* in Brooklyn was vandalized because of theological objections.[4]

The *eruv* is litigated

Intra-religious fighting is not the only forum for *eruv* controversy, however. Rather, both state and federal courts have faced questions over the existence of the *eruv* and its potential First Amendment implications. While this article will focus on the legal analyses within these lawsuits, it bears noting at the outset that *eruv* challenges are typically based on antisemitic attempts at preventing Jews from moving into certain neighborhoods—or, in the case of lawsuits brought by Jews themselves, preventing the "wrong kind" of Jews from moving in. (Jon Stewart's *The Daily Show* brought light to these beliefs in 2011 to great effect, including an interview with an anti-*eruv* activist arguing that the near-invisible wire would affect "the look of this town.")[5] Thus, litigation over the *eruv* carries not only constitutional significance, but is often at the forefront of the fight against religious bigotry.

The eruv *on the defensive*

One of the first legal challenges to an *eruv* occurred in 1987, when the ACLU of New Jersey sued the City of Long Branch in federal court on First Amendment grounds.[6] The *eruv* at issue was built using preexisting utility poles, telephone poles, and fences, but also used two additional poles erected on public property—notably, all at the expense of the supporting congregation. The ACLU argued that this public use violated the establishment clause (which prohibits any law "respecting an establishment of religion") because the *eruv* "constitutes the placement of 'permanent symbols' of the Jewish religion on public property."

District Judge (now Senior District Judge) Anne E. Thompson disagreed. Applying the now-abandoned *Lemon* test,[7] the court considered whether the city's action (permitting the use of public land for the *eruv*) (1) had a secular purpose, (2) had a "princip[al] effect which does not advance religion," and (3) did not foster "excessive entanglement with religion." All three were answered in the affirmative. As to the first analysis, Judge Thompson explained that the city's secular purpose was simply to "allow[] a large group of citizens to access public properties." Critically, the court further explained that the *eruv* itself did not carry any religious significance: "They are not objects of worship nor do they play any theological role in the observance of the Sabbath.... [I]t merely allows observant Jews to engage in secular activities on the Sabbath." Instead, the *eruv* constituted "an almost invisible boundary" that constitutionally provided "equal access to public facilities to people of all religions," none of which "impose[d] any religion on the other residents of Long Branch."

As to the second prong, the court similarly held that the city's action did not advance a specific religion for the same reasons as before: The *eruv* "does not impose the Jewish religion on other residents of Long Branch, it merely accommodates the religious practices of those residents who are observant Jews." And finally, as to the third *Lemon* analysis, the court found that there was no government "entanglement" with religion because the city's role in the *eruv* process was limited to assuring that "the items are being maintained correctly." All work, maintenance, and insuring of the *eruv*, on the other hand, were done at the congregation's expense. "In fact, in the future it would appear that contact between the Congregation and the city regarding the eruv would be minimal." Taken together, the court concluded that there was no First Amendment violation.

The eruv *on the offensive*

Disputes over the *eruv* erupted again in the 2000s, this time with the roles reversed. Litigation was brought by proponents of an *eruv* challenging governmental actions seeking to preemptively prevent its construction. Numerous cases were filed in state and federal court, filled with added rancor. The case of *Tenafly Eruv Association, Inc. v. The Borough of Tenafly* is illustrative.[8] There, a group of Orthodox Jews sought permission from the Borough of Tenafly, New Jersey, to construct an *eruv* (as required by Jewish law, discussed earlier). The first meeting held by the Borough Council to discuss the request, where residents in attendance "expressed vehement objections prompted by their fear that an *eruv* would encourage Orthodox Jews to move to Tenafly," set the tone for the dispute. The council members were no better, noting "a concern that the Orthodoxy would take over," and that Jews "might stone cars that drive down the streets on the Sabbath." Ultimately, and after months of debate and back-and-forths, the council belatedly relied on a city ordinance that prohibited the placement of "any sign or advertisement, or other matter upon any pole, tree... or elsewhere, in any public street of public place" as justification for its opposition to the *eruv*.

Supporters of the *eruv* soon brought suit, again in the Federal District of New Jersey, pursuant to the First Amendment's free speech clause (prohibiting any law "abridging the freedom of speech") and free exercise clause (prohibiting any law "prohibiting the free exercise" of religion). But the district court dismissed both theories. While recognizing that the council meetings included "statements that undeniably reflected the biases and prejudices of those who made them," the court nevertheless found that "many of those comments reflected legitimate concerns about the propriety of committing public property permanently for a religious purpose, and the apparent entanglement with religion that might result." Thus, according to the court, the city's decision to ban an *eruv* was based on a "reasonable, neutral access restriction of general applicability."

The Third Circuit reversed. After affirming the dismissal of the plaintiffs' free speech claim—finding that the affixing of *lechis* to poles was not "expressive conduct" because the *eruv* "serves a purely functional, non-communicative purpose indistinguishable, for free speech purposes, from that of a fence surrounding a yard or a wall surrounding a building"—the panel turned to the free exercise clause, and specifically to the issue of selective enforcement. While agreeing that the subject ordinance was "neutral and generally applicable," the court cited the record to demonstrate that the borough had not uniformly enforced it, including by "granting exemptions from the ordinance's unyielding language for various secular and religious—though never Orthodox Jewish—purposes." These exemptions included allowing the placement of holiday displays, church directional signs, and ribbons in support of the local high school.

The court did not view the *eruv* any differently. To the contrary, "the *lechis* are less of a problem because they are so unobtrusive; even observant Jews are often unable to distinguish them from ordinary utility wires." And while both the council and the district court relied on the "permanent" nature of the *eruv*, the Third Circuit explained that items permitted by the Council such as "house numbers nailed to utility poles" were equally permanent yet still permitted. Here, the *eruv* supporters were "not asking for preferential treatment," but rather "only that the Borough not invoke an ordinance from which others are effectively exempt." Thus, the court held that "the Borough's selective, discretionary application of Ordinance 691 against the *lechis* violates the neutrality principle" set forth in the Supreme Court's First Amendment jurisprudence.

Subsequent efforts to restrict *eruvim* have failed on similar constitutional grounds,[9] though this has not stopped opponents from continuing to try: In 2017, three municipalities near Tenafly attempted to stop construction of *eruvim* based on similar ordinances, which not only prompted lawsuits by *eruv* associations but caused the attorney general of New Jersey to file a civil suit to prevent "unlawful discrimination."[10] A negotiated settlement was ultimately reached in 2018, which allowed the *eruv* to proceed and further required a $10,000 payment to plaintiffs' attorneys.[11]

Conclusion

Lest there be any doubt, the many concerns raised by *eruv* opponents have not come to fruition. Tenafly, a suburb of New York City (and adjacent to your author's hometown), has seen its population and economic health grow. And if you drive through Saint Louis Park on a Saturday, the only thing that may be thrown at you is a wave. Instead, the *eruv* represents little more than an invisible but deeply important means of allowing observant Jews to enjoy their Sabbath like anyone else. And to Minnesota's credit, the creation of its *eruvim* was openly supported by public and private individuals alike—and certainly did not require acrimonious litigation. As one New York state judge denying a request to enjoin the creation of an *eruv* said, "by their very nature religious institutions are beneficial to the public welfare."[12] Thankfully, Minnesota appears to be a state that agrees. ▲

NOTES

[1] *Chiron Corp. v. Genentech, Inc.*, 266 F. Supp. 2d 1172, 1199 (E.D. Cal. 2002).

[2] Special thanks to Allan Baumgarten, one of the founders of the Saint Louis Park *eruv*, for taking the time to discuss the history and intricacies of its construction.

[3] The need for insurance was illustrated in *Egar v. Congregation Talmud Torah*, 885 N.Y.S.2d 711 (N.Y. Sup. Ct. 4/16/2009), where the plaintiff alleged that a downed *eruv* wire caused her to trip and fall.

[4] *https://forward.com/news/352853/2-hasidic-jews-charged-with-vandalizing-controversial-brooklyn-eruv/*.

[5] *https://www.cc.com/video/1jsrl7/the-daily-show-with-jon-stewart-the-thin-jew-line*.

[6] *Am. Civil Liberties Union of New Jersey v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987).

[7] *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *overruled by Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

[8] *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). Much thanks to Bob Sugarman, retired partner at Weil, Gotshal & Manges LLP and former lead counsel for plaintiffs, for taking the time to discuss this litigation with me.

[9] *E.g.*, *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015) (affirming dismissal of complaint brought by *eruv* opponents and finding that "[e]very court to have considered whether similar government actions violate the Establishment Clause has agreed that they do not.").

[10] *https://www.northjersey.com/story/news/bergen/2018/09/17/mahwah-nj-attorney-generals-office-settle-discrimination-lawsuit/1338480002/*.

[11] *https://www.northjersey.com/story/news/bergen/montvale/2018/02/13/montvale-approves-settlement-allow-eruv-northern-part-town/333974002/*.

[12] *Smith v. Cmty. Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Sup. Ct. 1985).

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INSIDE ADR'S MINNESOTA RULES RESET

Understanding the new Rule 114

PART ONE: AN OVERVIEW

BY KRISTI PAULSON

The process of amending Rule 114—the portion of Minnesota's General Rules of Practice for the District Courts pertaining to alternative dispute resolution as a means of avoiding litigation—began in July 2017. What followed was years of input from entities such as the ADR Ethics Board, the ADR Workgroup, and a Supreme Court Advisory Board. In July 2022, the Minnesota Supreme Court issued an order that made sweeping changes to Rules 114 and Rule 310 of the General Rules of Practice. On December 30, 2022, the Minnesota Supreme Court issued an administrative order clarifying certain points and correcting a few scrivener errors.

These changes—which took effect on January 1, 2023—dramatically alter the face of ADR by clarifying procedures, identifying responsibilities, creating new ADR rosters and training requirements, codifying an ethical code, and placing responsibility for the enforcement of these rules on the ADR Ethics Board. This article, the first of two, will provide an overview of the new rules and a general discussion of key aspects of those rules. It is not an exhaustive treatment of the changes, however, and it is not a substitute for reading the new Rule 114 in its entirety. Part two will focus on what practitioners need to know about the Code of Ethics and the ADR Ethics Board.

To whom does the new Rule 114 apply?

Rule 114 now applies to *everyone* who does any kind of court-annexed ADR. Rule 114 previously applied to all civil cases. The changes now extend that rule to govern all civil and family cases, making them subject to its provisions. The rule also applies to all neutrals, regardless of whether they are registered as Rule 114-qualified, making them subject to the authority of the ADR Ethics Board and requiring compliance with the new code of ethics. Rule 114 carves out some limited case-type exceptions (for example, medical malpractice cases or cases in which there is a history of domestic abuse—see Rule 114.01 (a)). The rules also add one new general caveat: The inability to pay may be grounds for a court to except a party from the ADR process. (But note that this determination is made by the court, not the parties.)

How does the Supreme Court define ADR?

The Supreme Court distinguishes ADR as falling into four categories:

1) Adjudicative: A process in which a neutral or panel of neutrals renders an award after consideration of evidence and presentation by parties or counsel. This includes processes such as arbitration, a consensual special magistrate, or a summary jury trial.

2) Evaluative: A process in which neutral(s) with subject matter experience review information relative to a case and provide an assessment of its strengths and weaknesses as well as opinions regarding the value or settlement ranges of the case. These processes include early neutral evaluations, non-binding advisory opinions, and neutral fact-finding.

3) Facilitative: A process in which a neutral facilitates communication and negotiation between parties to encourage a voluntary resolution of the conflict. An example is mediation.

4) Hybrid: A process that combines various ADR techniques or encourages parties to define a settlement process on their own terms. Examples of a hybrid process include a mini-trial, mediation-arbitration, arbitration-mediation, or the creation of some other process for reaching agreement.

Is this rule only for mediators or does it apply to attorneys who mediate?

Many of the rule changes apply to ADR neutrals, the training process for neutrals, and the rosters available to them. However, this rule also now imposes specific obligations on attorneys and court administrators with respect to ADR processes.

Parties are to confer about the ADR process and the selection of a neutral very early in a case. Court administration is now required to provide information about ADR processes and a list of neutrals qualified to provide ADR services in that county. The names of neutrals provided by a court *must* be listed on a qualified roster. If a neutral is agreed upon, it then falls upon the attorneys to notify the court of the name and contact information for the selected neutral. Once ADR has been ordered by a court, the neutral is required to proceed in accordance with that court order.

Attorneys are now required in all civil disputes to inform their clients about available ADR processes. Attorneys are responsible for notifying the court if a case has settled through ADR and are required to *promptly* complete settlement documents and finalize closure of the case.

Who selects the neutral—the attorneys or the court?

The parties are to immediately confer about the selection of an ADR neutral once they have commenced a case through service, petition, or motion. Rules 111.02 and 304.02 continue to require that parties include ADR information in initial court submissions.

If the parties agree to an ADR process, a court will order the agreed-upon process. If the parties cannot agree, the court will select a non-binding process. If the parties are unable to agree to the selection of an ADR neutral, the court will select from the list of qualified neutrals. The court is not to influence or express preferences when parties have agreed on ADR. The court will establish ADR deadlines, seeking the advice of parties.

New Rule 114 specifies a removal process if an attorney is not satisfied with the court-appointed neutral. A party, within seven days, may file a notice to remove a qualified neutral, in which case the court shall select another. After the one presumptive removal, removing a neutral requires an affirmative showing of prejudice brought by motion (see Minn. Rule 114.04(c)).

Parties are to inform the court as to any selected neutral, in which case the court will issue an order of appointment of the neutral. A neutral is to proceed with ADR in accordance with the court's order of appointment.

Who has to attend ADR proceedings?

ADR sessions are private and closed to the public, unless all parties agree otherwise. Attorneys who will try the case may be required by the court to attend. In adjudicative proceedings, a court does not have to require the person with settlement authority to attend. For evaluative, hybrid, and facilitative ADR sessions, by contrast, the person with settlement authority can be required to attend. Sanctions are the new teeth in this rule. A court can now award sanctions for violations of the attendance rule.

Can ADR be used for discovery?

The ADR process is certainly one in which parties learn a lot of claims, both their own and the other side's. The new rule now states that no evidence from an ADR process can be used in a later proceeding without either consent or an order from the court. Statements made in a non-binding proceeding are not admissible for any purpose at a later trial, including for impeachment. In adjudicative or binding arbitration (and in some non-binding arbitration cases), evidence may be used in later proceedings. The rule now goes further than it used to, stating that sworn testimony in summary jury trials is admissible in later proceedings as evidence.

What if a case settles during ADR?

The new rule requires that the attorneys notify the court and immediately begin the process of bringing before the court the documents required to finalize the matter. This is a requirement whether or not a case is filed, keeping in mind that most if not all family actions require approval of the court. Notably, the Advisory Committee comments offer guidance for civil actions, many of which go through presuit mediation, noting that while the new rule requires the prompt preparation of settlement documents, there is no requirement those documents be filed if the case is not filed with the court.

THE NEW RULE DEEMS ANY PERSON PROVIDING COURT-ANNEXED ADR SERVICES IN MINNESOTA AS HAVING CONSENTED TO THE JURISDICTION OF THE ADR ETHICS BOARD AND HAVING AGREEING TO COMPLY WITH THE ADR CODE OF ETHICS FOR COURT-ANNEXED ADR PROFESSIONALS. THIS IS TRUE WHETHER OR NOT THE PERSON IS LISTED ON A ROSTER OR IS RULE 114-QUALIFIED.

What is a qualified neutral?

The rule now defines a neutral as an individual who provides an ADR process under this rule. A *qualified* neutral is an individual or a community dispute-resolution group listed on the State Court Administrator's Office roster as provided in Rule 114.12 (and therefore having completed the required training).

The new rule requires that qualified individuals complete continuing education requirements to remain on the roster. Generally, for facilitative, evaluative, or hybrid rosters, 18 credits are required every three years; for adjudicative rosters, the requirement is nine credits every three years. Continuing education requirements are submitted to the court administrator's office through a prescribed affidavit form.

Community Dispute Resolution programs are those programs certified by the State Court Administrator's Office per Minn Stat. ch. 494. These programs are required to maintain records satisfying the provisions of this new rule and making sure compliance with roster requirements is met by each neutral it engages. The individual neutrals on these community programs are subject to the new rule's provisions and the jurisdiction of the ADR Ethics Board.

I'm not qualified, but I provide ADR services. Does this mean I have to stop?

The new rule deems any person providing court-annexed ADR services in Minnesota as having consented to the jurisdiction of the ADR Ethics Board and having agreeing to comply with the ADR Code of Ethics for Court-Annexed ADR Professionals. This is true whether or not the person is listed on a roster or is Rule 114-qualified. Parties are allowed to select a neutral of their choice, including one who is not Rule 114-qualified if they so choose. If they are unable to agree, the court may appoint a neutral, but in that case the person must be a qualified neutral.

The rule now provides in clear language, "Any individual providing ADR services under Rule 114 must either be a Qualified Neutral or be selected and agreed to by the parties." (See Minn. Rule 114.04 (b)). Keep in mind that the rule also clearly states, "Neutrals serving under this rule shall be deemed to consent to the jurisdiction of the ADR Ethics Board and shall comply with the ADR Code of Ethics for Court-Annexed ADR Neutrals" (Minn. Rule. 114.01 (a)).

What is the status of the neutral's notes?

Neutrals cannot be called to testify in the proceedings of the parties. The new rules codify that the "notes, records, impressions, opinions and recollections" of the ADR neutral are confidential and shall not be disclosed. The neutral has a duty to maintain confidentiality. The only exceptions occur if there is agreement by all the parties and the neutral, or disclosure is required by law pursuant to Rules 114.10-11. No recording of the proceedings is permitted except by agreement of all parties and the neutral. The rule acknowledges that many courtrooms are subject to continual recording and clarifies that even if there is constant recording, it is not admissible without full agreement of the parties and the neutral.

What are the new ADR rosters?

The State Court Administrator's Office maintains the Rule 114 rosters as provided in the Rules of the Minnesota Supreme Court for ADR Rosters and Training. Under the new rules, only individuals on these rosters will now be disclosed by state court administration to filing parties as ADR providers.

The civil ADR rosters comprise two rosters: (1) Civil Facilitative/Hybrid and (2) Civil Adjudicative/Evaluative. While there are no changes to the civil rosters themselves, there are changes to the training requirements and to the continuing education requirements.

The family ADR rosters will undergo substantial changes. All family law matters in the district courts are now subject to ADR under Rules 310 and 114 with limited exceptions (such as domestic abuse actions under Section 518B.01, contempt matters, public agency child support matters, or special master proceedings). In cases where domestic abuse has occurred and in domestic abuse cases in which parties agree to ADR, the court will not require such proceedings to be in person. Courts will also look at specific issues, and if ADR has been attempted unsuccessfully on current, pending issues, the court will not require ADR.

There will continue to be a Family Law Facilitative/Hybrid roster, and the rule further creates a second hybrid category consisting of (1) parenting-time expeditors and (2) parenting consultants. (Rule 310.03, now contained in Rule 114, defines all of these rosters in detail.) The rule also creates a new roster for Family Law Evaluative/Hybrid Processes and identifies new rosters for (1) Social Early Neutral Evaluation, (2) Financial Early Neutral Evaluation, and (3) Moderated Settlement Conferences. There is also a Family Law Adjudicative roster, essentially for family court arbitration processes.

The new rule recognizes the roles that child custody evaluators play in the family law process. A roster is not created for this designation. But clarity is provided along with a prohibition against a neutral later serving as a custody investigator in most instances. (In the limited cases requiring exceptions, the new rule requires: full disclosure by the neutral and agreement in writing signed by the parties; a court finding that there is no one else available to fill the custody investigation role; and written notification to the parties that disclosures will not be confidential.) (See Minn. Rule 310.03 (d).)

How do I get on the new ADR rosters?

The State Court Administrator's Office maintains the rosters and sets the training requirements for inclusion on the rosters. The training requirements include classroom training, experiential learning, and, in some cases, observations or "ride-alongs" of the process. To become a qualified neutral, one must complete the certified training requirements as set forth in Rule 114 and then must comply with the continuing education requirements to maintain inclusion on the roster.

The state court administrator will certify programs meeting the training requirements and now requires that trainers must also meet specified requirements. On December 30, 2022, the Supreme Court clarified that Rules 114.12 and Rules 114.13 are the new rules governing training and setting forth training requirements. Individuals who are able to demonstrate exceptional competence will still be allowed to seek a waiver. The Supreme Court has charged the ADR Ethics Board with setting up the criteria for waivers.

The ADR Ethics Board will also be setting the allowable time to apply for the roster once training has been completed. This has not been specified before. The ADR Ethics Board determined at its October 2022 meeting that the window of time to apply to a roster following completion of a training is one year, after which one would need to retake the training.

What about those of us who arbitrate? Do the new rules apply to us?

Yes. In fact, there is an entire section dedicated to arbitration proceedings, both binding and non-binding. (See Rule 114.09.) Unless there has been a waiver, all parties must be present during the taking of evidence. "Relevance" is now defined as it applies to documents, reports, and affidavits. The process of obtaining and using subpoenas is clarified. The rule sets forth the timing of the arbitrator's issuance of an award and the filing requirements for trial or vacation of an award.

Wait. I do family law or mediation—isn't that governed by Rule 310?

Rule 114 now governs family law cases; Rule 310, located in Title IV—Rules of Family Court Procedure, is incorporated directly into Rule 114 and provides the specific rules and procedures for ADR in family law cases. Rule 310 sets forth the limited exceptions to family law ADR and continues to not require ADR in cases in which domestic abuse has occurred. One notable change to Rule 310 is that it now defines the early neutral evaluation, moderated settlement conference, and parenting time expediting process as well as the parenting-time consulting process (for which there are new rosters).

Communication before, during, and after: Who can speak up?

The new rule defines the instances and the process for communicating with the neutral and for the neutral's communication with the court. There is to be no advance communication with a neutral, absent agreement by all, in any adjudicative process. In evaluative, hybrid, or facilitative processes, communication that encourages or facilitates settlement is allowed in advance of the proceedings.

A neutral continues to be limited with respect to the information it can share with a court during the ADR process, generally only confirming that a case has not resolved without comment or recommendation. A neutral can notify the court of non-compliance, request additional time, or indicate, with the written consent of the parties, that procedural action on the part of the court would facilitate resolution. One new facet of the rule is the provision that a neutral (either through consent of the parties or a court order) may disclose to the court information obtained during the ADR process. After an ADR process has been concluded, a neutral may inform the court that the case has been settled and provide a copy of the written agreement; that the case has not settled; that fees have not been paid; or, in the event of parenting-time adjustments, notify the court of those.

KRISTI PAULSON is a professional mediator and an accomplished trial lawyer. She serves on both the Lawyers Professional Responsibility Board and the ADR Ethics Board. Kristi owns PowerHouse Legal, a national training and education center focusing on mediation and trial advocacy skills trainings and CLE programs with a focus on #How2Skills.

THE ADR ETHICS BOARD IS THE ENTITY CHARGED BY THE MINNESOTA SUPREME COURT, ALONG WITH THE STATE COURT ADMINISTRATOR'S OFFICE, WITH ENFORCING THE CODE OF ETHICS CONTAINED IN RULE 114.

What about fees?

First, if a party cannot afford to pay for an ADR process (as determined through court processes, not the wishes of the parties), a court can exempt it from the ADR requirements.

Neutrals are to be paid for their services. The agreements are to be based on terms provided to the parties and their attorneys or ordered by the court. Fees for ADR services are to be fair and reasonable. If parties or attorneys fail to pay the neutral, the neutral may file an affidavit with the court and seek an order for just and proper relief.

What is the ADR Ethics Board?

The ADR Ethics Board is the entity charged by the Minnesota Supreme Court, along with the State Court Administrator's Office, with enforcing the Code of Ethics contained in Rule 114. The Minnesota Supreme Court notes that inclusion on the roster is a conditional privilege and subject to revocation for cause.

The Minnesota Supreme Court has now defined the process for making a complaint and the process the ADR Ethics Board is to use for investigating and addressing complaints. The ADR Ethics Board can impose sanctions, including but not limited to private or public reprimands or removal from the Rule 114 rosters. The process for review, appeal, and reconsideration are now clearly defined. Part two of this article will offer additional details about the workings of the board.

So what exactly is the ADR Code of Ethics?

The Rule 114 Code of Ethics defines standards of ethical conduct to guide the neutrals conducting ADR under this rule. It is based in the recognition that for a dispute resolution process to be effective, there must be a high level of integrity and fairness in the process to encourage public confidence. Part two of this article, appearing next month, will explore the Code of Ethics and the ADR Ethics Board in more detail, but for now here are a few key points.

Rule 114.13 ("Code of Ethics & Enforcement Procedures") defines the following ethical aspirations and sets forth specific requirements neutrals must demonstrate or follow in several areas:

- impartiality;
- conflicts of interest;
- competence;
- confidentiality;
- quality of process;
- advertising and solicitation;
- fees; and
- self-determination.

All of these are important. Practitioners must also keep in mind that there is presently no such thing as a "certified" neutral. The trainings are certified, but neutrals are *qualified*. The rules require that when it comes to advertising, a neutral on one of the rosters may use the phrase "qualified neutral under the General Rules of Practice."

The rules have always required fees to be non-contingent and to be fair and reasonable; they now provide more detailed guidance regarding what must be contained in a written fee agreement. It is important to know these requirements and comply with them.

Neutrals are required to provide a written agreement for services that must be signed by participants before or at the start of the ADR process in all civil and family cases employing ADR. The new version of the rule goes into detail regarding provisions that must be included in all such agreements and further requires a neutral to define and explain the process to parties at the start of any ADR process. These provisions represent one of the most significant changes to the rule and there are specific and detailed provisions that *must* be included in mediation agreements.

The Minnesota Supreme Court is clear that, while these are not *legal* duties, violations of any of these provisions may result in the imposition of sanctions by the ADR Ethics Board. We'll discuss how this works in part two next month.

Conclusion

The new ADR ethics rules contained in Rule 114 are intended to define and clarify the field of ADR, an area that has increased in popularity over the years. As with any new rule, there will be a period of clarification and interpretation as we move forward and it would be a good idea to remain attentive to these discussions as the new rule goes into play. How do you do this? Start by reading the new rule as ordered by the Supreme Court and pay attention to the ADR Ethics Board and the State Court Administrator's Office websites as rule clarifications come forward.

January 1, 2023, marked the official effective date of the new rule and the year ahead will be a transitional phase as the new rule is put in play. (For example: There will be an ADR waiver process for individuals previously qualified on current (family) rosters; it requires that if an individual wishes to apply for a waiver rather than take a required training, that process must be concluded by December 31, 2023.) There are new rules for trainers and new requirements for certified training courses. There is also now a limited one-year period during which one may apply to be on a roster following the completion of a training.

The ADR arena is growing and moving forward. The new ADR rules are meant to offer guidance and order regarding an increasingly popular process. Whether you are an ADR provider or an ADR advocate, the New Rule 114 is now part of your life and needs to be incorporated into your practice. ▲

WHAT DO JUDGES NEED TO KNOW ABOUT THE NEW ADR RULES?

■ The new rules apply to all civil and family cases (with limited exceptions) that come before the court. (Rule 114.01(a).) A court may waive the ADR requirement in a few cases:

• Inability to pay. The standard for reaching this determination is the waiver of fees pursuant to Minn. Stat. 563.01 or a court determination on other grounds. (Rule 114.01 (c).)

• A court, in family law matters, shall not ask for ADR in cases alleging domestic abuse; shall not require face-to-face ADR if there are allegations but the parties agree to ADR; and shall not require parties to engage in ADR if a process has already been tried and failed relevant to pending issues. (Rule 310.01 (b) and (c).)

■ The State Court Administrator's Office is required to:

• provide information about ADR and qualified neutrals to all parties. (Rule 114.03(a).)

• provide to the neutral a copy of the neutral's appointment once ordered by the court. (Rule 114.04(d).)

■ The court is required to:

• Order ADR when required under the rules.

- *If the parties agree on an ADR process, the court shall order that process. Parties can agree to a neutral, including a non-qualified one. If the parties agree on a process but cannot agree on a neutral, the court is not to substitute its judgement on the process. (Rule 114.04 (b).)*
- *If the parties cannot agree on an ADR process, the court shall order a non-binding process. (Rule 114.04 (b).)*
- *If the parties cannot agree on a neutral, the court shall order one. Any court-ordered neutral must be a qualified neutral as defined under Rule 114 and must be listed on the Supreme Court ADR roster. (Rule 114.04 (b).)*

• Establish (with the advice of parties) ADR process deadlines. (Rule 114.04(b).)

• Follow the ADR neutral removal process when the court appoints a neutral without consent of the parties. (See Rule 114.04(c).)

- *Parties may file a notice to remove a neutral within seven days of appointment. The court shall select another neutral.*
- *Once a party has exercised the removal by right, any subsequent removal motions require a showing of prejudice and shall come before the chief judge or his or her designee.*

• Require the attorneys to notify the court of settlement and promptly take measures to conclude the issue or matter before the court. (Rule 114.05.)

■ The court may be required to impose sanctions for violations of attendance requirements contained in Rule 114. (Rule 114.06(e).)

The court may be asked to consider evidence from ADR proceedings for use at trial (Rule 114.07); for when the disclosure of confidential ADR notes may be required (Rule 114.08(b)); or asked to enter judgment or vacate arbitration awards (Rule 114.09).

■ Courts are to be mindful of communication requirements with neutrals during and after the ADR process. The communication process is very limited and the acceptable areas of discussion are set forth in Rule 114. (Rule 114.10.)

■ Courts can order the payment of ADR fees whether they are court-ordered fees (Minn. Rule 114.10) or fees agreed to by private agreement of the parties. A neutral need only file an affidavit and shall not disclose any confidential information other than non-payment of fees. The court shall provide notice to the court and the parties and then may issue an order "granting relief as the court deems just and proper." (Minn. Rule 114.11.)

■ Courts need to know the ADR Code of Ethics. Courts are not to order neutrals to do anything that might be in violation of these rules. (Minn. Rule 114.13(A)(7)(b).) Nothing prevents a judge from reporting a violation of the ADR Ethics Code by a neutral to the ADR Ethics Board in accordance with the process outlined in the Code of Ethics.

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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

Controlled substances: Uncorroborated admission to possession of marijuana is sufficient to establish probable cause. During a traffic stop, police smelled marijuana in appellant's vehicle and appellant admitted he had a small amount of marijuana in the car. During a search of the car, police found a substance they believed to be marijuana. A field test of the substance detected THC, but no additional tests were conducted to determine the THC concentration. Appellant was charged with fifth-degree possession, but he moved to dismiss the charge, arguing his statement that he possessed marijuana could not be used to establish probable cause to believe he possessed marijuana, as opposed to hemp, because his statement was not corroborated by testing that showed that the statutory threshold concentration of THC was present. The district court granted appellant's motion, but the court of appeals reversed.

The Supreme Court accepted review to answer the question of whether the state must obtain a chemical test showing that the THC concentration of suspected marijuana exceeds the legal limit to survive a motion to dismiss a marijuana possession charge for lack of probable cause. The Court decides that such a test is not required in this case, because appellant admitted the substance was marijuana and his statement did not need to be corroborated to survive a motion to dismiss at the probable cause stage.

Under Minn. Stat. §634.03, a confession alone cannot support a conviction—additional independent evidence is needed. However, this rule does not apply to a probable cause challenge. Based on the language of section 634.03 and prior case law, the Court holds that a finding of probable cause can be based on an uncorroborated confession. Here, appellant admitted the substance in his vehicle was marijuana, an admission that is direct evidence of guilt. While this admission alone would not sustain a conviction, it is enough to survive a motion to dismiss for lack of probable cause. The district court erred when it granted appellant's motion to dismiss. ***State v. Dixon***, 981. N.W.2d 387 (Minn. 11/9/2022).

Juveniles: When examining a juvenile's culpability in making a certification determination, the court may consider only the child's level of participation in planning and committing the offense and the sentencing guidelines' mitigating factors. Appellant, a 15-year-old, was charged in juvenile court with aiding and abetting second-degree murder and first-degree aggravated robbery. The district court denied the state's motion to certify appellant as an adult. The court of appeals reversed, finding the state met its burden and certification was required.

Certification of a juvenile under the age of 16 is permissible only if the state proves "by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety." Minn. Stat. §260B.125, subd. 2(6)(ii). Six factors must be considered by the court: (1) the seriousness of the alleged offenses; (2) the culpability of the child in committing the alleged offenses; (3) the child's prior record of delinquency; (4) the child's programming history; (5) the adequacy of punishment or programming available in the juvenile system; and (6) the dispositional options available for the child. *Id.* at subd. 4. Greater weight is to be given to the first and third factors. *Id.*

Appellant argues the court of appeals erred in concluding that only those mitigating factors recognized by the sentencing guidelines may be considered when analyzing the second factor (culpability). He also argues that, while factors one and three weigh in favor of certification, the remaining four factors do not and the district court properly denied the state's motion for certification.

As to the second public safety factor, the district court must consider "the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines." *Id.* at subd. 4(2). Here, the district court considered other mitigating

factors, including scientific and social-scientific research, appellant's mental health diagnosis, and U.S. Supreme Court cases discussing child brain development.

The Minnesota Supreme Court first discusses the language of section 260B.125, subd. 4(2), noting that "the context strongly suggests that the word 'including' is a limitation" on what may be considered by the Court. This section's legislative history and the Court's previous narrow interpretations of the public safety factors also support this interpretation. Thus, the Court holds that section 260B.125, subd. 4(2), "limits a district court's consideration of the existence of any mitigating factors under the second public safety factor to those facts enumerated after the word 'including,' which includes the level of the child's participation in planning and carrying out the offense and the existence of any of the mitigating factors set forth in the sentencing guidelines, which are listed at Minn. Sent. Guidelines 2.D.3.a." Here, the district court improperly considered other mitigating information. Looking only at the factors permitted by statute, the second public safety factor weights in favor of certification.

Ultimately, the Supreme Court finds the district court abused its discretion when it determined the state had not met its burden of proving that retaining appellant in the juvenile system would not serve public safety. The Court finds the first four public safety factors all favor certification, which outweigh the only two other factors weighing against certification. The court of appeals' determination that the district court should have found certification was required is affirmed. ***Matter of Welfare of H.B.***, No. A20-0954, 2022 WL 16954540 (Minn. 11/16/2022).

Evidence: Factfinder is not required to apply circumstantial evidence standard of review when determining guilt. Appellant was found guilty after a court trial of one count of petty misdemeanor use of a controlled access highway as a pedestrian. The charge arose from appellant's participation in a group of demonstrators who walked onto I-94. Appellant appealed, arguing there is insufficient evidence to support the court's finding of guilt.

Where circumstantial evidence is used to prove an element of an offense, as in this case, a heightened standard of review applies, which requires the appellate court to determine the circumstances proved, disregarding evidence inconsistent with the verdict, and then requires the appellate court to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. Appellant argues the district court erred by not applying this test for circumstantial evidence before finding her guilty.

However, the court of appeals notes that the Supreme Court has previously recognized the different roles of a factfinder at trial and at the appellate court on review when it comes to how direct and circumstantial evidence is to be considered. The court of appeals finds that "it is clear that although an appellate court prefers direct evidence to circumstantial evidence when reviewing a determination of guilt on appeal, a factfinder does not prefer one form of evidence over the other when determining guilt at trial."

The court of appeals rejects appellant's argument that the district court was required to apply the circumstantial evidence standard at trial, holding that this test is to be applied only by the appellate court. The court of appeals applies the circumstantial evidence test itself to determine if the evidence was sufficient to support the district court's finding of guilt. The court determines that the circumstances proved make it reasonable to infer that appellant was among the group of demonstrators that walked on I-94. The court finds no reasonable inference inconsistent with guilt that can be drawn from the circumstances proved. The district court is affirmed. ***State v. Olson***, A21-1742, 2022 WL 17086778 (Minn. Ct. App. 11/21/2022).

Firearms: Unassembled shotgun parts able to be assembled constitute a "firearm." Police saw a car and a van parked near a known drug house and saw someone inside the van injecting heroin. A baggie of suspected controlled substances was found on one occupant of the van. A search of the van revealed a backpack containing unassembled shotgun parts, as well as a prescription box and pay stub both labeled with appellant's name. An occupant of the van told police the backpack belonged to appellant. The backpack contained all the parts necessary to assemble a functional shotgun, aside from the stock bolt and stock bolt washer. Appellant had a previous conviction for a crime of violence, so he was charged with unlawful possession of a firearm under Minn. Stat. §609.165, subd. 1b(a). Appellant was found guilty after a jury trial.

On appeal, appellant argues the evidence was insufficient to sustain his conviction, because unassembled shotgun parts do not constitute a "firearm." "Firearm" is not defined in section 609.165, subd. 1b(a), but it has been defined and interpreted in case law. In 2020, the Supreme Court held that "a 'firearm' is an instrument designed for attack or defense that expels a projectile by the action or force of gunpowder, combustion or some other explosive force." *State v. Glover*, 952 N.W.2d 190, 191 (Minn. 2020). The court has not previously considered whether an unassembled firearm fits this definition, but it has repeatedly found that the operability of a firearm is immaterial, because even an inoperable firearm still maintains its apparent ability to inflict injury.

Consistent with these decisions, the court of appeals concludes "that the potential use of an unassembled firearm is sufficient to bring such a firearm within the meaning of prohibited possession under Minn. Stat. §609.165, subd. 1b(a), so long as it is possible to assemble the firearm." The court points out that it cannot write an exemption for unassembled firearms into the statute where the Legislature could have chosen to do so but did not.

Whether a particular group of parts constitutes a "firearm" is a question of fact. Here, although two small parts were missing, it was possible to obtain those missing parts to assemble the firearm. In this case, the state proved it was possible to assemble the firearm parts into a firearm, and the district court properly instructed the jury that a firearm "[m]eans a device, whether operable or inoperable, loaded or unloaded, designed to be used as a weapon from which can be expelled the projectile by the force of any explosion or force of combustion." Thus, the evidence was sufficient to prove the unassembled shotgun parts constituted a firearm.

The court also finds that the circumstances proved in this case are consistent with the jury's finding that appellant constructively possessed the firearm. The circumstances proved do not support any reasonable inference other than guilt, and appellant's conviction is affirmed. ***State v. Stone***, A21-1648, 2022 WL 17244596 (Minn. Ct. App. 11/28/2022).

Procedure: Guilty plea is invalid if plea petition is not signed and there is no record of voluntary, intelligent plea. Appellant was charged with third-degree driving while impaired. Pursuant to Minn. R. Crim. P. 15.03, subd. 2, at a Zoom hearing, his defense counsel indicated a plea petition would be filed and that he would obtain appellant's permission to sign the petition on his behalf. The district court questioned appellant on the record about the plea agreement and plea petition, and told appellant he could permit his attorney to sign the petition for him. Appellant confirmed he understood. A plea petition was filed, which appellant's attorney signed on his behalf, and accepted by the district court. Appellant appeals his conviction, arguing his plea was not voluntary and intelligent.

The Minnesota Court of Appeals notes that Rule 15.03, subd. 2, which permits the entry of a guilty plea to a misdemeanor or gross misdemeanor charge via the filing of a plea petition, explicitly requires that the petition be signed by the defendant. A constitutionally valid plea is accurate, voluntary, and intelligent, and is established in a proper factual basis on the record. This record can include a verbatim recording of the proceedings and/or a plea petition signed by the defendant and filed with the court.

A plea petition signed by the defendant is *prima facie* evidence of a voluntary and intelligent guilty plea. Without the defendant's signature, the record must contain other evidence to establish the validity of the plea. Here, the record does not show appellant was advised of and forfeited his constitutional rights or that he understood and agreed to the terms set forth in the plea agreement. Reversed and remanded to allow appellant to withdraw his guilty plea. *State v. Lawrence*, A22-0080, 2022 WL 17409571 (Minn. Ct. App. 12/5/2022).

Criminal sexual conduct: Aggravated sentence for an offense occurring within the victim's zone of privacy is permitted when the offense is committed in the victim's bedroom. Appellant was convicted of third-degree criminal sexual conduct against a physically helpless victim after entering the victim's bedroom while she was sleeping and engaging in sexual penetration with her. The jury also found the offense was committed in the victim's zone of privacy, which the district court relied on to impose an upward durational departure from the sentencing guidelines.

The sentencing guidelines' list of aggravating factors that may support an upward sentencing departure include "[t]he offense was committed in a location in which the victim had an expectation of privacy" (zone of privacy factor). A single aggravating factor may support upward departure, "[b]ut even when the jury finds the presence of one or more of these factors, the district court must then determine that it constitutes a 'substantial and compelling' circumstance that renders the offense significantly more serious than a typical offense."

Here, the evidence at trial established that appellant was not allowed in the victim's room when she was sleeping without her permission due to a prior incident and she had her door closed on the day of the offense. The court also finds the district court did not err in finding that the commission of the offense within the victim's "zone of privacy" constituted a substantial and compelling ground for making the offense significantly more serious than a typical offense. Here, the victim had to repeatedly return to the location of her assault, her own

bedroom, making appellant's conduct more serious than a typical "physically helpless victim" criminal sexual conduct offense, which generally occur outside of the victim's zone of privacy. Appellant's sentence is affirmed. ***State v. Vanengen***, A22-0105, 2022 WL 17747774 (Minn. Ct. App. 12/19/2022).

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Employment & Labor Law
JUDICIAL LAW

Teacher licensure; immorality standard narrowed. The denial of a substitute teaching license for a former police officer who shot and killed a Black male vehicle driver six years ago was reversed and remanded by the Minnesota Court of Appeals. The appellate court held that the statutory language of "immoral character or conduct" is too "nebulous" and "vague" to support licensure denial to Jeronimo Yanez, who was acquitted after he killed Philando Castile, and the case was remanded to the Professional Education Licensing and Standard Board, with a "narrowing contribution" limiting the determination to whether and how that incident "relates to Yanez's fitness to teach in the public schools." ***In Re Yanez***, 2022 WL 17244835 (Minn. Ct. App. 11/28/2022) (unpublished).

Wrongful termination claim dismissed. An employee who was not entitled to an on-site inspection of her employer's facility had her wrongful discharge lawsuit dismissed. The 8th Circuit upheld a lower court determination that her breach of fiduciary duty claim was not actionable. ***Phox v. 21c Management, LLC***, 2022 WL 16847603 (Minn. Ct. App. 11/20/2022) (unpublished).

Retaliation rejected; legitimate reason to terminate. A community law enforcement agency had legitimate reasons to fire a Black male officer. Affirming a lower court ruling, the 8th Circuit rejected his racial retaliation claim because the record reflected that he failed to properly respond to a medical emergency as part of his job as a first responder. ***Thompson v. University of Arkansas***, 52 F.4th 1039 (8th Cir. 11/10/2022).

Unemployment compensation; quitting employees split cases. A pair of decisions of the Minnesota Court of Appeals yielded different outcomes in unemployment compensation cases.

An employee was denied benefits when he quit because his work location was switched, which impeded his transportation there. The employee's refusal to accept the new position did not constitute "good reason attributable to the employer" to quit. ***Winne v. J & G Holdings, Inc.***, 2022 WL 16910585 (Minn. Ct. App. 11/14/2022) (unpublished).

But an employee who was forced to sign a separation agreement on her last day of work before a planned leave of absence was granted benefits because she did not make a "free will choice" to quit or be given the opportunity to continue working. ***Walker v. St. Paul Public Library***, 2022 WL 16910615 (Minn. Ct. App. 11/14/2022) (unpublished).

Workers compensation; standard for additional attorney's fees. An award of additional attorney's fees to a claimant under Minn. Stat. 176.081 subd. 7 is distinct from ordinary contingent fees under Subdivision 1(c) and must be analyzed and decided separately. Reversing a ruling of the Workers' Compensation Court of Appeals, the state Supreme Court reversed and remanded for consideration of the additional fee prong independently from the chief contingency award. ***Lagasse v. Horton***, 2022 WL 7332366 (Minn. 2022).

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Environmental Law
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Minnesota Court of Appeals upholds summary judgment against Minneapolis 2040 Plan. The Minnesota Court of Appeals dealt another blow to the City of Minneapolis's 2040 Comprehensive Plan with its December 2022 order. Since the plan's passage in 2018, three groups (collectively referred to as "Smart Growth") sued the city, arguing the plan could cause environmental harm and suggesting the city conduct an analysis under the Minnesota Environmental Rights Act (MERA) before any implementation of the plan. The recent court of appeals decision, following an appeal from the Minnesota Supreme Court's 2021 remand, upheld the district court's grant of Smart Growth's motion for summary judgment, while reversing the grant of injunctive relief and remanding back to the district court for further proceedings. See *State by Smart Growth Minneapolis v. City of*

Minneapolis, 954 N.W.2d 584, 587-88 (Minn. 2021).

Under the burden-shifting framework of MERA, Smart Growth was required to present a *prima facie* case showing (1) the existence of a protectable natural resource; and (2) that the city's conduct is likely to cause the impairment of that resource. If met, the city then must rebut Smart Growth's case or present an affirmative defense. The city acknowledged that the plan does implicate protectable natural resources, but asserted that Smart Growth failed to establish the second element—namely that Smart Growth's allegations relied on an assumption of a *full build-out* of the Plan, and not a *gradual* implementation on a project-by-project basis. The district court found for Smart Growth and granted its motion for summary judgment, relying on an expert report that suggested a full build-out would cause material adverse environmental effects. The court also required the city to "immediately cease all present action in furtherance of the 2040 Plan," until the city satisfied its MERA obligation of rebutting Smart Growth's *prima facie* case or prevailed under an affirmative defense.

Following the 2021 Minnesota Supreme Court decision, the appellate court found the district court appropriately based its MERA analysis on a presumption of a full build-out under the plan. Smart Growth therefore met its burden under MERA, and the city failed to rebut the expert report, properly granting Smart Growth's motion for summary judgment. However, the appellate court reversed the injunction. The court reasoned that the district court's injunction and order that the city revert to the 2030 plan was made with "limited analysis" and without proper findings of fact on the necessity and scope of injunctive relief. The court remanded the matter back to the district court for further proceedings concerning the injunction. ***State by Smart Growth Minneapolis v. City of Minneapolis***, No. 27-CV-18-19587, 2022 WL 17957328 (Minn. Ct. App. 12/27/2022).

ADMINISTRATIVE ACTION

EPA and the Corps issue revised definition of "waters of the U.S.," incorporating both jurisdictional tests from *Rapanos*. On 12/30/2022, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers issued a final rule defining "waters of the United States" (WOTUS). The definition of WOTUS is significant because it prescribes the reach of federal jurisdiction under the Clean Water Act (CWA), including the NPDES and 404 permit programs. Recall that a set of 1986 rules defining WOTUS had been subject to numerous fractured interpretations by the Supreme Court of the United States, including the Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). In that case Justice Scalia, in a plurality opinion, articulated a jurisdictional test that the CWA extends only to waters that are "relatively permanent, standing or continuously flowing" or to wetlands that are immediately adjacent to such waters. But Justice Kennedy, in a partially concurring opinion, said federal "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."

EPA during the Obama era adopted a new definition of WOTUS, incorporating the more broad "significant nexus" approach of Justice Kennedy in *Rapanos*. That definition was repealed by the Trump EPA and replaced by the Navigable Waters

Protection Rule (NWPR), which found CWA jurisdiction primarily under Justice Scalia's more narrow "relatively permanent" standard. In 2021, federal district courts in both Arizona and New Mexico vacated the NWPR. Subsequently, EPA and the Corps announced that they would stop implementing NWPR and rely on the 1986 rule, and, in December 2021, the agencies issued an interim rule defining WOTUS. 86 Fed. Reg. 69372 (12/7/2021).

The agencies describe the final rule issued on December 30 as a return to a "reasonable and familiar framework founded on the pre-2015 definition [of WOTUS] with updates to reflect existing Supreme Court decisions, the latest science, and the agencies' technical expertise." Notably the rule codifies aspects of both the "relatively permanent" and "significant nexus" tests from *Rapanos*.

In short, the rule defines WOTUS to include:

- traditional navigable waters, interstate waters, the territorial seas, and their adjacent wetlands;
- most impoundments of WOTUS;
- tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard;
- wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and
- other intrastate lakes and ponds, streams, or wetlands that meet either the relatively permanent standard or the significant nexus standard.

The new rule includes eight exceptions to the WOTUS definition, including the two exceptions codified in the 1986 rule (waste treatment systems and prior converted cropland) and six other exceptions that the agencies have applied by practice: ditches, artificially irrigated areas, artificial lakes or ponds created by excavating or diking dry land to collect and retain water, artificial reflecting or swimming pools or other small ornamental bodies of water, waterfilled depressions created in dry land incidental to construction activity, and swales and erosional features (e.g., gullies, small washes) characterized by low volume and infrequent or short-duration flow.

Notably, the agencies issued the new rule as the U.S. Supreme Court is set to issue a decision in *Sackett v. EPA*, which is likely to address the CWA jurisdictional standard for wetlands. ***Revised Definition of "Waters of the United States"*** (33 CFR Pt. 328 & 40 CFR Pt. 120), ___ Fed, Reg. ___ (2022).)

EPA issues environmental justice principles for air-permitting decisions. In December the EPA's Office of Air and Radiation issued a guidance document featuring eight principles for addressing environmental justice during Clean Air Act permitting decisions. The guidance document cross-references an FAQ document issued under the EPA Office of General Counsel and Office of Policy in August 2022 titled *Environmental Justice and Civil Rights in Permitting Frequently Asked Questions* (EJ FAQs).

The guidance document notes that Title VI of the Civil Rights Act of 1964 mandates that state and local permitting programs, as well as all other recipients of EPA financial assistance, must "not discriminate—either intentionally or in effect—against persons on the basis of race, color, national origin, disability, sex, and age." The EPA is also directed to achieve environmental justice and equity by three executive orders (EOs) issued across two administrations: EO 14008 "Tackling the Climate Crisis at Home and Abroad" (1/27/2021); EO 13985 "Advancing Racial Equity and Support for Underserved Communities through the Federal Government" (1/20/2021); EO 12898 "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (2/11/1994).

With the goal of assisting EPA regions and state and local authorities during air-permitting decisions, the guidance document does not issue a "one-size-fits-all" methodology for addressing environmental justice, but rather offers multiple principles to be considered on a case-by-case basis.

The eight principles are as follows: 1) Identify communities with potential environmental justice concerns. 2) Engage early in the permitting process to promote meaningful participation and fair treatment. 3) Enhance public involvement throughout the permitting process. 4) Conduct a "fit for purpose" environmental justice analysis. 5) Minimize and mitigate disproportionately high-end adverse effects associated with the permit action to promote fair treatment. 6) Provide federal support throughout the air-permitting process. 7) Enhance transparency throughout the air-permitting process. 8) Build capacity to enhance the consideration of environmental justice in the air-permitting process.

The guidance document offers a thorough explanation of each principle, as well as cross-references to the August 2022 EJ FAQs. This Decem-

ber 2022 guidance document follows the May 2022 publication of the EPA Legal Tools to Advance Environmental Justice (EPA Legal Tools) document, the creation of the Office of Environmental Justice and External Civil Rights in September 2022, and the announcement from the EPA Office of Land in Emergency Management finalizing the "EJ Action Plan: Building up Environmental Justice in EPA's Land Protection and Cleanup Programs" that same month.

Like the December 2022 principles, the EJ action plan was created to identify and "address the nation's environmental justice challenges." It has four main goals: 1) strengthening compliance with cornerstone environmental statutes; 2) incorporating environmental justice considerations during the regulatory development process; 3) improving community engagement in rulemaking, permitting decisions, and policies; and 4) implementing Pres. Biden's Justice40 Initiative, the goal of which is to deliver at least 40 percent of the overall benefits from federal investments in climate and clean energy to disadvantaged communities. ***Principles for Addressing Environmental Justice in Air Permitting***, EPA Office of Air and Radiation (12/22/2022), *available at https://www.epa.gov/system/files/documents/2022-12/Attachment%20-%20EJ%20in%20Air%20Permitting%20Principles%20.pdf*

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Attorney-client privilege; "dual-purpose" communications; grant of *certiorari*. The Supreme Court heard argument on 1/9/2023 on the issue of "whether a communication involving both legal and non-legal advice is protected by attorney-client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication." The 9th Circuit held that the "primary purpose" test applies to "dual purpose" communications, and that the communications at issue were not privileged. ***In Re Grand Jury***, 23 F.4th 1088 (9th Cir.), *cert. granted*, 143 S. Ct. 80 (2022).

Nationwide preliminary injunction pending appeal; failure to address relevant injunction standard. Reversing a district court's determination that the plaintiff states lacked standing to pursue claims arising out of the student loan forgiveness program, the 8th Circuit found that Missouri had standing and issued a nationwide injunction pending appeal.

Notably from a procedural perspective, the court failed to address whether the states' request for injunction relief was to be considered under the traditional *Dataphase* test or whether the higher standard applicable to government actions applied.

The Supreme Court granted *certiorari* before judgment and is scheduled to hear argument in February. It is unclear whether the injunctive relief standard will be addressed in the course of that appeal. ***Nebraska v. Biden***, 52 F.4th 1044 (8th Cir.), *cert. granted*, ___ S. Ct. ___ (2022).

ERISA; arbitration; no federal question. Relying on the Supreme Court's intervening decision in *Badgerow v. Walters* (142 S. Ct. 1310 (2022)), the 8th Circuit reversed a district court's confirmation over 177 arbitration awards, finding that plaintiffs' claims were not sufficiently ERISA-related to establish federal question jurisdiction, and remanded for a determination of which claims, if any, were subject to diversity jurisdiction. ***Hursh v. DST Systems, Inc.***, 54 F.4th 561 (8th Cir. 2022).

Younger* abstention rejected.** Finding that none of the required "exceptional circumstances" were present, the 8th Circuit reversed a district court decision to abstain under *Younger*. ***375 Slane Chapel Road, LLC v. Stone County, 53 F.4th 1122 (8th Cir. 2022).

Award of attorney's fees affirmed. Affirming an order by then-Chief Judge Tunheim and rejecting defendants' argument that the plaintiff should recover "nothing" in attorney's fees, the 8th Circuit affirmed an award of almost $250,000 in attorney's fees. ***Parada v. Anoka County***, 54 F.4th 1016 (8th Cir. 2022).

Trademark: attorney's fees; exceptional case. Finding no abuse of discretion in the district court's determination that a Lanham Act case was "exceptional," the 8th Circuit also found no abuse of discretion in the district court's decision to reduce requested hourly rates and award plaintiff's counsel only a quarter of the lodestar. ***Pocket Plus, LLC v. Pike Brands, LLC***, 53 F.4th 425 (8th Cir. 2022).

Fed. R. Civ. P. 12(f); motion to strike affirmative defenses denied; intra-district split.

Acknowledging an intra-district split as to whether the *Twombly/Iqbal* plausibility standard applies to affirmative defenses, Judge Menendez denied plaintiff's motion to strike affirmative defenses and found that the defenses "should not be stricken based on an absence of specific factual allegations." ***Hollie v. Essentia Health Moose Lake***, 2022 WL 17076751 (D. Minn. 11/18/2022).

Motion to dismiss unjust enrichment claim granted; common practices criticized. Bemoaning both "the practice of many plaintiffs' attorneys to include an unjust-enrichment claim in every civil complaint" and "the practice of many defense attorneys to bring a motion to dismiss in every case," Chief Judge Schiltz granted defendant's motion to dismiss one of four claims. ***Strategic Import Supply, LLC v. Meyers***, 2022 WL 16718673 (D. Minn. 11/4/2022).

Proposed depositions of counsel; work product objections sustained; protective order issued. In a lengthy opinion, Magistrate Judge Wright rejected the plaintiff's motion to compel the depositions of experts and an investigator retained by defense counsel in a related criminal case, finding that the work product privilege attached to the work of non-attorneys, including their recollections of non-privileged interviews, and entered a protective order barring any further attempts to depose these individuals. ***Evans v. Krook***, 2022 WL 17176186 (D. Minn. 11/23/2022).

Motions for contempt granted and denied; multiple cases. Adopting a report and recommendation by Magistrate Judge Wright, Judge Wright granted plaintiff's motion to have the defendants held in contempt, with defendants being ordered to pay a fine of $100 a day (increasing to $500 a day a week later) until they purge their contempt by complying with the court's prior order, and also ordered defendants to pay plaintiff's reasonable attorney's fees incurred in seeking defendants' compliance with the prior order. ***Powerlift Door Consults., Inc. v. Shepard***, 2022 WL 16822179 (D. Minn. 8/17/2022), *Report and Recommendation Adopted*, 2022 WL 16821500 (D. Minn. 11/8/2022).

Judge Davis denied defendant's motion to have plaintiff school district held in contempt, fined, and the school superintendent taken into custody due to the school district's failure to comply with a prior order, finding that the defendant was "making every good faith effort" and that defendant's actions were "not the act of a party attempting to circumvent a Court Order." ***Osseo Area Schools, Indep. School Dist. No. 279 v. A.J.T. ex rel. A.T. and G.T.***, 2022 WL 17082826 (D. Minn. 11/18/2022).

Motions for contractual attorney's fees denied; multiple cases. While granting plaintiff's motion for default judgment, Judge Wright denied the related motion for an award of attorney's fees where plaintiff sought more than $9,000 in attorney's fees and costs but did not provide billing records or identify the attorneys who worked on the case, their hourly rates, or the hours each attorney worked. Judge Wright declined plaintiff's offer to submit billing records for *in camera* review, finding "no justification" for its failure to submit those records with its motion. ***Huntington Nat'l Bank v. Dignity Senior Living, LLC***, 2022 WL 16638346 (D. Minn. 11/2/2022).

Judge Wright also denied a request for more than $16,000 in attorney's fees and costs in a second case decided the next day, again criticizing counsel for the failure to submit appropriate billing records to the court. ***Huntington Nat'l Bank v. TNT Trucking LLC***, 2022 WL 16700298 (D. Minn. 11/3/2022).

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Intellectual Property
JUDICIAL LAW

Copyright: Denial of attorneys' fees where litigation not frivolous or unreasonable. Judge Tostrud recently denied prevailing defendants' motion for attorneys' fees under the Copyright Act. Plaintiff MPAY Inc. sued defendants Erie Custom Computer Applications, Inc. and Payroll World, Inc., for breach of the parties' agreements regarding source code for payroll-processing software and ensuing copyright infringement. After a seven-day trial in June 2022, the jury found no breach of the agreement. Without any breach, MPAY could not establish its related copyright infringement claims as a matter of law, and judgment was entered in favor of the defendants. Defendants then moved for an award of attorneys' fees pursuant to the parties' Software Development and License Agreement (SDLA) and under the Copyright Act. After the court found the SDLA was no longer in effect and did not provide a basis for attorneys' fees, the court considered the demand for fees under the Copyright Act. Section 505 of the Copyright Act allows for but does not mandate an award of attorneys' fees to the "prevailing party." The discretion to award fees considers factors such as whether the lawsuit was frivolous or unreasonable, the losing litigant's motivations, the need in a particular case to compensate or deter, and the purposes of the Copyright Act. The court found MPAY's claims were not frivolous or objectively unreasonable because many of MPAY's claims survived summary judgment and defendants' motion for judgment as a matter of law at the close of evidence. The court further found awarding fees would not advance the Copyright Act's purpose to protect creative works. ***MPAY Inc. v. Erie Custom Comput. Applications, Inc.***, No. 19-cv-704 (ECT/LIB), 2022 U.S. Dist. LEXIS 229311 (D. Minn. 12/21/2022).

Patent: Indefiniteness requires resolution of factual issues. Chief Judge Schiltz recently refused to find a claim limitation indefinite at the claim-construction stage, delaying the determination until at least the summary judgment stage. Plaintiffs Vascular Solutions LLC, Teleflex LLC, Teleflex Life Sciences Limited, and Arrow International LLC (Teleflex) sued Medtronic, Inc. and Medtronic Vascular, Inc. (Medtronic) alleging infringement of a family of patents directed to guide-extension catheters used in interventional cardiology procedures. Medtronic counterclaimed for declarations of non-infringement and invalidity. During claim construction, Medtronic argued that certain claims were indefinite because they require comparing a "material" to a "structure." A patent is invalid for indefiniteness if its claims (read in light of the specification delineating the patent, and the prosecution history) fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention. The court first found that Teleflex's contention that the claims require a structure-to-structure comparison would read words

out of the claim. At the claim construction hearing, Teleflex newly contended that the claim called for a material-to-material comparison arguing that a flexural modulus is a material property that is independent of shape and that can be determined by testing a structure, thus allowing for a material-to-structure comparison. The court therefore found that there was a factual dispute concerning whether flexural modulus can be determined independent of structure. Accordingly, the court deferred the issue of indefiniteness to the summary judgment stage. The court acknowledged that while indefiniteness is a matter of law, a jury may be required to resolve factual disputes before a court can reach that legal conclusion. ***Vascular Sols. LLC v. Medtronic, Inc.***, No. 19-CV-1760 (PJS/TNL), 2022 U.S. Dist. LEXIS 231581 (D. Minn. 12/27/2022).

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Real Property
JUDICIAL LAW

Decision to grant variances was legally valid. When the county's zoning ordinance provides that a variance may only be granted upon compliance with Minnesota Statutes Ch. 394, the county's decision is not arbitrary if the board of adjustments uses a checklist with contents that correspond with Minn. Stat. §394.27, subd. 7, even if the board does not specifically mention the ordinance in its written findings granting the variances. In *Behrends v. Jackson Cnty.*, the owner of a parcel adjacent to four properties on which windmills were located instituted a declaratory judgment action to challenge variances granted by Jackson County to allow the continued use, with modifications, of the wind turbines. The district court granted summary judgment dismissing the action and the court of appeals affirmed. The county's ordinance required that an applicant for a variance demonstrate that "extraordinary circumstances" exist for the subject property. The plaintiff, therefore, asserted that the board of adjustments' decision was legally invalid since it did not make a finding concerning this factor. But the court of appeals held that the board's consideration of the second requirement of Minn. Stat. §394.27, subd. 7—which requires that "the plight of the landowner is due to circumstances unique to the property not created by the landowner"—constituted sufficient compliance with the ordinance. ***Behrends v. Jackson Cnty.***, No. A22-0797, 2022 WL 17956776 (Minn. App. 12/27/2022).

Marketable Title Act did not extinguish recorded easement. Misuse of an easement can constitute continuous use for purposes of the Marketable Title Act's possession exception. In *Matter of Sharifkhani*, a landowner instituted a Torrens registration proceeding and sought an adjudication that an easement recorded in 1933 had been terminated. The fee owner of the benefitted parcel, which had been in residential use at the time of the easement grant but was converted to commercial use in 1999, appeared and filed an answer in opposition. The parties stipulated to certain facts, including that the possession exception was fulfilled from 1973 until 1999. The examiner of titles held a trial regarding the use of the easement through the time of the filing of the action. The examiner found continuous use since 1973, satisfying the MTA possession exception and precluding the termina-

tion of the easement, and the district court adopted the examiner's recommendation. It is "well settled" that easements cannot be "expanded beyond the objects originally contemplated or expressly agreed upon by the parties." The applicant, therefore, argued that such expanded use could not be used to show continuous possession sufficient to defeat the conclusive presumption of abandonment under the MTA arising from failure to record a notice within 40 years of creation of the interest. The court of appeals declined to apply an equitable determination of easement misuse to the MTA possession exception. ***Matter of Sharifkhani***, No. A22-0617, 2022 WL 17747896 (Minn. App. 12/19/2022).

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Tax Law
JUDICIAL LAW

Supreme Court's reasoning in *Boechler* does not apply to the 90-day deadline of section 6213(a) deficiency cases. In *Boechler*, the Supreme Court held that "[s]ection 6330(d)(1)'s three-day time limit to file a petition for review of a collection due process determination is an ordinary, nonjurisdictional deadline subject to equitable tolling." *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1501 (2022). After missing by one day the 90-day filing deadline applicable to deficiency matters, taxpayer Hallmark Research Collective argued that the Court's reasoning in *Boechler* applies with equal force to the 90-day filing deadline in section 6213(a). The tax court embraced the opportunity to review the *Boechler* opinion. After a meticulous review, the court concluded that the Supreme Court's reasoning in *Boechler* does not apply to the 90-day deadline of section 6213(a). Judge Gustafson's opinion was joined by all 16 of his fellow tax court judges. ***Hallmark Rsch. Collective v. Comm'r***, No. 21284-21, 2022 WL 17261546 (T.C. 11/29/2022).

Tax court declines to second-guess hardworking farmers' use of 40 tractors to work 482 acres. Taxpayers Steven and Judy Hoakison have been farming in central Iowa since 1971. Mr. Hoakison has a high school education and, in addition to farming, has worked full-time as a UPS delivery driver for about two decades. Mrs. Hoakison plays an important role in managing the business side of the family's farming business. She also worked as a receptionist at a veterinary clinic during the tax years at issue. The Hoakisons survived the 1980s farm crisis. Since that time, the couple "conducted both their personal lives and their farm operation with determined frugality." "By working tirelessly and managing their financial affairs in this way," the tax court observed, the Hoakisons "have been able to weather downturns in the farm economy and by [the tax year at issue] owned 422 acres of land debt-free." Those 422 acres were noncontiguous tracts of land on which the Hoakisons grew row crops and ran a cow-calf operation. Both these types of farming operations require significant physical labor. Mr. Hoakison did the majority of this challenging physical work before and after his UPS shifts. Mr. Hoakison continued to work the farm even after a heart attack and triple-bypass surgery in 2011, although the couple made some accommodations to account for his health.

The Hoakisons' 2013, 2014, and 2015 returns were selected for examination and the Service determined that they were not entitled to a number of claimed deductions and expenses for each of the years. In particular dispute was the treatment of a number of tractors for which the Hoakisons had claimed depreciation, as well as depreciation claimed on several pick-up trucks. The Hoakisons claimed depreciation and section 179 deductions totaling approximately $270,000 for the three tax years at issue. The Service disallowed just under $200,000 of the $270,000 of claimed depreciation.

The court addressed the dispute surrounding the pick-up trucks to determine whether the trucks were subject to Section 274(d)(4)'s strict substantiation requirements. This section provides that no deductions shall be allowed for "listed property" (usually pick-up trucks would be "listed property") unless substantiation requirements are met. The Hoakisons kept careful records but could not meet the strict substantiation requirements for the pickups (e.g., no mileage logs or other record of the vehicles' use). However, the court held that only one of the couple's many pick-ups was subject to the 274(d)(4) requirement. The other trucks were "qualified nonpersonal use vehicles" and as such the strict substantiation requirement was not applicable to them. A "qualified nonpersonal use vehicle" is "any vehicle which, by reason of its nature, is not likely to be used more than a de minimis amount for personal purposes." The Hoakisons had customized nearly all the pickups for specific uses on the various farm properties. As such, all but one of the pickups were "qualified nonpersonal use vehicles."

The court also addressed the parties' dispute surrounding claimed depreciation for the couple's 40 tractors. The commissioner argued that Mr. Hoakison acquired most of the tractors for personal reasons (the commissioner suggested "nostalgia" motivated the purchases). The court criticized the commissioner's position as "gloss[ing] over or ignor[ing] many critical details of Mr. Hoakison's situation." The court concluded that "[t]he type or number of tractors whether new or used in the farm operation is within petitioners' business judgment, and it is not respondent's or the Court's role to second-guess that judgment or substitute its own unless the facts and circumstance require us to do so.... The evidence shows, and the Court so finds, that petitioners purchased the tractors for use in their farming business and did so use them in the years at issue." The Hoakisons were entitled to most of the claimed depreciation for the tractors.

The court also addressed depreciation claimed on a machine shed and certain disallowed Schedule F expenses (utilities, fuel, gasoline, repairs, and maintenance). Finally, the court addressed accuracy-related penalties and held the Hoakisons responsible for a small portion of those penalties but concluded that the couple had reasonable cause and acted in good faith with respect to most of the underpayment. ***Hoakison v. Comm'r***, T.C.M. (RIA) 2022-117 (T.C. 2022).

IRS listed transaction notice concerning syndicated conservation easements violated Administrative Procedure Act. Syndicated conservation easements involve several investors forming an entity to purchase land that is then donated for a charitable deduction. These easements have long been an IRS enforcement concern. In 2017, the IRS designated "syndicated" conservation easements as "listed transactions." Notice 2017-10. By designating these

easements as listed transactions, the Service imposed upon taxpayers an obligation to provide the IRS with information and documentation related to the transactions. In *Green Valley Investors*, the tax court held that Notice 2017-10 is a legislative rule, improperly issued by the IRS without notice and comment as required under the Administrative Procedures Act. The court further held that Notice 2017-10 will be set aside by the court, and additionally prohibited the imposition of I.R.C. §6662A penalties in these consolidated cases. The lengthy opinion was a 15-2 decision, with Judge Gale and Judge Nega dissenting separately. ***Green Valley Investors, LLC, et al., v. Comm'r***, No. 17379-19, 2022 WL 16834499 (T.C. 11/9/2022).

■ **Mayo Clinic entitled to nearly $12 million in UBIT refunds.** Tax-exempt entities generally do not pay income tax—hence, the "tax-exempt" label. However, as the IRS explains, "[e]ven though an organization is recognized as tax exempt, it still may be liable for tax on its unrelated business income." UBI is income from a trade or business that is not substantially related to the charitable, educational, or other purpose that is the basis of the organization's exemption. The Mayo Clinic is a 501(c)(3) tax-exempt organization, albeit one with a complicated, extensive, and evolving organizational structure. Following an audit in 2009, the IRS concluded that Mayo owed UBIT on certain investment income it received from the investment pool it manages for its subsidiaries. Mayo challenged this decision in Federal District Court for the District of Minnesota, and the court granted summary judgment to Mayo. The government appealed and the 8th Circuit reversed the grant of summary judgment and remanded. *Mayo Clinic v. United States*, 997 F.3d 789, 791 (8th Cir. 2021) (the Service issued a nonacquiescence: 2021-47 I.R.B. 725 (IRS ACQ 2021)). A bench trial followed the remand, and the trial court was tasked with determining whether Mayo's overall purpose and operations establish that it is organized and operated exclusively for educational rather than other purposes. If so, Mayo would be entitled to the UBIT refund. The trial court issued extensive findings of fact (350 discrete findings) and concluded that Mayo met the criteria for the exemption and was entitled to full refund of the UBIT paid for tax years 2003, 2005-2007 and 2010-2012. Readers interested in the history of the Mayo might find the opinion particularly worthwhile. ***Mayo Clinic v. United States***, No. 16CV03113ECTECW, 2022 WL 17103262 (D. Minn. 11/22/2022).

■ **Anesthesiologist's frivolous arguments rejected.** Dr. Christopher J. Wendell received over $1 million in wages from his work in Minnesota for Associated Anesthesiologists, P.A. over two tax years. Dr. Wendell and his spouse nonetheless reported $0 in federal adjusted gross income and $0 in Minnesota taxable income in each of the two tax years. There was no dispute as to material facts, and the Minnesota Tax Court held that the Department was entitled to judgment as a matter of law for tax year 2019 and for tax year 2020 in most respects. The court also upheld the commissioner's imposition of a frivolous claim penalty. The court reasoned that "[t]he Wendells' unsupported assertion that 'neither of the Wendells was an 'employee' who received 'wages,' as those terms are relevantly defined in the IRC[ ]' does not make it so." The court found no basis in Dr. Wendell's briefing or in the attachments to his submissions to conclude otherwise. ***Wendell v. Comm'r of Revenue***, No. 9488-R, 2022 WL 17747903 (Minn. Tax 12/15/2022).

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Torts & Insurance
JUDICIAL LAW

■ **Insurance coverage; repairs & code compliance.** Plaintiff suffered storm damage to a building, including the building's drywall. Defendant insurer agreed to cover repair costs for the damaged property, including removal and replacement of the damaged drywall. When the damaged drywall was removed, cracks in the masonry were discovered. Because the cracks in the masonry violated the city's building code, the city would not allow plaintiff to replace the drywall without also repairing the masonry. Plaintiff then requested that insurer reimburse it for the cost of repairing the masonry, and the insurer declined. After plaintiff filed suit, the district court ordered an appraisal, which found: (1) $77,969 was necessary to address the code upgrades; and (2) the "deteriorated conditions, cracks and out-of-plumb condition" of the masonry were not caused by the storm. The district court then granted summary judgment in favor of the insurer, holding that the insurer was only required to provide the minimum coverage set forth in Minn. Stat. §65A.10, subd. 1, and that no coverage existed to repair the code violations because they were not caused by the storm. The court of appeals affirmed.

The Minnesota Supreme Court affirmed. Minn. Stat. §65A.10, subd. 1. generally requires replacement cost insurance to cover the cost of repairing any "damaged property in accordance with the minimum code as required by state or local authorities." In "the case of a partial loss," replacement cost insurance is required to cover only "the damaged portion of the property." *Id.* The Court interpreted the statute to require the insurer, in the event of a partial loss, to pay only for "repairs necessary to bring up to code that part of the property that was damaged in the insured event." In so holding, the Court rejected the plaintiff's contentions that payment was required under §65A.10 "when there is a 'direct connection' between the repairs required by the code and any diminution in value caused by the insured event" or because the two were parts of a single damaged item—a wall. The Court noted that it found nothing in the limited and narrow language of the statutory test that supported these positions. Finally, the Court affirmed the district court's decision that nothing in the insurance policy provided coverage beyond that required by Minn. Stat. §65A.10.

Justice Hudson filed a dissenting opinion that was joined by joined by Justices Chutich and McKeig. The dissent would have found coverage because the drywall and masonry were part of the same wall. ***St. Matthews Church of God and Christ v. State Farm Fire & Cas. Co.***, No. A21-0240 (Minn. 11/23/2022). *https://mn.gov/law-library-stat/archive/supct/2022/OPA210240-112322.pdf*

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PEOPLE + PRACTICE

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

Susan M. Gallagher was awarded the 2022 John D. Levine Distinguished Service Award for her volunteer representation of clients through the Hennepin County Volunteer Lawyers Network. Gallagher is a family law attorney and sole practitioner at the Gallagher Law Office, LLC.

Faegre Drinker announced that **Gina Kastel** was selected by the firm's board as its next chair. Kastel co-chairs the firm's compensation committee.

Bethany Anderson joined Soule & Stull as an associate attorney. Anderson focuses her practice on civil litigation, including product liability, commercial, medical negligence, and environmental.

Gov. Walz appointed **Sydnee Woods** as district court judge in Minnesota's 4th Judicial District. Woods will be replacing Hon. David L. Piper and will be chambered in Minneapolis in Hennepin County. Woods is general counsel for the Minnesota Department of Public Safety.

Andrew Peterson joined Sykora & Santini PLLC as an associate attorney. Peterson handles estate planning, probate, and business matters.

Naomi Martin joined Newmark Storms Dworak as an associate. Martin will primarily handle employment, sexual assault, and civil rights litigation.

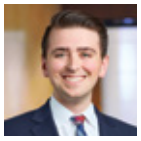
Heidi J. Nau joined Fox Rothschild LLP as counsel in the real estate department.

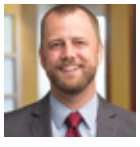
Ryan Paukert joined Meagher + Geer with the firm's commercial litigation, construction, and products liability practice groups.

Veronica Mason was promoted to the partnership of Faegre Drinker. Mason focuses her practice on finance and restructuring.

Martha J. Amdahl joined Northwoods Law Group, PA as an associate attorney and will focus her practice on estate, long-term care, and special needs planning.

Sequoia L. Butler and **Connor R. Johnston** joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. The firm also announced the election of **Allison N. Krueger** and **Stephanie K. Smodish** as shareholders at the firm.





Maslon LLP announced the addition of a new partner, **Michael Rosow**, and of attorney **Andrew Page** to the financial services group. The firm also announced that **Jevon Bindman**, **Peter Doely**, and **Katie Eisler** have been elected to the law firm's partnership.

Benjamin D. Gilchrist and **Kiralyn J. Locke** have become associates of Bassford Remele. Gilchrist focuses his practice in the areas of construction, real estate, consumer law, and trust and estates. Locke focuses her practice in the areas of commercial litigation, employment law, trust and estates, consumer law, and professional liability.

Katie Kelley and **Kendal O'Keefe** joined Chestnut Cambronne PA. Kelley joins as an associate and O'Keefe joins as a partner. Both attorneys will be practicing family law.

Lathrop GPM announced that **Eli Bensignor, Kara Gray**, and **Bradley Hintze** have all been promoted to partnership.

Smith Gendler, PA announced the addition of **Nate Maher** as shareholder. He joins the leadership of the property tax appeal group.

Roger M. Stahl joined Frazer Ryan Goldberg & Arnold, LLP, in Phoenix, Arizona, as a partner, joining the firm's estate planning, probate and trust administration, real estate, and corporate practice groups. He retains his Minnesota license and continues to serve his Minnesota clients.

PAUL ALLAN FINSETH, age 79, of Rochester, passed away on July 29, 2022. He graduated from the University of Minnesota Law School in 1967. Upon graduating, Paul enlisted in the US Army and spent time in Vietnam. He had practiced law at Dunlap & Seeger (previously Dunlap, Finseth, Berndt & Sandberg, P.A) up until his death.

HON. DAVID P. SULLIVAN passed away on September 6, 2022 at age 80. He was a civil litigator for more than 30 years. Sullivan was appointed as 6th Judicial District judge by Gov. Arne Carlson in 1996. He presided as a judge until his retirement in 2006. He then spent 14 years as a mediator/arbitrator through his own business, Sullivan ADR Services.

MARK H. GRUESNER, age 70, passed away on November 27, 2022. He graduated from Hamline University School of Law in 1977. In 1986 he joined Schwebel, Goetz & Sieben, where he practiced as a trial lawyer. He was also an adjunct professor at Hamline University School of Law.

HON. JEANNE H. SEDERBERG, the first woman to be appointed judge in northern Minnesota's 6th Judical District, died on October 30, 2022. Sederberg, 96, had been a judicial officer for 18 years when she was appointed by Gov. Arne Carlson in 1992. Sederberg hit the mandatory retirement age of 70 after just four years.

CAPTAIN ROBERT H. RYDLAND passed away December 14, 2022, at the age of 76. Rydland deferred his enrollment in law school to join the United States Navy, becoming an A-6 Intruder pilot. After leaving active duty, he returned to Minnesota and attended law school at the University of Minnesota. He was in private practice for many years before he joined the ELCA Board of Pensions as vice president and general counsel. He was a past president of the Hennepin County Bar Association.

JAMES GUROVITSCH, age 78, passed away on December 16, 2022. He was committed to his career as a private practice attorney and dedicated to volunteering in the community.

CLASSIFIED ADS

For more information about placing classified ads visit: www.mnbar.org/classifieds

ATTORNEY WANTED

ASSISTANT FEDERAL DEFENDER

Attorney position in Minneapolis representing clients charged with federal criminal offenses at both the trial and appellate level. Must have a demonstrated commitment to working with diverse communities and a commitment to equal justice. Three years criminal defense experience preferred. See full posting at mn.fd.org for position requirements, duties, and selection criteria. To apply, email a letter of interest, resume, writing sample and contact information for three professional references to: sandy_krattley@fd.org. Subject: AFD position. Equal Opportunity Employer

ATTORNEY WANTED

The University of Minnesota is seeking an experienced lawyer to provide counsel to the University and handle internal/external disputes on a broad range of employment law topics. For qualifications, a complete job description and information on how to apply online, go to: employment.umn.edu and enter job opening ID 353539.

ASSOCIATE ATTORNEY

Rodney D. Anderson Law Offices, LLC, an estate planning law firm in Rochester, MN, is looking for an attorney to practice in the areas of estate planning and probate and trust administration. Qualifications: Two plus years of Minnesota estate planning, probate and trust administration experience. Please submit resume, letter describing your background and experience, and law school transcript to Corenia Kollasch Walz at: walz.corenia@rdalaw.net.

ASSOCIATE ATTORNEY - ESTATE PLANNING

Best & Flanagan is seeking an associate attorney to join its Private Wealth Planning practice group handling all aspects of estate planning and administration. Candidates must be licensed in Minnesota and should have familiarity with estate planning, specifically Wills, Trusts, probate, and post-mortem administration. While no minimum number of years of practice is required, ideal candidates will have practiced for at least three years and will have estate planning and administration experience. We offer competitive base compensation for associate attorneys and increases based on experience, a full benefits package, professional development reimbursement, and business development opportunities. Best & Flanagan offers a challenging, rewarding and collegial environment for you to build your career. If you are interested in joining our team, please email a resume to: recruitment@bestlaw.com. For more information, visit our website at: www.bestlaw.com.

ASSOCIATE ATTORNEY

Rajkowski Hansmeier Ltd., a regional litigation firm with offices in St. Cloud, MN and Bismarck, ND, has an opening for an associate attorney with zero to five years' experience to join its team of trial attorneys. Our firm has a regional practice that specializes in the handling of civil lawsuits throughout the State of Minnesota, North Dakota, and Wisconsin, including a significant volume of work in the Twin Cities. We offer a collegial workplace with experienced trial attorneys who are recognized leaders in their field of practice. We are seeking an associate who has strong motivation and work ethic along with excellent communication skills. Our lawyers obtain significant litigation experience including written discovery, motion practice, depositions coverage, trial and appellate work. We try cases and are committed to training our younger attorneys to provide them with the skills to develop a successful litigation practice. Competitive salary and benefits. Please submit resume, transcript, and writing sample to: Human Resources, Rajkowski Hansmeier Ltd., 4140 Thielman Lane, Suite 110, PO Box 7456, Saint Cloud, MN 56302-7456, 320-251-1055, humanresources@rajhan.com, EOE

ASSOCIATE ATTORNEY

Reichert Wenner, PA 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.

ASSOCIATE ATTORNEY

Flaherty & Hood, PA, St. Paul, Minnesota, is seeking an associate attorney with zero to five years of experience to join its growing practice representing and advising Minnesota cities and other local government units in the areas of general municipal law, land use and development, real estate transactions, and contracts. Education and a demonstrated interest in public sector law as well as some administrative hearings and/or litigation experience is preferred. Flaherty & Hood, P.A. provides competitive salaries and benefits, such as medical, dental, long-term disability, and life insurance; 401(k) plan; health club, and data plan reimbursement; and paid holidays and paid time off. Please submit your cover letter and resume by email to Chris Hood, Shareholder Attorney, at: cmhood@flaherty-hood.com. More information about the firm is available at: www.flaherty-hood.com.

EMPLOYMENT & BUSINESS LITIGATION ASSOCIATE ATTORNEY (MINNEAPOLIS)

Trepanier MacGillis Battina PA seeks a highly motivated associate attorney licensed in Minnesota with two to four years of experience to perform top-quality work in a small-firm atmosphere. This position will primarily involve litigation in the areas of employment, non-compete, trade secrets, minority shareholder, breach of contract, and general business disputes. The position will also involve some contract drafting, transactional work, and advice and counseling. Candidates should have strong academic credentials and excellent writing skills. Competitive wage based on experience; 401(k) with 3% contribution, health/dental/vision insurance, and life insurance available. If you have a positive attitude and great work ethic, please apply to join our team! We offer a small-firm work environment with a reasonable annual billable hour's target. This position presents the opportunity to immediately have client contact and be involved in litigation in the courtroom. Send inquiries via email only to: Joni L. Spratt, Legal Assistant and Office Manager, Trepanier MacGillis Battina PA, jspratt@trepanierlaw.com. More information on the firm can be found at: www.trepanierlaw.com. Trepanier MacGillis Battina PA represents corporations, business owners, and executives in the areas

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ASSOCIATE ATTORNEY

Join our team at the Swenson Lervick Law Firm! We are currently looking for an associate attorney to build our growing practice. As the city attorneys for several surrounding municipalities, our associate attorney will have the opportunity to hone their courtroom skills while prosecuting crimes for the City of Alexandria, as well as establish a private law practice. We are currently looking to build on our thriving family law practice but welcome this attorney to expand on their particular areas of interest. Ranked as one the top micropolitans in the U.S. and as the #1 micropolitan in Minnesota, Alexandria is surrounded by great lakes for year-round fun and even greater people! We are conveniently located between Fargo and Minneapolis and offer a large client base and a collegial local bar association without the hustle and bustle of the big city. Our team offers opportunities for personal and professional growth and values community involvement. Alexandria is known to be an excellent place to live, work, and raise a family. For more information about our team and practice, please visit our website at: www.alexandriamnlaw.com. Interested applicants should send a cover letter and resume to Beth at: bak@alexandriamnlaw.com.

ASSOCIATE ATTORNEY DULUTH, MN

Hanft Fride Law Firm is seeking an associate attorney with zero to five years of experience to join its civil litigation practice in Duluth. Associates will also have opportunities to experience our transactional practice. Qualified candidates will have excellent communication and writing skills, solid academic credentials, and the ability to work independently or as a team. Litigation experience or judicial clerkship experience preferred, but not required. For those interested in working at a well-established firm and living in a cool city, please apply online at: hanftlaw.com/careers

BUSINESS ATTORNEY

Gurstel Law Firm, P.C. ("Gurstel") is looking for entrepreneurial business attorneys looking for an alternative to a solo or big firm practice. Are you tired of administrative hassles, internal politics, absurd and stale billable hourly requirement expectations, and/or lack of collaboration? If so, Gurstel is the home for you! We value creative thinkers, offer a generous draw and revenue split on originations, subsidized benefits including a 401k match, business development assistance, sharing of firm clients and opportunities, and office space (or support for your remote work needs-should the beach be your preferred office setting). Portable book of business required. Please contact Creig Andreasen at: Hourly@Gurstel.com for more information.

FAMILY LAW ATTORNEY WANTED

Melchert Hubert Sjodin, PLLP, an established and highly respected law firm located in the SW Metro, seeks to hire an experienced family law attorney to assume an established family law practice. Qualified candidates should have a strong academic and professional background, value hard work and integrity, and have a willingness to become involved in the communities in which we serve. Please submit resume, transcript and writing sample to: mbening@mhslaw.com.

LITIGATION ATTORNEY

Tewksbury & Kerfeld is growing and seeks an attorney with seven plus years of experience to join its civil litigation practice. We offer a varied practice including both complex defense cases as well as plaintiff's personal injury litigation, a cooperative atmosphere, and many benefits. The ideal candidate will be an excellent communicator and writer with the experience to take the lead on his or her own caseload. Salary commensurate with experience. To apply, please send your resume and cover letter to Liz Kerfeld at: lkerfeld@tkz.com.

LITIGATION ASSOCIATE

The Minnesota office of Thompson, Coe, Cousins & Irons, LLP is looking for an associate attorney with two to five years of litigation experience to join the firm. Candidates should have a working knowledge of state and federal civil procedure, and excellent advocacy and writing skills. Litigation experience, including taking and defending depositions, drafting and arguing motions, and attending mediations is preferred and previous labor and employment experience is strongly preferred. Valid Minnesota BAR license required. The attorneys in this position will handle the day-to-day aspects of Thompson Coe's litigation cases including client meetings, reporting and investigation, and taking and attending depositions, hearings, mediations and arbitrations and/or trials. Depending on the size and exposure of the case, the candidate will independently handle the case or work closely with a partner. Please contact Jessica Childs at: jchilds@thompsoncoe.com

LITIGATION ATTORNEY

Small, growing litigation firm with national personal injury defense practice seeking a lawyer with 5 to 15 years' experience in personal injury and/or trial work. Strong writing, researching and interpersonal skills are necessary. Licensure in other states is a plus. Please send resume and/or direct inquires to jgernes@donnalaw.com.

CIVIL MUNICIPAL ATTORNEY

Eckberg Lammers, PC is seeking an experienced Civil Municipal Attorney with strong experience working on behalf of Minnesota communities. About Our Firm: At Eckberg Lammers, we believe it all starts with our people. In this role, the municipal attorney will work within a firm environment that fosters a collaborative work environment where everyone is valued for his or her diverse talents and contributions. This environment allows us to deliver the best results to our clients and colleagues alike, just as we have done for the last 70 years. Our Firm's mission is to build and strength communities. We are advocates in the law but also maintain a strong foothold in supporting charitable causes through advocacy, volunteerism, or offering legal education to individuals and local businesses. It is important to the sustainability of our firm that all attorneys and staff share the same values. Core Values: Integrity, Professionalism, Knowledge, Drive. Essential Duties and Responsibilities: Advise city leaders on matters related to ethics, personnel, ordinances, contracts, land use, taxes, and finance. Stay informed on changes to state and federal laws that impact the city. Inform the appropriate elected officials and city staff as laws are being debated in the State Legislature or Congress. Draft city ordinances and contracts. Review all contracts and

memoranda to ensure that the city's legal interests are not compromised. Attend city council meetings - travel to and attend night meetings. Attend city meetings – travel to and attend meetings with city staff as requested throughout the week. Respond to clients in a timely manner- either via phone, email or in person respond within the same working day. Skills, Abilities and Qualifications: Must be admitted to practice in Minnesota and in good standing. At least five years' experience in municipal representation. Ability to be highly collaborative and enjoy cross-practice-area camaraderie. Excellent interpersonal communication skills, attention to detail and organizational skills. Ability to foster existing and build new relationships. High level of personal confidence and professional competence. Emotionally positive, resilient, and mature; readily adapts to diverse situations. Highly focused, reliable, and results oriented. Excellent time management and prioritization skills. Driven, focused self-starter with strong multi-tasking and follow-up skills. Wants to work in person or in a hybrid environment. Demonstrated experience in research, communication and problem-solving.
Eckberg Lammers offers an inclusive work environment with opportunity for growth and development in addition to competitive compensation and benefits offerings, including 401(k), health insurance, life insurance, vacation and sick-time. For more information about Eckberg Lammers, visit our website: www.eckberglammers.com. We are an Equal Opportunity Employer that does not discriminate on the basis of disability, veteran status or any other basis protected under federal, state or local laws.

ASSOCIATE ATTORNEY

Arthur, Chapman, Kettering, Smetak & Pikala, PA is a mid-sized law firm seeking an attorney to join our Workers' Compensation Practice Group. We are a team-oriented firm committed to providing our clients with superior legal services. Candidates must be currently licensed in Minnesota. Candidates must also possess a strong work ethic with excellent communication and writing skills. We are seeking a range of candidates and workers' compensation experience is not required, but it is preferred. Our firm offers a competitive compensation/benefits package and is dedicated to creating a collegial, diverse workplace. Salary is commensurate with experience. If you are interested in joining our team, please send your cover letter, resume, writing sample, and salary expectations in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala PA, Human Resources, recruiting@arthurchapman.com, www.arthurchapman.com, Equal Opportunity Employer.

ASSOCIATE ATTORNEY PERSONAL INJURY

Meshbesher & Spence is a highly regarded personal injury law firm headquartered in Minneapolis, Minnesota. We are seeking an associate attorney with three or more years of experience to join our Minneapolis office. This is not a remote position. All applicants must be committed to plaintiffs' personal injury advocacy, and possess excellent research, writing and analytical skills, and a strong work ethic. Please send cover letter, resume, transcripts, and writing sample in PDF format to: jbsheehy@meshbesher.com.

PERSONAL INJURY ATTORNEY

Personal injury attorney with five plus years of experience wanted for successful, growing, five attorney law firm in Park Rapids, the heart of lake country in north-central MN. Flexible compensation, partnership potential, and high quality of life. Potential hybrid option. Reply via email to: saraswanson@tszlaw.com or via mail to PO Box 87, Park Rapids, MN 56470.

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FIDUCIARY TRUST COUNSEL - BREMER BANK

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procedures and systems in applying legal and policy requirements Ability to handle multiple tasks, prioritize work in a deadline-intensive environment. Exceptional written and verbal communications skills; ability to effectively communicate at all levels of the organization, including senior business leaders, as well as with external constituencies, including external counsel and regulatory officials. Preferred Qualifications: Trust litigation experience preferred. Apply at: Bremerbank.com/careers

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