OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVII NUMBER VI
JULY 2020
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Bench&Bar NESOTA

MSBA President 2020-21

DYAN EBERT

Steady as she goes

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The business interruption pandemic

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

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MSBA Minnesota State Bar FOUNDATION

Our Community. Our Commitment.

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Our History

The Minnesota State Bar Foundation has been providing financial support to nonprofit organizations that deliver legal services to the disadvantaged and advocate for improvements to the justice system for over 70 years.

Our Mission

The Minnesota State Bar Foundation's mission is to support access to justice to all Minnesotans. Our primary strategy is to provide financial support for:

1. Legal assistance to the disadvantaged;
2. Quality law-related education;
3. Enhancements to the administration of justice and to the vitality of the legal profession.

The work of the Foundation has never been more important than it is today, as Minnesota confronts institutionalized inequities, from discrimination in housing and employment, to domestic violence and immigration. The Foundation has a vital role to play in our community's confrontation with the pervasive racism manifested in the killing of George Floyd by Minneapolis police.

Our Work

The MSBF provides roughly $100,000 in monetary grants per year. In recognition of the vital service we provide, the Minnesota Disaster Recovery Fund awarded the Foundation a $100,000 grant to support the recovery and resilience of Minnesota's nonprofit sector during the COVID pandemic. We thank the MDRF for their generous support during this critical time.

▶ **Applications for a Minnesota State Bar Foundation grant can be found at www.mnbar.org/foundation**

The deadline for submissions is July 16, 2020. We encourage MSBA members who serve on nonprofit boards to pass along this opportunity. Donors to the Minnesota Disaster Recovery Fund can be viewed at www.mcf.org. Contact Amanda Idinge at aidinge@mnbars.org with any questions.

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Your Support

We invite you to contribute to the MSBF, whether it be through dues check-off or an individual donation, to support legal aid efforts throughout the state.

Visit www.mnbar.org/foundation to learn more and donate today.

A time of new perspectives

Over the last several months we have all had to make significant changes in our lives and our practices. These changes, while difficult and often inconvenient, have also afforded us an opportunity to look at things from different perspectives.

Of course, our perspective on *where* we practice has likely been one of the biggest changes we have encountered. At least it has been for me. In early March, I returned from Seattle after spending a few days with my brother and his family. My return coincided with the increased attention to covid-19 in the U.S.; Washington State had been identified as an epicenter of the virus. While I had no reason to believe I had been exposed, I nevertheless decided to self-quarantine in my home. I fully anticipated returning to the office in a couple of weeks.

As a litigator with a practice that routinely has me traveling all across Minnesota, the idea of working exclusively from home felt particularly foreign. Frankly, it was hard to stay in one place. And because I was often on the road several days a week, I had also really come to appreciate the respite my law firm office provided me on those rare occasions when I was able to be there. I liked arriving early and staying late, and I really enjoyed seeing my co-workers. The thought of giving up both the travel and my office time in one fell swoop was a bit unnerving.

Before covid-19, I occasionally worked from home, primarily using the kitchen table as my desk. Assuming my time working from home would be short-lived, I naturally started out there. Of course, the "couple of weeks" I needed to work from home quickly morphed into a month and, ultimately, several months. At some point I decided having to clear my work from the kitchen table every evening so we could have dinner as a family did not make much sense, so I moved my "office" to a folding table in our seldom-used formal living room, again assuming it was only temporary.

Eventually, after my college-age daughter finished her distance learning for the year, I moved my work space yet again, to the dining room table that she had previously occupied. I think perhaps moving my work area so many times may have been my unconscious way of satisfying my need to travel! Regardless, each time I moved I found I had a new perspective on my home and family and I began to more fully appreciate how fortunate I was to have both. It also highlighted for me just how lucky I have been to travel all across the state while enjoying the safety net of a home base in St. Cloud.

My perspective on *how* I practiced law also changed as I moved around my home. In-person interactions with my clients have always been an integral part of my practice style and one of the most rewarding aspects of my job. Quite simply, over the past 25 years I have found that getting to know people makes it much easier to represent them. Being forced to communicate with my clients exclusively by email and cell phone seemed a poor substitute for face-to-face meetings. As the weeks came and went, I became more comfortable with technology, and virtual meetings soon became the norm. Yet although they're a huge upgrade over emails and the phone, even virtual meetings are no substitute for being in the same room with one another. Like changing my work area, adapting to the use of technology in my practice gave me a new perspective on just how important relationships are in our profession.

So I am beginning my MSBA presidency with what I hope is a healthy mix of optimism and concern. I am optimistic because the MSBA and our profession have been able to quickly adapt to the challenges covid-19 has thrown at us. The MSBA has worked tirelessly to find innovative and effective ways to ensure our members continue to have access to the tools and resources they need in their practices. This, in turn, is enabling our members to provide quality legal services to clients all across the state. The MSBA also continues to be a voice for the legal profession. I have always known that the MSBA is important, but this experience has further cemented my belief that the association is absolutely critical to the vitality of our profession, now more than ever.

I candidly acknowledge that I am also concerned for what the year will bring and how effectively the association can lead "from a distance." I am struggling with the idea that the way we have always done things will not be able to guide me on this journey. Even so, you have my commitment that I will continue to look for opportunities to improve and embrace change that will enhance the MSBA and keep things under control.

On a personal note, I want to thank the many people who have provided me the opportunity to take on this leadership role. First and foremost, I want to thank my husband, Paul, and our daughter, Laurin, for allowing me to devote so much of my time and attention to the MSBA. Over the years, they have kept a lot of dinners warm for me! My partners and colleagues at Quinlivan & Hughes have likewise been extremely supportive of my bar involvement and gave me not only their "permission" but their encouragement to pursue this leadership position. And, finally, to the many MSBA friends I have made along the way, thank you for the trust you have invested in me and for all of the hard work and dedication you devote to the association. Together our collective perspectives will keep the MSBA moving forward. ▲

DYAN EBERT is a partner at the central Minnesota firm of Quinlivan & Hughes, P.A., where she served as CEO from 2003-2010 and 2014-2019. She also served on the board of directors of Minnesota CLE from 2012-2019.

Photo by Lorie Shaull. The mural, located on the corner of 38th Street and Chicago Avenue South in Minneapolis, is the work of artists Xena Goldman, Cadex Herrera, and Greta McLain, with the help of artists Niko Alexander and Pablo Hernandez.

Statement on George Floyd

From the Minnesota State Bar Association, Hennepin County Bar Association, Ramsey County Bar Association, and the Minnesota Chapter of the Federal Bar Association

On Monday, May 25, 2020, video footage circulated of the violent killing of George Floyd in an incident involving Minneapolis police officers. In the video, a Minneapolis police officer is seen kneeling on Mr. Floyd's neck for over five minutes, while Mr. Floyd repeatedly states, "I can't breathe." We write today to join in the grief and anger over the fact and manner of Mr. Floyd's death, to pledge that his death will be honored and not forgotten, and to commit ourselves to the continuing effort to bring justice to the fore, for Mr. Floyd and his family and friends, of course; but also for our shared community. The Minnesota bar associations, and the legal profession itself, are dedicated to the Rule of Law, equal justice for all, and the dignity and sanctity of human life.

More than just an isolated incident, Mr. Floyd's killing highlights an ongoing problem. In a state and country devastated by the deaths of Black and Brown people at the hands of police officers, drastic changes are needed in our approach to public safety. The Minnesota State Bar Association, Hennepin County Bar Association, Ramsey County Bar Association and the Minnesota Chapter of the Federal Bar Association support the equal administration of justice for all, and to that end, envision a Minnesota where law enforcement personnel are held to a standard of treating all individuals with dignity.

Just as the legal profession is charged with promoting and delivering the principles of equal justice in our communities, the police must promote and deliver the principles of equal justice and administration of justice for all people. Acts of misconduct against people of color reduce the public's trust in police, the police force and the administration of justice. If a Black man in south Minneapolis can be brutally choked by law enforcement, whose motto is to protect with courage and to serve with compassion, no individual should feel safe.

The Bar Associations call on Governor Walz and all other public officials and law enforcement agencies across the state to actively confront the systems and cultures within their police departments that have repeatedly allowed people of color to be brutalized and killed.

The Bar Associations also recognize that the rule of law needs to protect us all and must exist at all levels of our justice system. We support the lawyers, judges and other court personnel who will work on all sides of this issue to ensure that the constitutional rights of all involved are respected and justice is achieved.

The Bar Associations envision a state where no person must fear the police and where arrest and use of force by law enforcement are last resorts, not first options. The peace and well-being of our community relies on trust in our system of justice. We pledge to participate in the healing that must come after the events of the past week, and to lift and support the voices and actions of others working toward the goals of equal access to justice and equal administration of public safety for all people. The Bar Associations further renew their commitment to their vision of being leaders in achieving equal justice for all.

This statement reflects the position of the Minnesota State Bar Association, Hennepin County Bar Association, Ramsey County Bar Association and the Minnesota Chapter of the Federal Bar Association. It does not necessarily reflect the position of the national Federal Bar Association. Board members affiliated with the judicial and executive branches of the federal, state and local governments did not participate in the issuance of this statement.

Saluting MSBA Award winners

This month we congratulate the winners of several annual MSBA awards, recognized at the recent MSBA Virtual Convention.

- 2020 MSBA Lifetime Achievement Award (given to an experienced member of the state bar who has continually displayed commitment and contributions to the bar, the legal profession, and/or the public throughout their career): **William (Bill) Pentelovitch,** Maslon LLP

- 2020 MSBA Professional Excellence Award (given to one or more attorneys who are actively involved in the legal profession and who combine excellence in professional service with outstanding service to and on behalf of the Minnesota State Bar, the legal profession, or the public): **Jack Rice**, Rice Law Office, P.A.

- 2020 Presidents Award (given to recognize a member's outstanding support and assistance to the Association and its mission): The Honorable **Walter Mondale**

- 2020 Elmer H. Wiblishauser Award (given to the author of the best article to appear in Bench & Bar during the prior bar year, as chosen by members of the MSBA Publications Committee): **Michael Boulette & Jennifer Colich,** "The Myth of the Invincible Prenup" (September 2018)

Saluting our North Star Lawyers

The Minnesota State Bar Association is tremendously proud of our members who render free legal services to low-income persons. For hours volunteered in calendar year 2019, the MSBA gave special recognition to members who provide 50 hours or more of legal services as defined in Rule 6.1(a), (b)(1) and (b)(2) of the Rules of Professional Conduct. In 2019, over 884 MSBA members were certified as North Star Lawyers. North Star Lawyers provided over 97,500 total hours of pro bono service with an estimated value of $24.3 million (using a $250/hr. billing rate).

We know many more of you could be recognized for your efforts this year. Members who report their voluntary service will be recognized as 2020 North Star Lawyers and included in the annual roster insert published in the May/June 2021 Bench & Bar edition, as well as in other recognition opportunities. Certification for calendar year 2020 will open in December. For more information, please see the North Star Lawyers website (*www.mnbar.org/northstar*) or contact MSBA Public Service Director Steve Marchese (*smarchese@mnbars.org,* 612-278-6308).

Court recognizes top pro bono efforts

The Pro Bono Council of the MSBA Access to Justice Committee annually coordinates with the Minnesota Supreme Court to recognize outstanding pro bono volunteer service in the prior calendar year. In March, the council received nominations from legal service programs, law firms, corporations, and public law offices of volunteer pro bono lawyers who provided exceptional service to low-income clients and programs during the 2019 calendar year. A subcommittee reviewed nominations, and selected attorneys were recognized last month by the Minnesota Supreme Court with personal letters signed by Chief Justice Lorie S. Gildea.

Please join us in congratulating the following 29 individuals for their outstanding pro bono service to our state in 2019: Evan Berquist; David Bland; Patricia Bloodgood; Meredith Boudrie; Gail Brandt; Erin Bryan; Andrew Davis; Mary Fenske; R. Leigh Frost; Diane Galatowitsch; Susan Gallagher; Stuart Kitzman; Wendy Legge; Lew Linde; JoLynn Markison; Daniel Murray; Miluska Novota; Thomas Pack; Daniel Prokott; Susan Robiner; Mark Rosenfeld; Cheryl Rosheim; Nick Ryan; Gordon Shumaker; Sandy Smalley-Fleming; Mallory Stoll; Tom Tinkham; Joshua Turner; and Mark Vavreck. ▲

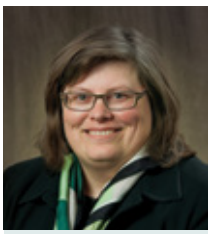
Prospective clients and the ethics rules

You have a conversation with someone who is considering hiring you for a legal matter. You decide not to undertake the representation. Because no fee agreement was signed, the conversation does not have any future implications for you, right? Well, not exactly. Understanding your ethical obligations to prospective clients is an important part of ensuring an ethical practice.

Rule 1.18, Minnesota Rules of Professional Conduct, addresses duties to "prospective clients:" individuals who consult with a lawyer about the possibility of forming an attorney-client relationship. In 2005, Minnesota adopted the ABA model rule on prospective clients, and on June 9, 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 492 addressing this rule. The opinion provides a good look at this little-discussed rule (you might not even know it exists if you went to law school more than 15 years ago), and it's worth your time to review this rule and the opinion to make sure you are handling such encounters in accordance with the rules.

Client, prospective client, or neither

Let's start with definitions. "Prospective client" is "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter."[1] The consultation must be more than a unilateral outreach to the lawyer for someone to become a prospective client. Where "a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship," the person is not a prospective client.[2] What if you invite the contact, though? The comments to the rule indicate that if you invite the submission of information without a clear warning about terms, that may be sufficient to constitute a consultation.[3] The comments also provided this helpful caveat: "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'"[4] This is the case because that individual does not fit the definition of a prospective client, which specifically incorporates the purpose of the consultation—to form a client-lawyer relationship.



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

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On the other hand, we all know who is a client, right? Certainly when you have entered into an agreement for representation, someone is a client. But don't forget that in Minnesota, you can also form a client-lawyer relationship under circumstances in which a lawyer gives advice and the individual reasonably relies upon the same.[5] Known as the "tort" theory of attorney-client formation, it means you don't need to have been paid or executed a written fee agreement for a client relationship that imposes ethical obligations to arise. Such obligations go beyond those listed in Rule 1.18 toward prospective clients, so it is important to watch for those inadvertent relationships.

Prospective client obligations

What ethical duty is owed to a prospective client? There are two. The first relates to confidentiality: You must keep the confidences of the prospective client just as you would those of a former client, irrespective of whether a relationship is formed.[6] Remember too that as with keeping former client confidences, the proscription is that you must not "use or reveal" the information; including the term "use" means the obligation is broader than just nondisclosure.

The second obligation is one of conflict: You may not represent someone else with interests materially adverse to those of the prospective client in the same or a substantially related matter if you received significantly harmful information from the prospective client.[7] A lot is happening in this sentence, which is largely the focus of ABA Opinion 492, so let's pull it apart. Before we start, however, the comments provide an additional option for consideration: You might consider conditioning any consultation with a prospective client on the person's informed consent that no information disclosed during the representation will prohibit the lawyer from representing a different client in a matter. This is expressly discussed in comment 5 to Rule 1.18, but a strong caution is noted to this approach. Informed consent is a defined term in the rules (Rule 1.0(f), MRPC), and depending on the facts and circumstances—including the sophistication of the consulting party—it might not be obtainable.

Assuming a lack of informed consent, let's further discuss conflict and disqualification. Remember that representation against a former client is always prohibited if the representation involves the same or a substantially related matter.[8] This is true regardless of the confidential information available to the lawyer. Rule 1.18 does not provide the same degree of protection to a prospective client but rather focuses on the nature of the information obtained. A disqualifying conflict exists where the lawyer receives information that "could be significantly harmful" to the prospective client. "Significantly harmful" is not a defined term and must be determined on a case-by-case basis in light of the specific facts of the matter. Much of ABA Opinion 492 describes what "significantly harmful" might look like, but a non-exhaustive list includes information such as views on settlement, personal accounts of relevant events, strategic thinking on how to manage a situation, discussion of potential claims and the value of such claims, or premature receipt of information that might affect strategy or settlement.[9]

If you receive information from a prospective client that "could be significantly harmful" to that prospective client, you are prohibited from accepting representation of another whose interests are adverse to the prospective client in the same or a substantially related matter. In my experience answering calls on the ethics hotline, lawyers often take an over-cautious approach to such situations, meaning they decline representation because they had a preliminary consult with the opposing party, irrespec-

tive of the information provided. That is certainly the lawyer's prerogative, but it's not dictated by the ethics rules. Rather, the inquiry turns on the type of information obtained and the potential for significant harm to the prospective client.

For those in a firm, Rule 1.18 also provides protection against imputation of a conflict to the firm even if the consulting lawyer has a conflict due to receipt of potentially significantly harmful information. While the lawyer who received the information may have a disqualifying conflict, if the lawyer receiving the information (1) took "reasonable measures to avoid exposure to disqualifying information than was reasonably necessary to determine whether to represent the prospective client," (2) is timely screened, (2) is apportioned no part of the fee, and (4) notice is provided to the prospective client, the firm can nevertheless undertake representation adverse to the prospective client.[10] As is often the case, if both the affected client and prospective client provide informed consent confirmed in writing, the intake lawyer can proceed notwithstanding the receipt of potentially harmful information.[11]

Lessons

There are several lessons here. First, have a disciplined approach to limit intake calls to only information necessary to determine if you can or want to accept the engagement, such as limiting information collection to identifying all parties (including entities if relevant) involved in the representation, the general nature of the representation, and fees for the work you would undertake. Train all lawyers in the firm on this approach. Advise potential clients that it is important to refrain from sharing sensitive or potentially adverse information until both parties decide to go forward with a representation. Don't be afraid to stop someone when they start telling you the whole backstory; wait until you have determined there is no conflict and they can afford your fees. Understand that the more information you gather before making a determination on the engagement, the more likely you may be disqualified from undertaking representation of others in a substantially related matter. Keep a record of prospective clients and the information obtained, but keep access to that information limited so you can quickly implement a screen if needed.

Rule 1.18, MRPC, strikes a nice balance in affording prospective clients some protections under the rules but not all of the protections afforded to clients, and is clear that contact made simply to disqualify counsel does not afford that individual even the subset of protections afforded prospective clients. The rule also affords to those who take care the ability to avoid imputation to the rest of the firm. As always, if you have a specific question regarding the application of the ethics rules to your practice, please call our ethics line at 651-296-3952, or send an email through our website at *lprb.mncourts.gov*. ▲

Notes

[1] Rule 1.18(a), MRPC.
[2] Rule 1.18, cmt. [2].
[3] *Id.*
[4] *Id.*
[5] *See In re Severson*, 860 N.W.2d 658 (Minn. 2015).
[6] Rule 1.18(b), MRPC ("Even when no client-lawyer relationship ensues, a lawyer who has consulted with a prospective client shall not use or reveal information obtained in the consultation, except as Rule 1.9 would permit with respect to information of a former client.").
[7] Rule 1.18(c), MRPC.
[8] Rule 1.9(a), MRPC.
[9] ABA Formal Opinion 492 at 4-8.
[10] Rule 1.18(d)(2), MRPC.
[11] Rule 1.18(d)(1), MRPC.

Cyber riots and hacktivism

As the calendar turned to June and the nation continued to cope with the aftermath of the killing of George Floyd, the Minnesota Senate allegedly fell victim to the international hacktivist group Anonymous. On June 2, the Senate's servers were breached and passwords used by senators and staff were accessed, resulting in web pages going down. As noted in the Pioneer Press, "In a tweet, the hacking movement Anonymous highlighted the hack, which appears to have included a defacement of a Senate web page showing an Anonymous calling card and saying 'Justice for George Floyd.'"[1] While it cannot be definitively determined whether this was really an Anonymous attack, it comes in the midst of a number of distributed denial of service (DDoS) attacks against Minnesota government web pages. Even as rioting recedes in the streets of Minneapolis and throughout the nation, cyber rioting and hacktivism will continue to be of concern.

'Hacktivism' can be defined as acts of cybercrime motivated by political or social causes. Anonymous is an international, decentralized hacktivist group that is being reenergized by the recent protests.[2] Since there is no clear leader to this group, new factions can be created very quickly and work together to enact largescale attacks. The social upheaval and widespread anger washing over our world fuels this group and makes it attractive to those who want to protest and riot from a distance, "anonymously."

Threat actors tend to have financial gain as their primary motivator. Ransomware and phishing attacks are typically examples of money-driven cybercrime. Hacktivism is more personal, and the mindset of a hacker with a social or political agenda may have an impact on how an attack is conducted. Apart from the team effort that groups like Anonymous are able to marshal, hacktivist attacks may be more tenacious than your average cybercrime venture, and government entities may be particularly targeted.

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.

The risks of a hacktivist attack are largely operational, as is evident by the recent attacks perpetrated in Minnesota. DDoS attacks seek to make a system or network unusable for a period of time by disrupting services to users. Government websites and data will most likely continue to be threatened by hacktivist groups, in addition to law enforcement agencies. Companies and organizations with government clients or contracts and individuals related to those involved in the tragic death of George Floyd may also encounter a greater number of cyber events.

As we continue to struggle with the ongoing limitations spawned by the coronavirus pandemic and compounded by the recent events calling for social reform and justice, it is important to consider how our clients and colleagues may be affected digitally as well as in "real time." Staying apprised of best cybersecurity practices and keeping up with the current cyber landscape is important to ensuring the safety and efficiency of our digital spaces, especially as many of us continue to work remotely.

In closing, a lesson from the Minnesota Senate hacking: It is always wise to avoid having a "Passwords File." Passwords stored in text files on network-connected devices contributed to the scope and severity of this breach. Regular backup policies, VPNS, avoiding public WiFi, and the general advice to "slow down" online in an effort to reduce the risk of falling prey to phishing attacks are all simple ways to mitigate cyberthreats. ▲

[1] *https://www.twincities.com/2020/06/02/minnesota-senate-computers-hacked-passwords-file-accessed-web-pages-down/*

[2] *https://www.reuters.com/article/us-minneapolis-protests-anonymous/hackers-and-hucksters-reinvigorate-anonymous-brand-amid-protests-idUSKBN23A06I*

MSBA PRESIDENT 2020-21

DYAN EBERT

Steady as She Goes

By Amy Lindgren

Photos by Stan Waldhauser

An experienced leader takes the helm in uncertain times

If you've had occasion to ask Dyan Ebert what she's planning for her year as president of the Minnesota State Bar Association, you may have heard something like this: "I don't have one specific thing that I want to get done. I am trying to go into this with the old adage, 'Do no harm.'"

When incoming leaders say things like that, it's easy to imagine they're punting until they can put together an actual agenda. When Dyan Ebert says it, having already led six other organizations, it sounds like the voice of experience talking. As another old saying goes: This isn't her first time at the rodeo. (For a look at Ebert's other leadership roles, check the bio box sidebar.)

Indeed, given the very uncertain pandemic road we're on, the refusal to set detailed goals looks almost prescient. Instead, Ebert says, she's going to do her best to follow the strategic plan that's already in place, while helping the bar association dodge any monkey wrenches the coronavirus may throw at its members. Some of the areas she's keeping an eye on include wellbeing for attorneys—"We have to put that at the forefront, to put out resources to help the members"—as well as access to justice, which is facing new challenges in an age when lack of broadband access could literally disconnect clients from the justice system.

As luck would have it, Ebert is no stranger to working remotely in the legal system. Although her litigation practice representing organizations in issues of employment and liability for the St. Cloud firm of Quinlivan & Hughes has traditionally been conducted in person, she's also been arguing before the Minnesota Court of Appeals for decades—a process that frequently happens with the attorneys in different locations than the appeals panel. Even so, she finds herself on a learning curve with everyone else relative to remote technology. Now, by necessity, she's using virtual platforms such as Zoom and Webex to conduct interviews for her employment investigation work, and to take depositions and participate in mediations as part of her litigation practice.

Ebert plans to expand on this budding expertise over the next year, as fellow bar association members rely more on remote technology for CLE training and for delivering legal services. "The great thing is that the bar association as an organization has always been pretty technologically savvy," she says. "Now we're going to have to be much more nimble about providing what members need. We're really paying attention to things like getting more virtual CLEs available—things that are valuable and timely, and that people can access from home."

Ebert counts herself as one of those MSBA member attorneys who is under the gun to master new skills and strategies in the face of covid-19. "It does affect me," she says of our present situation. "It is my livelihood. The people in leadership roles at a volunteer organization have a vested interest because this is our life too. And at the heart of it is the need to serve the clients and get them legal access."

When Ebert says the current uncertainties affect her too, she's speaking not only as a practicing attorney, but as a business operator. Having started with Quinlivan & Hughes (under a slightly different firm name) in 1994, she quickly became a shareholder, then joined the board less than a decade later, before serving as the 83-year-old firm's first female CEO from 2003 to 2010, and again from 2014 to 2019. By some perspectives, she has not only led the organization, but helped shape it for the future.

Laura Moehrle, a former shareholder at Quinlivan who recently left after she was appointed a district court judge in Stearns County, practiced at the firm for 15 years. In that time she observed Ebert as someone who "leads from a sense of service. She's been the figurehead of our office for a long time, standing front and center to congratulate everyone on a job well done. We were growing and evolving the whole time I was there and Dyan was a big part of building that culture."

Moehrle also describes Ebert as a mentor, a dimension she experienced even before she went to work at the firm in 2004. "Of all the people I've had the pleasure of being mentored by," Moehrle says, "Dyan got a 10-year head start because I met her when I was in high school." The school was Apollo High in St. Cloud, where Ebert has managed an annual mock trial tournament since 1994, also serving as a coach during the years Moehrle was enrolled there.

When Moehrle made the transition from student to lawyer, she became a colleague of Ebert's in more ways than one. Before she knew it, her former coach had "encouraged" her into volunteering for the mock trial program as well. "I call it being 'voluntold,'" Moehrle says with a laugh. Eventually she was able to transition some of the coaching to another attorney, leaving her to partner with Ebert on coordinating the invitational every January. It doesn't surprise her that Ebert has stayed with the program for 25 years, despite her growing obligations. "Dyan's a mentor, she's a litigator, she's a teacher. It's a really good fit for her. I think over the years it just etched itself on her heart."

Ebert probably wouldn't disagree. Having grown the program from six or seven St. Cloud teams to 32 teams that come from around the state, she enjoys seeing more students involved every year. "I'm a big fan of the civic education component," she says. "It's a great way of sharing with kids what our lives are like and what's important about having legal representation. What's neat about mock trial is that the kids see the whole justice system—the judges, the attorneys, the witnesses—and they get to see how things mesh together. It's just a rewarding program all around."

If civic education comes easily as a priority for Ebert, it may be an inherited trait. Both of her parents were educators in the small town of Luverne, Minnesota, where they raised Ebert and her three siblings. Rose Carroll worked with special education children, while Laurin Carroll taught high school math and coached the boys' basketball team. Theirs was an athletic family, with uncles and cousins also serving as coaches and Dyan's siblings becoming athletes as well.

As the third child, she made the decision to break away from the family sport by playing volleyball instead of basketball. It was something her younger brother, Anthony Carroll, remembers well, mostly for the success Dyan achieved. "I remember when Dyan's team went to the state tournament," he says. "Not long before that, my dad and my brother ended up leading the boys' basketball team to State. Just to have my sister have that success too added another level of excitement. It was pretty cool."

Anthony now lives in Seattle, where he recently left a 23-year corporate career with Starbucks to open a franchise (Mr. Appliance of Central Seattle). It's the kind of leap he's been able to run past his older sister over the years, gleaning her advice and support—skills he believes she honed on the volleyball court. "Dyan was the setter on the team," he notes. "They facilitate and make others on the team successful. That's always been pretty important to her, to help others. She's the one taking the serve or setting up the pass so someone else can get the glory, so to speak. I always think about that with Dyan."

Ebert herself downplays the achievements of her Luverne Cardinals volleyball team, pointing out how quickly their championship run ended. She does recall the fun of eating at a Chuck E. Cheese restaurant for the first time and learning to play Skee-Ball during the team's brief sojourn in the Twin Cities. She also carries souvenirs from her playing years, in the form of broken fingers that needed surgery and a bone graft from her wrist – on her non-dominant hand, fortunately.

When Ebert wasn't studying or playing sports, she was likely to be working, according to Anthony. "We were always a family that valued work," he explains. For the two boys, that meant helping their father with his summer lawn-mowing or painting businesses. But Dyan wasn't drawn to outdoor labor, which her parents must have noticed: "I vividly remember when we heard the Dairy Queen was going to be opening, my mom and dad basically told me to reach out to the manager. As the third child in the family, my parents were very keen on making sure I had a job for the summer. I think I was probably in the 8th grade."

Ebert kept that job for two years before switching to the grocery store that employed her friends. But not before facing one of the first ethical dilemmas of her working life: If a customer orders a hot dog on the exact night of Luverne's Annual Hot Dog Night, do you make the sale or do you tell them about all the free hot dogs being given away three blocks down Main Street? Ebert won't say how she solved the problem, but one can guess it honed her capacity for legal reasoning.

Growing up in a small town requires kids to do a lot of walking and biking, until they manage to get their license or meet someone with a car. By a stroke of luck, one of Ebert's best friends, Laura Beem, happened to be the daughter of a car dealer, and was allowed to borrow any used car on the lot. Sometimes it was a Ford Fiesta, which she drove with seven or eight friends crammed into the hatchback. Other times it was the Lincoln, handy for Sadie Hawkins' Day dances and cruising on Friday nights.

Beem, now an accounting director with United HealthGroup, remembers their friendship deepening through countless late night talks sitting in Ebert's driveway after going to the movies or out for pizza. They would go on to share life milestones and regular get-togethers, including annual camping trips and New Year's Eve dinners. That longevity is characteristic of Ebert, Beem says. "Her thing is lifelong friends, lifelong settings, a lifelong job that she's grown up in. She makes connections to people."

One of those people is her husband, Paul Ebert, who grew up in the same small town, just eight blocks from Dyan. A year older, he remembers noticing her congregating with the other teenagers on the steps of the elementary school across from his house. That's where he decided to ask her out to the middle school dance. "I thought she was a cute girl," he says now. That's how Dyan ended up going steady with her future husband while still in the seventh grade—a relationship that has endured nearly unbroken to the present day.

It helped, Paul says, that Dyan's family accepted him instantly. "My brothers were 15 and 16 when I was born," he notes. "So I was raised essentially alone after they left home. At my house it was quiet, but you go to her house and you had to yell to be heard." You might expect parents to object to kids going steady at such a young age but Paul says he never felt any reluctance from Dyan's mother and father. "They were around 20 and 21 when they got married," he says, "so I think they probably understood that people start early sometimes. I always knew I wanted Dyan in my life."

Something's cooking in Dyan's kitchen

While friends and family know that Dyan Ebert loves to cook, her husband Paul understands best the dividing line between enjoying an activity and fitting it into a demanding schedule. As he notes, "I'm the maintenance cook who makes sure we eat every day. She's the events cook who kills it on special dishes." Following are recipes for two of her signature offerings.

For the beach or cabin: Dyan Ebert's Memorial Day shrimp boil

Picture yourself cooking outside over a wood fire or propane burner, or relaxing on the cabin porch with a book while your dinner bubbles merrily away on the stove. If you bring your ingredients already prepped, this meal nearly cooks itself. Ebert first encountered this classic southern dish on an MSBA trip to the East Coast more than a decade ago.

Ingredients
½ cup Old Bay (or similar seafood seasoning) + 3 tbsp
1 or 2 limes, cut in half
1 or 2 lemons, cut in half
2 onions, cut in quarters
3-5 lbs. new potatoes or fingerlings, cut in half
5 ears sweet corn, cut in thirds (frozen ears also work)
1 lb. carrots and 1-2 stalks celery, sliced into chunks
2-3 lbs. Polska kielbasa (or similar sausage), cut into chunks
3-4 lbs. shrimp, uncooked (shell on, deveined are best)

1. In a very large stock pot, filled 3 inches from the top with water, boil Old Bay seasoning, lemons, limes, onions, carrots and celery together for about an hour.
2. Add more water to the pot, if necessary.
3. Add potatoes and cook until fork tender (about 30 minutes).
4. Add corn and sausage; return to a boil and cook for about 10 minutes.
5. Add shrimp and cook for 3-5 minutes, or until pink.
6. Drain water; pour boil mixture on butcher paper on table, sprinkle with more Old Bay and dig in!

For comfort food this winter: Gooey caramel bars

When you need to retreat, it helps to take something comforting with you. Gooey caramel bars might do the trick. While Ebert usually brings these (by popular demand) to family holidays and weekend trips with friends, they are the perfect accompaniment to a winter's evening of binge-TV while waiting out social gathering restrictions.

Ingredients
34 caramels (individually wrapped is best)
¾ cup butter + 3 tbsp butter
1 cup flour
1 cup oatmeal
¾ cup brown sugar
½ tsp salt
1 tsp baking soda
3 tbsp milk
1 ½ cups chocolate chips (semi-sweet best)

1. Make the crust: Combine ¾ cup melted / softened butter, flour, oatmeal, brown sugar, salt and baking soda. Press mixture into 9 x 13 pan. Bake at 350 degrees for 10 minutes; let cool for 10 minutes.
2. Make the caramel topping: Melt caramels and 3 tablespoons of butter in microwave or double boiler. Once melted, stir in 3 tablespoons milk (will take awhile to fully incorporate). Pour caramel sauce over baked crust. Sprinkle chocolate chips on top. Bake an additional 10 minutes. Cool completely before cutting into squares.
3. Enjoy. Best eaten with a slightly raised arm, to block the view of the exercise bike in the corner of the room.

To add spice when gatherings are possible again: Home-canned pickles

Dyan also enjoys canning a variety of vegetables, including pickles. The "sweet garlic dill" recipe she uses is top secret and will not be shared, so don't even bother to ask. She adds, however, "When we're able to gather again, I'll bring the pickles and you can try them for yourself." Something to look forward to; who's bringing the hamburger buns? ▲

After graduating from high school, Paul headed to South Dakota State for a five-year bachelor's degree in pharmacy science; a year later, Dyan left for Augustana College in Sioux Falls. They got formally engaged after her junior year, marrying in 1990. What followed was an unusually tumultuous period, given their later stability. While Dyan was pursuing her law degree at William Mitchell, Paul worked at a number of pharmacy locations, inspiring them to move several times to shorten the commutes. Eventually things settled down when Dyan was offered the job with Quinlivan and Paul took his current position as pharmacist at Kemper Drug in Elk River—an "old-time mom and pop store" just ten miles from the home they built in Big Lake.

Somewhere along the way, they had daughter Laurin (she's 20 now, and applying for medical schools), and began a surprising tradition of family vacations: visiting St. John, one of the U.S. Virgin Islands. Although Canadian fishing trips or a rustic cabin might have seemed more in keeping with their greater Minnesota upbringing, both Eberts say the nearly annual visits to this small tropical island (which is nearly 75 percent protected national park) have become an indispensable part of their family life. While Paul and Laurin enjoy snorkling and spend most of their time in the water, Dyan prefers to read a book on the beach in complete silence.

Dyan and Paul attend a number of sporting events every year, and have been season ticket holders for both professional and college teams. Going to basketball games, in particular, is a pastime they enjoy with another couple, Susan Holden and Brian Gaviglio, who both appreciate Dyan's ability to analyze the players and explain the strategy. "If you have a question, she can tell you what happened and why," Holden notes. "She's does the clapping and the cheers; she's part of the fun game experience."

These are friends with whom Dyan shares more than a love of hoops. Holden, too, has served as MSBA president (2005-2006) and has faced Ebert across the table and the courtroom as opposing counsel (she is a partner at the personal injury firm SiebenCarey). Gaviglio, meanwhile, is a client, relying on Ebert as a key attorney representing members of the League of Minnesota Cities, where he serves as litigation manager for the insurance trust. Both have high regard for Ebert's prowess as an attorney, while also noting the positive influence of her small-town upbringing.

"Dyan brings a unique combination to legal problems," Holden says. "She's a really good trial lawyer. That small-town common sense helps immensely when you're presenting to a jury. She's also a really sharp appellate attorney. You don't always find that package in one lawyer. That just demonstrates the depth of her talent." Gaviglio attributes Ebert's straightforward communication style to her background. "She's very, very genuine," he says. "That's the impression you get when you meet her. What I've found is that the most effective trial lawyers are themselves. Dyan is the epitome of that. She doesn't talk down to a jury, doesn't try to be an orator. That's why she's so easy to like and trust."

Trust and likability, common sense and talent: Ebert is likely to need all these assets and more in what will undoubtedly be one of the most challenging years yet for an MSBA president. She's already putting in 12-hour days, as her husband can attest since she's been working from home. So this year's success can't hinge on longer hours. Gaviglio predicts she'll call on another asset to meet the challenge: "Dyan is very adaptive. I have seen that as one of her strengths. I don't know exactly how you prepare for the unexpected, but that's what she'll have to do."

Indeed, Ebert is already adapting, despite the shock of leading a statewide organization from home. "I don't think you can even imagine how surprised I am about the situation I am thrust into," she says. Even so, she's already begun to change her perception of what the bar can do for its members and to consider which new services might become permanent. "I can't imagine that we'll go back to where we think in-person is what we need to be effective," she says. "At least I hope we don't go completely back, because I think there is some value here. There are already a lot of good legal services being provided remotely."

Ebert also sees advantages to attorneys in greater Minnesota as more bar programs move online—even to the point of facilitating participation at the highest levels. "The strides we're already making on using electronic processes might encourage more people in greater Minnesota to throw their hat in the ring for leadership roles," she predicts. "We want to hold onto what's good from what's happening to us. But I do hope we go back to being able to be together from time to time, because what the MSBA is about is relationship-building. That will be our challenge going forward."

In retrospect, it's probably a good thing Ebert didn't have an elaborate agenda in mind for her year as president, and just as good that she has decades of leadership experience to help the MSBA navigate these tricky waters. ▲

Just the Facts
Bio Bits on Dyan Ebert

Family
Raised in Luverne, MN by Rose and Laurin Carroll in a family of four children
Married to Paul Ebert, 30 years
Children: Laurin, 20
Dog: Josie, a golden retriever and her fourth dog named for women of the Wild West (Wyatt Earp's wife in this case)

Education
Juris Doctorate, William Mitchell College of Law, 1993
Bachelor of Arts, Augustana College, 1990
Luverne High School, 1986

Legal career
Quinlivan & Hughes, St. Cloud, MN, since 1994 (shareholder since 1998)
Judicial Law Clerk: Olmsted County, Rochester, MN, 1993-1994

Additional legal experience
APPOINTMENTS
No Fault Arbitration Panel, American Arbitration Association
Civil Justice Reform Task Force, Minnesota Supreme Court, 2010

APPELLATE LAW
50+ cases handled in state and federal appeals processes

ADMINISTRATIVE LAW
150+ Responses to Charges of Discrimination filed with the Minnesota Department of Human Rights and the Equal Employment Opportunty Commission and Minnesota Unemployment Compensation appeals handled on behalf of employers

ALTERNATIVE DISPUTE RESOLUTION
300+ no fault arbitrations and mediations handled on behalf of insurance companies and employers
Serves as party-select mediator in variety of disputes

LITIGATION
Dozens of jury and court trials involving employment issues and claims of negligence, personal injury, governmental liability, and premises liability

Professional leadership roles (selected)
President, Minnesota State Bar Association, 2020-2021; Executive Council member since 2017
CEO, Quinlivan & Hughes, 2003-2010, 2014-2019
Secretary & Minnesota State Chair, Association of Defense Trial Attorneys, since 2017
Board of Directors, Minnesota CLE, 2012-2019
Secretary / Treasurer, 7th District Bar Association, 2002-2018
President, Minnesota Defense Lawyers Association, 2014-2015; Board of Directors, 2006-2016
Representative to MSBA Council, Minnesota Women Lawyers Association, 2006-2012
Alumni Board, William Mitchell College of Law, 2006-2009
President, John E. Simonett American Inn of Court, 2007-2008
President, Stearns / Benton County Bar Association, 2000-2001
President, Central Minnesota Chapter, Minnesota Women Lawyers Association, 1999
Executive Editor, William Mitchell Law Review, 1992-1993

Honors
AV Rated Attorney, Martindale-Hubbell
Minnesota Super Lawyer
Top 50 Women Attorneys in Minnesota, 2014

Civic volunteering
Coordinator, Apollo High School Mock Trial Invitational Tournament, since 1994
Board member, Central Minnesota Emergency Services Chaplaincy, 2003-2008
Volunteer attorney coach, Apollo High School Mock Trial Team, 1994-1999

5 additional facts about Dyan Ebert

1) She loves pizza in any form, from frozen to gourmet.

2) She can provide play-by-play analysis of basketball games, having served as the statistician for the high school teams coached by her father.

3) Friends say she suffers from minor addictions to cookbooks, picture frames, and kitchenware.

4) She enjoys an occasional butterscotch Dilly Bar, having recovered from early years working for the Luverne Dairy Queen.

5) Her father named her after a favorite actress, Dyan Cannon. ▲

THE BIG QUESTION:
Back to the Office?

How to weigh your firm's—and your clients'—options and mitigate legal risk

By Brett Larson and Jeremy Warring

As businesses and their leaders navigate these unprecedented times, we face novel decisions that will likely impact our businesses and our employees both in the short term and for years to come. The first of these decisions was whether to bring your entire business remote (if possible) in order to protect employees and family members from what, at the time, was a relatively unknown pandemic. Messerli Kramer, like many businesses, innovated and brought the entire Minneapolis Division—including all attorneys, paralegals, administrative support, and all non-legal functions, including finance and IT—remote over a week before ordered to do so by Gov. Tim Walz's stay-at-home order.

Next, like many businesses, we navigated that order to identify which businesses, and which functions of a particular business, were deemed critical and exempt from the general prohibition against office work. Then came the CARES Act and the PPP Loan Program, a well-intended program that provides a significant tailwind to some businesses, while leaving others (hospitality for example) out in the cold. Now as the stay-at-home orders in many states have concluded, and as Minnesota "turns the dial" to reopen parts of the state's economy, the next issue is perhaps the most difficult one from a human, business, and even legal perspective: How and when do we return to a semblance of normal, which in most cases means a return of employees to the workplace?

When working through a crisis, we must continue to focus long-term, difficult as that may be, and ensure that core values drive decision-making. For that reason, successful leadership teams will identify a guiding principle as a primary step. For Messerli, the safety and health of our employees and our families is the first priority. That spirit guided each decision while we strategized to position the business to weather the storm. This guiding principle led us to the decision to require all functions of the Minneapolis Division to begin teleworking over a week before ordered to do so by the state.

While federal and state guidance has been extremely helpful in navigating these uncharted waters, as leaders we cannot and should not wait to be told what to do. The decision to return to the workplace is similarly fraught with practical, legal, and health concerns. This article attempts to address best practices guided by these concerns. One size does not fit all, and you need to make the best decisions for your firm or business based on the specific dynamics of your work environment. As a starting point, it is helpful to understand whether you can legally open your business and under what conditions.

On March 25, 2020, Gov. Walz signed Executive Order 20-20 directing Minnesotans to stay home beginning Friday, March 27, 2020 through Friday, April 10, 2020. The Stay-at-Home Order required Minnesotans to stay at their home or place of residence with limited exceptions.

On June 4, 2020, Gov. Walz announced that Executive Order 20-74 would replace Executive Order 20-63 in its entirety beginning at 11:59 p.m. on June 9, 2020. EO 20-63 focuses on increasing occupant capacity at many businesses previously permitted to operate during Phase II, and further permits the reopening of gyms, fitness centers, and entertainment venues.

Specifically, the order contains the following provisions:

Group gatherings: The maximum gathering of people in any organized setting, whether residential or business, is 250 persons. Private outdoor gatherings size increased from 10 to 25 people. Private indoor gatherings must not exceed 10 people. Social distancing is required and masks are strongly encouraged.

Restaurants and bars: Restaurants and bars are permitted to open for indoor dining; they may serve a maximum of 50 people inside and 250 people outside, and operating capacity has increased from 25 percent to 50 percent. Reservations and all social distancing requirements previously outlined in Phase II are still required. Employees are still required to wear a mask and customers will be strongly encouraged to do the same (as much as practically possible while eating and drinking).

Personal care services (barbershops, hair salons, tattoo parlors, and nail salons): Operating capacity has increased from 25 percent to 50 percent. Clients are still required to make appointments and walk-ins will not be allowed under any circumstances. Employees and clients are still required to wear masks.

Places of worship, religious services, weddings and funerals: Places of worship are permitted to operate at 50 percent capacity. May host gatherings of a maximum of 250 people inside or outside.

Gyms, fitness centers, and yoga studios: Gyms are permitted to reopen with a capacity of 25 percent (not to exceed 250 people). Social distancing is required and masks are encouraged as much as possible. Group exercises will be allowed if social distancing requirements can be maintained. Outdoor group exercise is encouraged.

Entertainment venues (movie theaters, bowling alleys, arcades and museums): Permitted to reopen with a capacity of 25 percent (not to exceed 250 people). There will be special safety precautions depending on the type of venue. For example, seated entertainment and recreational entertainment will have different social distancing requirements. Outdoor entertainment venues are permitted to host events for 250 people or less.

Sports and recreational activities: Permitted so long as any gathering does not exceed 25 people. Per the June 5, 2020 conference, Gov. Walz indicated that guidelines for low-risk and high-risk sports would be forthcoming. Public swimming pools are permitted to reopen with a capacity of 50 percent.

In every circumstance, these changes are only permitted if capacity and social distancing requirements and other safety precautions can be followed. Gatherings greater than 250 people are not permitted in any circumstances.

As required under EO 20-63 during Phase I and Phase II, individuals who can work from home must continue to do so, meaning that law firms and other businesses that work from an office environment will not change to the extent workers are able to work from home. Beginning on June 29, 2020, all critical sector businesses are required to have a Covid-19 Preparedness Plan in place. Workers continue to raise concerns regarding the safety of their work environments during this time and reports of unsafe work environments, discipline, and retaliation have been common.

ASSESSING WHETHER TO REOPEN

If your business can reopen per the applicable state order, the first question is whether you should. The answer can only be determined by weighing multiple factors. First, given the capacity limitations, does it make financial sense to open? Many restaurants and gyms will struggle with this question and likely choose to stay closed until capacity increases again. Second, if allowed to open, and opening makes financial sense, will your employees return to work? How can we, as employers, make them comfortable with the idea and provide a safe work environment?

Even though they are legally allowed to do so, many business and law firms are debating whether they should require employees to return to the workplace. The decision should be guided first and foremost by employee safety, and the extent to which a plan to return workers to the office can be implemented. With employees settling in to a routine of working remotely, and to the extent they can be efficient and productive in doing so, many firms and other businesses are opting to allow employees to continue. In these cases, office work is limited to a small crew providing critical administrative functions that cannot be effectively serviced by telework, like mail processing.

Companies returning employees to the office must focus on the health and safety of employees. From a legal compliance and risk mitigation perspective, this means following appropriate guidance. A limited number of people should be charged with staying informed about and updating employees on current guidelines from leading health authorities, including the CDC and local authorities. While many statements by authorities are advisory, and provide guidance only, they still serve as a good measure for best practices and determining whether reasonable care has been taken to protect employees and customers.

The first and most important step (and one required by Minnesota law) is to develop and communicate policies and procedures for reopening your office. Employees should receive policies in writing, written in plain language easily understood by all employees. Employees should sign and return an acknowledgment stating they received the policy and procedures to make a safe workplace, they understand their requirement to participate, and importantly, they acknowledge their mandatory reporting requirement to report any unsafe working conditions. The goal is to comply with the OSHA general duty standard, and the mandatory reporting eliminates any later claim that the employer failed to meet this standard. Comprehensive plans to return workers to the workplace safely should follow the current CDC and OSHA Guidance, both of which recommend inclusion of the following elements:

- **Evaluate which employees may have the right to remain off work.** Before requiring employees to return to work, employers should evaluate which employees may have the right to remain off work under the Family and Medical Leave Act (FMLA) and/or the Families First Coronavirus Response Act (FFCRA). When leave is requested, document the name of the employee requesting leave, the dates for which leave is requested, the reason for leave, and a statement from the employee that he or she is unable to work because of the reason. If the leave is requested to care for a child whose school is closed, or child care provider is unavailable, also document the name of the child, the name of the school/provider which is unavailable, and a statement from the employee that no other suitable person is available to care for the child. Employers who provide paid sick leave and expanded family and medical leave under the FFCRA are eligible for reimbursement of certain costs through refundable tax credits. Thoroughly documenting leave will make claiming these tax credits easier when the time comes.

- **Actively encourage sick employees to stay home.** Employees who have covid symptoms should notify their supervisor, stay home, and follow CDC-recommended steps. People with covid-19 who have symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions: (1) at least 3 days (72 hours) have passed *since recovery,* defined as resolution of fever without the use of fever-reducing medications, (2) improvement in respiratory symptoms (e.g., cough, shortness of breath), and (3) at least 10 days have passed *since symptoms first appeared*. Previous recommendations for a test-based strategy remain applicable; however, a test-based strategy is contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing.

  CDC guidance recommends that employees not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers. Employees who are well but who have a sick family member at home with covid-19 should notify their supervisor and follow CDC recommended precautions.

- **Consider conducting daily in-person or virtual health checks.** Perform health checks (e.g., symptom and/or temperature screening) of employees before they enter the facility, in accordance with state and local public health authorities and,

if available, your occupational health services. If implementing in-person health checks, conduct them safely and respectfully. Employers may use social distancing, barrier or partition controls, or personal protective equipment (PPE) to protect the screener. However, reliance on PPE alone is a less effective control and is more difficult to implement given PPE shortages and training requirements.

Employers choosing to conduct health checks should limit the number of individuals charged with administering checks. They should be medical staff if possible, or senior employees or members of the human resources team. All medical information obtained, including temperatures, should be kept in a separate employee medical file (not in the employee's general personnel file) to be treated as a confidential medical record under the Americans with Disabilities Act and the Minnesota Human Rights Act. The information should also be destroyed once it is no longer needed. To prevent stigma and discrimination in the workplace, make employee health screenings as private as possible, and do not make determinations of risk based on race, country of origin, or any other protected class.

Instead of performing checks, some employers have opted for self-reporting policies ranging from a general requirement of self-reporting and prohibition of coming to the workplace if the employee or a family member has symptoms, to daily or weekly surveys proactively administered to each employee with results monitored by the employer's human resources department.

Employees refusing legitimate and standard screening procedures may be denied entry into the workplace. If an employee is refusing to be screened, be aware of the reason the employee is refusing; are they requesting an accommodation based on religion, disability, or age? Can a reasonable accommodation be found to the screening procedure? If the request for accommodation is illegitimate, or an accommodation cannot reasonably be made because doing so would jeopardize the health of other employees or customers, the employee's refusal may be treated as insubordination.

■ **Identify where and how workers might be exposed to covid-19 at work.** Employers are responsible for providing a safe and healthy workplace. Conduct a thorough review of the workplace to identify potential workplace hazards related to covid-19. Use appropriate combinations of control to limit the spread of covid-19, including engineering controls, workplace administrative policies, and PPE to protect workers from the identified hazards:

- Conduct a thorough hazard assessment to determine if workplace hazards are present, or are likely to be present, and determine what type of controls or PPE are needed for specific job duties.
- When engineering and administrative controls cannot be implemented or are not fully protective, employers are required by OSHA standards to:
    - determine what PPE is needed for their workers' specific job duties,
    - select and provide appropriate PPE to the workers at no cost, and
    - train their workers on its correct use, including when to use PPE; what PPE is necessary; how to properly put on, take off, dispose of, or disinfect PPE; how to inspect PPE for damage and maintain PPE; and the limitations of PPE.
- Encourage workers to wear a cloth face covering at work if the hazard assessment has determined that they do not require PPE, such as a respirator or medical facemask, for protection.

■ **Separate sick employees.** Employees who appear to have symptoms upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors, and sent home. Have a procedure in place for the safe transport of an employee who becomes sick while at work. The employee may need to be transported home or to a healthcare provider.

■ **Take action if an employee is suspected or confirmed to have covid-19 infection.** In most cases, you do not need to shut down your facility. If it has been less than 7 days since the sick employee has been in the facility, close off any areas used for prolonged periods of time by the sick person. Wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible. During this waiting period, open outside doors and windows to increase air circulation in these areas. If it has been seven days or more since the sick employee used the facility, additional cleaning and disinfection is not necessary. Continue routinely cleaning and disinfecting all high-touch surfaces in the facility.

Follow the CDC cleaning and disinfection recommendations:

- Clean dirty surfaces with soap and water before disinfecting them.
- To disinfect surfaces, use products that meet EPA criteria for use against SARS-Cov-2, the virus that causes covid-19, and are appropriate for the surface.
- Always wear gloves and gowns appropriate for the chemicals being used when you are cleaning and disinfecting.
- You may need to wear additional PPE depending on the setting and disinfectant product you are using. For each product you use, consult and follow the manufacturer's instructions for use.

Next, determine which employees may have been exposed to the virus and take additional precautions, including informing employees of their possible exposure. Employers must maintain confidentiality of the sick employee as required by the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act. Most workplaces should follow the Public Health Recommendations for Community-Related Exposure and instruct potentially exposed employees to stay home for 14 days, telework if possible, and self-monitor for symptoms.

Employers in critical infrastructure have an obligation to manage potentially exposed workers' return to work in ways that best protect the health of those workers, their co-workers, and the general public. Critical infrastructure workers may be permitted to continue working following potential exposure provided they remain asymptomatic, and additional precautions are implemented. These include pre-screening employees with temperature checks, regular monitoring of symptoms, wearing masks, social distancing where possible, and disinfecting and cleaning work spaces.

Employers may not retaliate against any employee who has been in isolation or quarantine, or who is not in isolation or quarantine but has responsibility for care of a minor or adult family member who is disabled or vulnerable and who is in isolation or self-quarantine, if such employee is responsible for all or a portion of such person's care.[1] An employee cannot be discharged, disciplined, threatened, penalized, or otherwise discriminated against in the work terms, conditions, locations, or privileges because of such isolation or quarantine.[2]

Finally, recordkeeping requirements under the Occupational Safety and Health Act (OSHA) also require that covered employers record certain work-related injuries and illnesses on their OSHA 300 log. Per OSHA's May 19, 2020 guidance, employers are responsible for recording confirmed covid-19 illnesses which are work-related, and which involve one or more of the general recording criteria (deaths, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness). Cases involving significant injury or illness diagnosed by a physician or other licensed health care professional also meet the general recording criteria even though such illness does not result in any of the foregoing.

■ **Educate employees about steps they can take to protect themselves at work and at home.** Encourage employees to follow new policies or procedures related to illness, cleaning and disinfecting, and work meetings and travel. Advise employees to:

- Stay home if they are sick, except to get medical care, and to learn what to do if they are sick.
- Inform their supervisor if they have a sick family member at home with covid-19 symptoms, and to learn what to do if someone in their home is sick.
- Wash their hands often with soap and water for at least 20 seconds or to use hand sanitizer with at least 60 percent alcohol if soap and water are not available. Inform employees that if their hands are visibly dirty, they should use soap and water over hand sanitizer.
- Avoid touching their eyes, nose, and mouth with unwashed hands.
- Practice routine cleaning and disinfection of frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to disinfection. To disinfect, use products that meet EPA's criteria for use against SARS-CoV-2, the cause of covid-19, and are appropriate for the surface.
- Avoid using other employees' phones, desks, offices, or other work tools and equipment, when possible. Clean and disinfect them before and after use.
- Practice social distancing by avoiding large gatherings and maintaining distance (at least 6 feet) from others when possible.

■ **For employees who commute to work using public transportation or ride sharing, consider offering support.** If feasible, offer employees incentives to use forms of transportation that minimize close contact with others (e.g., biking, walking, driving, or riding by car either alone or with household members). Ask employees to follow the CDC guidance on protection during transportation. Allow employees to shift their hours so they can commute during less busy times and remind employees to clean their hands as soon as possible after their trip.

■ **Do not retaliate**. In Executive Order 20-54, Gov. Walz reiterated that workers have the right to refuse to work under conditions that they, in good faith, reasonably believe present an imminent danger of death or serious physical harm.[3] This includes the reasonable belief that a working environment is not reasonably protected from exposure to covid-19. Workers cannot be fired for refusing to work in unsafe conditions, including conditions without sufficient protection from covid-19.[4] Employers may not retaliate against workers for reporting unsafe or unhealthy workplaces to health officials.[5]

Finally, as a pre-condition to allowing employees to return to the workplace, employers should deliver a copy of their covid-related policies and require that each employee acknowledge and agree (either by signature or survey) to follow these requirements. This acknowledgment will provide some level of protection against a claim that the employer has forced the employee into an unsafe work environment and will provide an assurance from the employees that they will report sickness in their household as required, abide by the applicable quarantine policies, and practice social distancing when in the workplace.

Any business, law firms included, should start with investigating the financial and practical aspects of returning employees to the workplace, guided by how we can provide safe work environments. Development of a written policy should be the next step, which will assist in accomplishing this objective and minimize liability for employers to do so. ▲

Notes

[1] Minn. Stat. 144.4196
[2] *Id.*
[3] Minn. Stat. 182.654 Subd. 11
[4] Minn. Stat. 182.654 Subd. 9
[5] *Id.*

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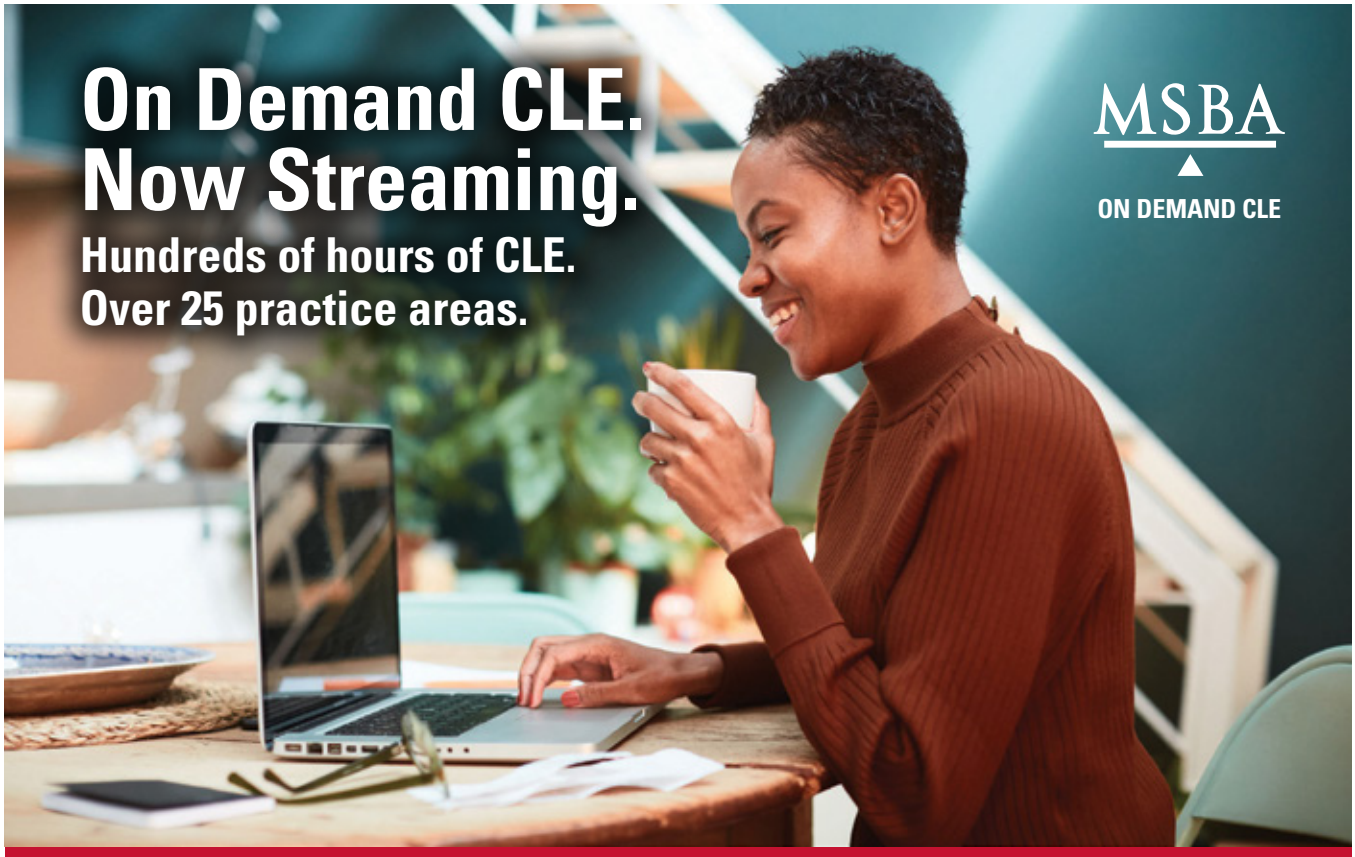

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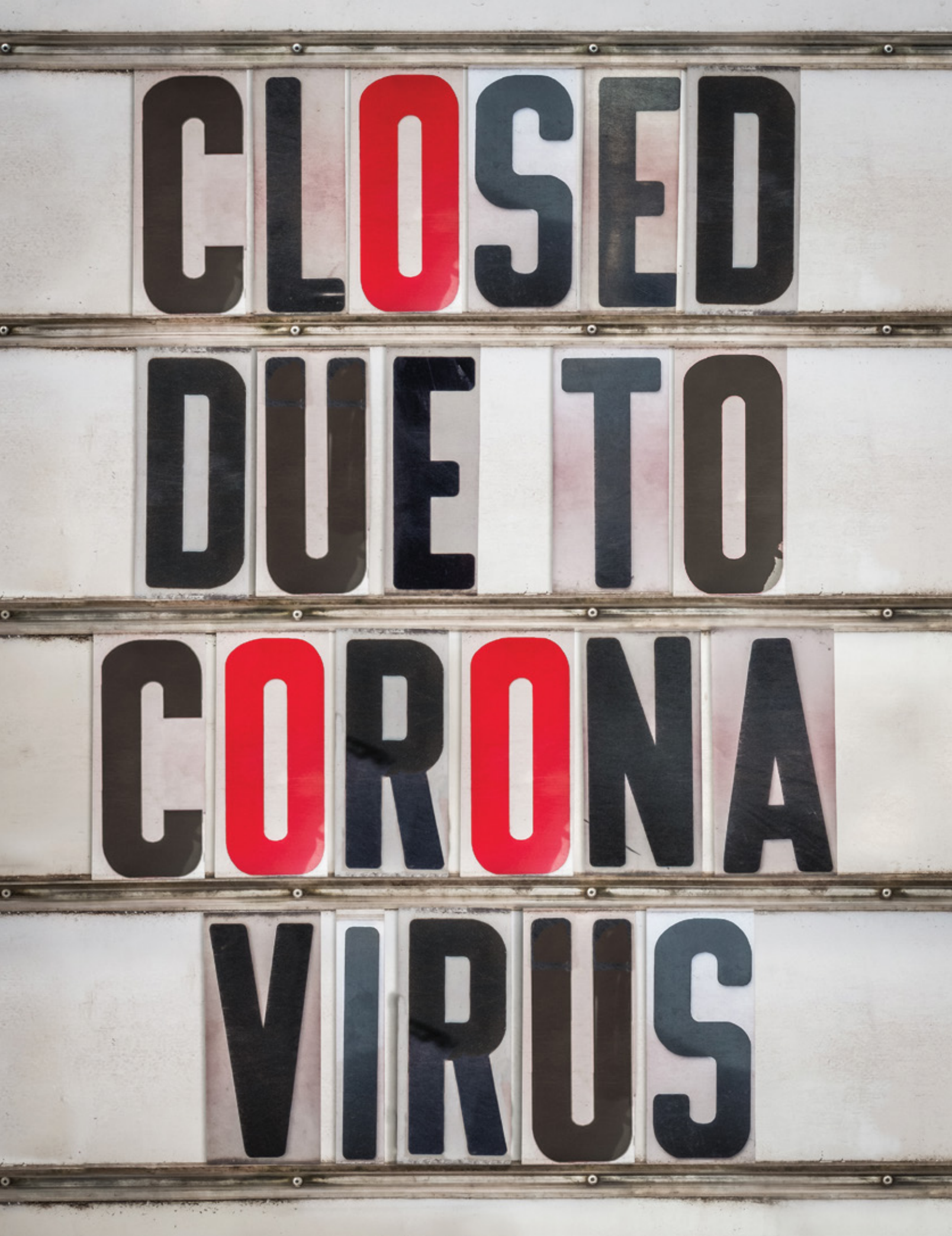

CLOSED
DUE TO
CORONA
VIRUS

THE BUSINESS INTERRUPTION PANDEMIC

Claims for business interruption loss coverage in the wake of covid-19

By Patrick Larkin, Brandon Meshbesher, Eric Steinhoff, and Rick Lind

The economic loss caused by the covid-19 pandemic is and will continue to be devastating to many businesses. The governmental and societal response has been fluid. In Minnesota, Gov. Tim Walz issued a series of executive orders—first closing schools, then closing bars, restaurants (limiting them to only take-out or curbside pick-up), beauty salons, bowling alleys, golf courses, movie theaters, and many other types of business that rely on attracting people to their stores, offices, and premises; and finally, a "stay home" order, ordering all Minnesotans to stay at home unless they are engaged in certain designated "essential activities" or "critical sector" work as defined in the order. The "stay home" order was originally set to expire on April 10, 2020, but was extended through May 18, 2020. Since then, the state government has been making adjustments to these orders to allow more public businesses to operate in varying degrees, but social distancing and modified "stay home" requirements will remain in place through the entire summer.

Minnesota's responses to the pandemic—and the similar responses in many states throughout the country—have resulted in a drastic and dire impact on many business operations, both small and large. Major corporations are laying off thousands of employees. Many small and medium-sized businesses are closing down indefinitely, and some have already made the decision to close permanently. More than 20 million American workers have applied for unemployment benefits since this crisis began. Aggregate business losses are astronomical and will continue to grow throughout the pandemic and potentially beyond.

Although it is still too early to predict the exact nature, extent, and duration of this crisis on most workers and businesses, the future for property and casualty insurers is already beginning to take shape. The widespread shutdown of businesses will lead to an increase in claims under policies containing coverage for business interruption losses and loss of business income. This article will explore some of the expected issues that may arise in the context of claims for business interruption coverage and information concerning ongoing cases and proposed legislation. With lawsuits already underway in several states, insurers, affected businesses, and the lawyers representing them need to be aware of these developments in order to best serve their clients.

WHAT ATTORNEYS NEED TO KNOW ABOUT BUSINESS INTERRUPTION INSURANCE NOW

State responses to the covid-19 pandemic will cause a significant increase in insurance claims nationwide—especially under policies that provide coverage for business interruption and/or loss of business income. Lawsuits seeking declaratory relief as to insureds' rights under these policies have already been filed and many more are certain to follow.

There are a number of potentially applicable federal, state, and local laws and regulations that might apply to analyzing insurance coverage for business loss. Of course, insurance coverage is generally governed by the specific terms, conditions, and exclusions contained in each individual policy. Coverage is also dependent on the case law of different jurisdictions. While there is no one-size-fits-all answer for every claim, the general strategies and policy provisions share many similarities. Lawyers should carefully analyze each individual policy and relevant case law in their jurisdiction to determine how courts may rule on the coverage question.

General types of losses covered

Business interruption insurance is included or added to many commercial property insurance policies and provides coverage for loss of income due to a slowdown or suspension of the insured's operations at its premises. Minnesota courts have described that such coverage is intended "to do for the business what it would have done for itself had no loss occurred."[1] Although such coverage is generally only available in the event of direct physical loss or damage to the business's premises, many policies also provide coverage for a suspension of operations due to a civil authority or similar order that prohibits access to a policyholder's premises. Business interruption insurance often includes coverage for extra expenses that an insured may incur in order to continue operations following a covered loss. Business interruption coverage may also include coverage for business income lost due to the physical loss or damage to a dependent property—such as material suppliers, product manufacturers, and customers. Supply chain disruption could last well beyond the pandemic itself.

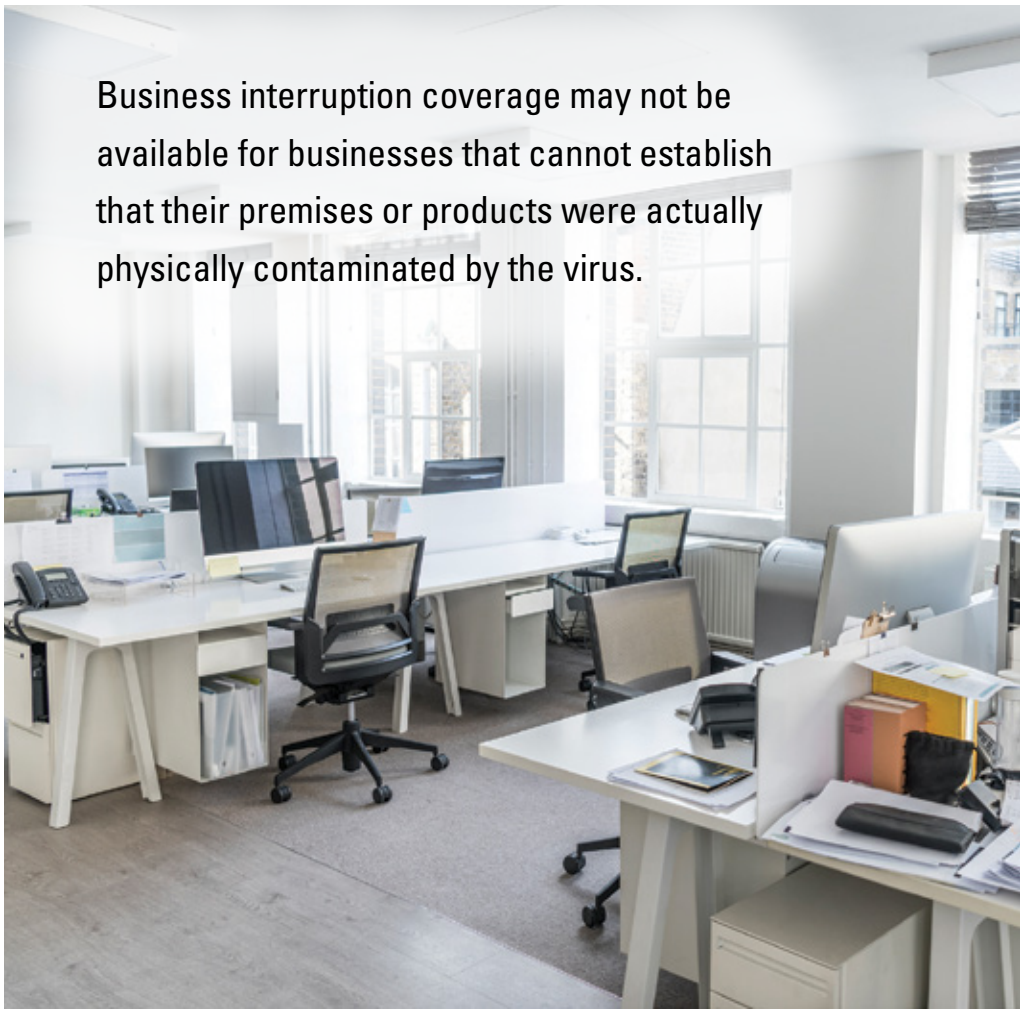
Policy language and case law

Because business interruption coverage usually requires that the insured sustain physical loss or damage to its insured property, the coverage determination will often turn on whether the covid-19 pandemic caused physical loss or damage to the insured's property within the meaning of the policy. An insured may argue its premises sustained damage and that the virus was present within its premises if an employee or customer at the premises was diagnosed with covid-19. Even essential businesses have been shut down due to the presence of the virus at the location, most notably meatpacking operations. Is that enough to prove damage at the premises? Courts will need to interpret

what is meant by "physical loss" or "damage" as used in each policy. If these or similar terms are not defined in the policy itself, the interpretation of such terms by case law will also be determinative.

Although there are no Minnesota cases that directly address this issue, there are some decisions that can provide an indication on how reviewing courts might analyze the issue. First, in *Source Food Technology, Inc. v. U.S. Fidelity and Guar. Co.*,[2] the 8th Circuit considered a claim for business interruption coverage brought by Source Food when it was unable to import beef products from its sole supplier, a Canadian company, after the USDA prohibited the importation of beef products from Canada due to the presence of mad cow disease. Source Food conceded that there was no evidence that the products it had ordered were contaminated.[3] Source Food's policy provided coverage for business income losses "caused by direct physical loss" to the insured property or "caused by action of civil authority that prohibits access to the described premises due to direct physical loss to property..."[4] Importantly, the policy did not define the phrase "direct physical loss to property." The 8th Circuit affirmed the district court's grant of summary judgment in favor of the insurer, finding that there was no coverage obligation under the policy. Specifically, the court concluded that "[a]lthough Source Food's beef product... could not be transported to the United States... the beef product... was not... physically contaminated or damaged in any manner."[5] Accordingly, "[t]o characterize Source Food's inability to transport its… product across the border… as direct physical loss to property would render the word 'physical' meaningless."

In *Pentair, Inc. v. Am. Guar. and Liability Ins. Co.*,[6] Pentair asserted a claim for business interruption losses arising out of a power outage caused by an earthquake that shut down two of its manufacturing plants in Taiwan. Pentair's policy provided coverage for "all risk of direct physical loss of or damage to property described herein" and extended business interruption coverage to both extra expenses incurred to resume normal operations and "damage" to "property of a supplier of goods and/or services to the Insured."[7] The 8th Circuit again affirmed the district court's grant of summary judgment in favor of the insurer that there was no obligation to provide coverage under the policy. In reaching its conclusion the court found that the power outage was not a "direct physical loss or damage" within the meaning of the policy.[8] Importantly, the court rejected a reading of the policy that "would mean that direct physical loss or damage is established whenever property cannot be used for its intended purpose."



In reaching the conclusions in both *Pentair* and *Source Food*, the 8th Circuit distinguished two decisions from the Minnesota Court of Appeals. First, in *General Mills, Inc. v. Gold Medal Ins. Co.*,[9] a substantial quantity of General Mills' raw oats had been treated with a pesticide that was not approved by the FDA for that use. General Mills's insurance policy required "direct physical loss or damage to property."[10] Although the oats were not hazardous for human consumption, they were, nevertheless, unusable in General Mills's oat products.[11] Accordingly, the court found that the contamination rendered the oats unusable, and General Mills was entitled to coverage for "direct physical loss or damage to property."[12] Second, in *Sentinel Mgt. v. N.H. Ins. Co.*,[13] the insured made a claim under its policy arising out of the presence and release of asbestos fibers on its property. The policy provided coverage for "direct physical loss to building(s)."[14] The Minnesota Court of Appeals "conclude[d] that contamination by asbestos may constitute a direct, physical loss to property under an all-risk insurance policy" and affirmed the trial court's denial of summary judgment.[15]

In distinguishing *General Mills* and *Sentinel*, the 8th Circuit concluded that "actual physical contamination was established" in both cases.[16] While reviewing courts in the wake of the covid-19 pandemic may find reason to distinguish *Source Food* and *Pentair*, these cases appear to indicate that business interruption coverage may not be available for businesses that cannot establish that their premises or products were actually physically contaminated by the virus.

Some policies may also provide coverage for business interruption where a civil authority has prohibited access to an insured property. This coverage could apply in states that have ordered specific

businesses to close or the population to remain in their homes. However, the orders in most states were made to generally achieve greater social distancing, not because the virus was physically found at any one particular location. Further, not every policy is the same and some may require such an order to be specifically directed at an insured premises. In addition, even if owed, such coverage is likely quite limited. Civil authority-based business interruption coverage is typically only available for four weeks under most policies if standard ISO insurance forms are contained within the policy.

Review all endorsements and coverage extensions

Some policies include endorsements and coverage extensions that may apply. Some of these endorsements and coverage extensions provide coverage for business interruptions and income losses caused by the presence of a contamination or a "communicable disease." Depending on the policy language, covid-19 may be a "communicable disease" for which coverage may apply. These endorsements and coverage extensions often have limited or specified types of losses identified for coverage. The language in the policy dictates what is covered and what monetary losses are covered.

Anticipate the creative arguments on all sides

Lawyers for claimants will be extremely creative in trying to broaden and expand coverage for many different types of business loss coverages. For example, a business might argue that the virus effectively damaged its property on a nationwide scale, rendering the business premises unusable even though the physical structure remains undamaged. Insurers will likely advocate for a narrower reading of the policy language and rely upon the ordinary meaning of undefined terms like "damage" and "physical loss." It is not yet clear whether reviewing courts may be more receptive to broad readings of policy language in the wake of this crisis.

Lawyers representing insurance companies, on the other hand, are likely to advocate for broad interpretations of particular exclusions. Many, but not all, policies added exclusions designed to exclude coverage for viral outbreaks in the aftermath of SARS and H1N1, but not all policies contain such exclusions. Even if a policy does not contain an exclusion related to viral outbreaks, it may contain exclusions related to bacteria, mold, fungi, or pollutants. Although covid-19 is caused by a virus, attorneys should anticipate arguments that these exclusions apply to the current outbreak.

It will be important for lawyers to create and anticipate novel arguments given the unprecedented factual backdrop of the current claims.

PENDING LITIGATION AND GOVERNMENT ACTION

The first lawsuits

Several lawsuits seeking to enforce business interruption coverage have already been commenced across the country. In *Cajun Conti LLC, et al. v. Certain Underwriters at Lloyd's, London, et al.*,[17] a restaurant owner has sought a declaratory judgment that it is entitled to business interruption coverage under an all-risk policy that allegedly does not contain a virus exclusion. The restaurant owner is seeking a declaration that policy provides coverage for its business losses because of a civil authority shutdown of its restaurant business and that the virus contaminated its premises. The owner asserts that the physical damage requirement was met because the virus is physically impacting private property and physical spaces by remaining viable on surfaces which then require cleaning and fumigating before business operations can continue. The complaint claims that any argument by the insurer to the contrary would be a fraudulent misrepresentation that could endanger policyholders and the public.

In *French Laundry Partners, LP dba The French Laundry, et al. v. Harford Fire Insurance Company, et al.*,[18] venued in the Superior Court for the State of California, County of Napa, two restaurants owned by the Thomas Keller Restaurant Group commenced a lawsuit against their insurer seeking declaratory judgment that its policy covers physical losses and damage caused by the covid-19 pandemic. Similar to the Louisiana case, the restaurants allege they are insured under an all-risk policy that provides coverage for lost business income and extra expenses if access to the insured premises has been prohibited by a civil authority as a direct result of a covered loss in the immediate area. The restaurants further claim that the policy does not include an exclusion for viral pandemic and the "policy's Property Choice Deluxe Form specifically extends coverage to direct physical loss or damage caused by virus."

Two separate lawsuits were filed by the Chickasaw Nation and Choctaw Nation in Oklahoma state court alleging entitlement to coverage for business interruption losses for the closure of their casinos under a stay-at-home order. Similar to the above lawsuits, these Native American tribes allege that they have an all-risk policy that provides coverage for business interruption losses.

Another lawsuit, *Big Onion Tavern Group, LLC, et al. v. Society Insurance, Inc.*,[19] was filed in Illinois after an insurer denied a claim for business interruption coverage to a group of restaurant and movie theater owners. This case has a different procedural posture from the aforementioned cases because the filing of this case occurred after claims were submitted and denied. In the other cases, the insureds filed the coverage lawsuits in anticipation of their claims being denied by their respective insurers. The insureds in *Big Onion* assert that the insurer's denial was wrongful, and their pleadings allege the insurer acted in bad faith by either denying the claims verbally or through cursory written responses without conducting a reasonable investigation of the claim as required by Illinois state law. The complaint seeks bad faith damages in addition to their business coverage losses.

In mid-April 2020, two separate motions were filed by plaintiffs' lawyers with the Judicial Panel on Multidistrict Litigation (JPML) asking the panel to consolidate federal suits seeking business interruption coverage against insurers who were denying claims, accusing insurers of dodging claims by businesses that were shut down by government orders. These motions argue that the question of whether business interruption insurance policies will cover losses incurred by businesses should not be answered in piecemeal by different courts around the country and that the legal issues should be presented and decided in an efficient and centralized manner.

Also in mid-April, 2020, Travelers Casualty Insurance Company commenced a declaratory judgment action in the U.S. District Court for the Central District of California against a law firm, asserting that the policies it issued to the firm do not cover the firm's claimed business losses resulting from the pandemic. In *Travelers Casualty Insurance Co. of America v. Geragos & Geragos,*[20] Travelers claims that the law firm did not purchase insurance for the losses that it is now claiming and the policies require direct physical loss or damage to a property, which the virus did not cause. Travelers also states that the policies contain a virus exclusion that bars the business loss claims.

There are also similar cases recently filed in the federal courts of New Jersey and Florida by restaurant owners seeking to enforce business interruption coverage. In the New Jersey action, *Truhaven Enterprises Inc. d/b/a Fiorino Ristorante v. Chubb Ltd.*,[21] the restaurant owner acknowledges its policy has a virus exclusion, but it pleads that the loss of use of its property was caused by a mandatory closure, which itself should constitute a direct physical loss that triggers business interruption coverage. The plaintiffs in these cases are also seeking class action status on behalf of restaurant owners.

In Minnesota and Wisconsin, several lawsuit have been initiated in both state and federal court. In Minnesota, a salon owner initiated a class action against IMT Insurance Company alleging that two of his salons are entitled to business interruption coverage because Gov. Walz's executive orders closing salons constitute direct physical loss or damage to the insured property.[22] Similarly, a series of lawsuits has been initiated in Wisconsin by a number of restaurants, bars, and other hospitality businesses. In *Colectivo Coffee Roasters, Inc. and Tandem Restaurant, LLC d/b/a The Tandem v. Society Insurance, A Mutual Company*, the plaintiffs allege that the governor's orders constitute a "necessary suspension" of operations requiring their insurance company to provide business interruption coverage.[23]

The *Colectivo* plaintiffs specifically allege in the complaint the existence of a virus exclusion—absent in the policies issued to the plaintiffs—shows that the insurer considers a viral outbreak to be a "physical loss within the meaning of the applicable policy. Other, similar lawsuits have been filed in Wisconsin.[24] These lawsuits have been initiated as class actions and will likely raise important questions with respect to class action certification—especially with respect to the commonality of the claims asserted.

While no legislation has yet been enacted, the proposed legislative bills in some states show that legislatures are indeed looking for ways to shift some of the mounting business loss costs to insurers.

These cases are in their infancy, but should be monitored closely by insurers, businesses, and law firms as important test cases for the wave of litigation that will inevitably follow. Further, it is important to remember that each policy is different and courts generally interpret insurance policies broadly and construe any ambiguities in favor of finding coverage. Out of jurisdiction precedent may not be binding, but with this unprecedented and nationwide problem, it is likely the cases will be persuasive.

It is anticipated these cases will involve the use of various experts, including insurance language and coverage experts to discuss the specifics of the policy

language at issue and offer opinions on whether the facts of the pandemic fit with the policy language. Other experts will likely include epidemiologists to give opinions about the virus and its ability to remain on surfaces for certain periods of time and the exposures the virus could cause to an insured's premises. Forensic accounting experts will likely be used to support and critique an insured's claimed loss calculations.

Legislative and executive actions may influence coverage decisions

In addition, insurers and law firms should closely monitor legislative developments. Although no legislative or regulatory action has occurred in Minnesota at this time, other states have taken actions with respect to insurance policies. Indiana has issued a moratorium on the cancellation of insurance policies due to non-payment. The New Jersey House of Representatives proposed legislation that would require coverage for business interruption losses due to the covid-19 pandemic. The bill sought to retroactively apply to all policies in effect at the time the state's governor first declared a public health emergency. While the bill has since been withdrawn, it provides insight as to possible future action by state legislatures. The Ohio Legislature, for example, introduced similar legislation. The Ohio bill would require insurers offering business interruption insurance to cover losses attributable to viruses and pandemics.

The New York Department of Financial Services has mandated that insurers gather and produce "certain information regarding the commercial property insurance [they have] written in New York and details on the business interruption coverage provided in the types of policies for which it has ongoing exposure." The Washington State Insurance Commissioner issued a similar letter to all Washington state authorized property and casualty insurers, instructing each insurer to provide the Washington Insurance Commissioner and policyholders with certain information identifying business interruption or business income type coverages (including civil authority) that may be available under any of their coverage forms.

While no legislation has yet been enacted, the proposed legislative bills in some states show that legislatures are indeed looking for ways to shift some of the mounting business loss costs to insurers. Similarly, although the federal government has not enacted legislation, 16 congressional representatives signed a letter to insurance industry associations urging insurers to provide business interruption coverage for covid-19-related losses. The associations authored a joint response stating, "[b]usiness interruption policies do not, and were not designed to, provide coverage against communicable diseases such as covid-19."

In early April 2020, the Global Federation of Insurance Associations responded to such tactics by issuing a statement asking governments not to disrupt the "essential stabilizing force" of the insurance industry. It stated that any legislative action requiring insurers to cover business interruption losses retroactively or in cases where coverage for pandemics or other causes of loss were not included in insurance policies could seriously threaten the stability of the global insurance industry. The constitutionality of any retroactive application would also undoubtedly be challenged.

CONCLUSION

Whether a given policy provides coverage for business interruption losses due to the covid-19 pandemic remains an open question. Although applicable Minnesota case law appears to require actual physical contamination, it is not clear whether these decisions will be applied to prevent coverage in the wake of the crisis. Ultimately, each policy is different and the available coverage will turn on the terms, conditions, and exclusions contained therein. Lawyers representing insurance companies and businesses should closely follow the cases that have been filed throughout the country concerning business interruption coverage and monitor any legislative developments. ▲

Notes

[1] *Woods Galore, Inc. v. Reinsurance Ass'n of Minnesota*, 478 N.W.2d 205, 209-10 (Minn. Ct. App. 1991).
[2] 465 F.3d 834 (8th Cir. 2006).
[3] *Id.* at 835.
[4] *Id.* at 835-36.
[5] *Id.* at 838.
[6] 400 F.3d 613 (8th Cir. 2005).
[7] *Id.* at 614.
[8] *Id.* at 616.
[9] 622 N.W.2d 147, 150 (Minn. Ct. App. 2001).
[10] *Id.* at 151.
[11] *Id.* at 150.
[12] *Id.* at 151–52.
[13] 563 N.W.2d 296, 297 (Minn. Ct. App. 1997).
[14] *Id.* at 298.
[15] *Id.* at 300.
[16] *Source Food*, 465 F.3d at 837; *see also Pentair*, 400 F.3d at 616.
[17] No. 2020-02558 (La. Dist. Ct., Orleans Parish, complaint filed 3/16/2020).
[18] No. 20CV000397 (Filed 6/1/2020 Superior Court of the State of California, County of Napa).
[19] No. 1:20-cv-02005 (N.D. Ill. 3/27/2020).
[20] Case number 2:20-cv-03619, in the U.S. District Court for the Central District of California.
[21] Case No. 2:20-cv-04586, (D. NJ).
[22] *Kenneth Seifert d/b/a The Hair Place and Harmar Barbers, Inc., individually and On behalf of all others similarly situated v. IMT Ins. Co.*, No. 2020-cv-01102 (D. Minn. 5/06/2020).
[23] *Collectivo Coffee Roasters, Inc. and Tandem Restaurant LLC d/b/a The Tandem v. Society Ins., a Mutual Company*, No. 2020CV002597 (Milwaukee County Circuit Ct., complaint filed 4/16/2020).
[24] *Rising Dough, Inc., et al. v. Society Ins.*, No. 20-cv-00623 (E.D. Wis. 4/17/2020); *PGT Live Events, LLC d/b/a Pabst Riverside Theater Group v. The Cincinnati Ins. Co.*, No. 2020CV002596 (Milwaukee County Circuit Ct., complaint filed 4/15/2020).

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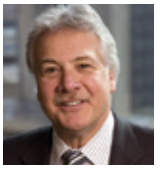

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Ethics Wake-Up Calls for Supervisory Responsibilities

By William J. Wernz

Who in your law firm is responsible for adopting and updating policies and procedures on legal ethics matters? Who is responsible for training lawyers and staff on these matters? Must your firm audit its own files and procedures to reasonably ensure compliance with the ethics rules? What are the areas of law firm operation that are important for ethics scrutiny?

Lawyers who manage law firms and law offices should be asking these questions. Several wake-up calls—including an article by Susan Humiston, the director of the Office of Lawyers Professional Responsibility, and a public reprimand—make the questions timely.[1] Before considering these questions, let's also ask, how do lawyers best learn legal ethics? And how do lawyers and law firms go about character formation?

Ethics as habit, character, and culture

In recounting his law firm legal ethics education in the 1980s, Patrick Schiltz regarded the ethics rules as "irrelevant."[2] His learning came from watching and emulating an experienced partner-mentor. Schiltz paid special attention to the mentor's ethics *habits*, the ways in which the mentor's professional character manifested itself in his regular conduct.

The heart of a good professional ethics education will always be the development of habits and character. How do I live a good life in the law? How do I treat subordinates and adversaries? How do I best serve clients—by reflexively implementing their goals or by first counseling with them about their true interests? Do I treat mundane things like notarizations, filing, and others' schedules impatiently or with good systems? What does it mean to be an officer of the court?

The best class in legal ethics is participatory: learning by watching and doing. Lawyers who learn their habits without benefit of good mentors will have to work hard at becoming good lawyers in the full sense. In decades gone by, law firm partners could claim that their firm's ethics program largely consisted of saying to new attorneys, "Keep your head up, your eyes open, your mouths shut, and emulate the best of what you observe."

The rules are not the primary determinant of a law firm's—or a lawyer's—character and core values. But a managing partner who regards the rules as "irrelevant" in 2020 risks discipline, damages, and disaster.

Law firm ethics also reflect the firm's character. Are there any consequences if a powerful partner treats staff and junior attorneys disrespectfully? Do partners customarily take time to mentor associates? Does the firm encourage pro bono efforts? How does the firm acculturate new lawyers in the firm's traditions? The rules are not the primary determinant of a law firm's—or a lawyer's—character and core values. But a managing partner who regards the rules as "irrelevant" in 2020 risks discipline, damages, and disaster.

The rules and law firm practices in the late 20th century

Before 1985, the ethics rules did not regulate the conduct of managing partners and supervisory attorneys. In 1985, the Court adopted Rule 5.1, which provides that lawyers with management responsibility "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Supervising lawyers in law firms and in corporate and governmental offices are treated alike. In 1985, the Court also adopted Rule 5.3, creating supervisory obligations for lawyers regarding nonlawyer staff.

After 1985, OLPR increased disciplinary regulation of several areas of law firm administration. Lawyers who did not keep their license or CLE status current for substantial periods were disciplined. A trust account overdraft notification program was initiated. Law firm managers were sometimes disciplined via OLPR's "Who's Responsible Letter." When an ethics complaint was filed against a law firm, OLPR would write to the firm, asking the name of the attorney who was responsible for the conduct. The letter produced awkward, short-straw moments for law firms. The lesson of the letter was obvious—best to have a partner who, in advance of any complaint, takes on, and actually exercises, responsibility for various law firm operations.

In 1992, I resigned as OLPR director and became ethics partner at Dorsey & Whitney. I took seriously the fact that my name would be on the response to any "who's responsible" letter from OLPR. In addition to Dorsey responsibilities, I advised other law firms, and served on two malpractice insurance claims committees.

In the early 1990s, most large firms had policy and procedure manuals, but the manuals were likely to be incomplete, out-of-date, and not readily accessible. When intranet technology became available, the firm could post a manual on the intranet, readily update it, and make it available to all in the firm.

As law firms expanded, developing uniform policies and procedures became imperative. As firms merged and laterals joined, training in the firm's policies was also necessary. Designation within the firm of partners responsible for these tasks was likewise necessary.

A 1994 OLPR article advised that Rules 5.1 and 5.3 required certain law firm "systems" and "education."[3] The article also advised that establishing a firm ethics committee was an excellent means of managing supervisory responsibilities. The article did not mention auditing. The article advised, "What is reasonable for a partner in a 100-plus lawyer firm… may not be reasonable for a partner in a two-person firm." From this article and my own experience, I would say that at the turn of the century OLPR expected large firms to have policies, procedures, and training in ethics matter. Expectations regarding smaller firms were less formal and well-defined.

Today's ethics requirements of law firms: Wake-up calls

Humiston's article was not the first wake-up call on law firm ethics. OLPR has published several articles on supervisory responsibilities.[4] ABA Formal Opinion 17-477R (2017) advised that firms should have ethics policies, training, and auditing. These developments show rising expectations of lawyers, in large firms and small.

Another wake-up call arrived on June 19, 2020, in a petition for disciplinary action that alleges: "Respondent's failure, as sole shareholder and managing attorney of the firm, to ensure there were measures in place to ensure he and members of his firm were kept apprised of widely publicized and pertinent amendments to the MRCP which directly impacted the viability of his clients' cases violated Rule 5.1(a), MRPC." (In re Biersdorf, A20-0875) In the civil case underlying this charge, a client's case was dismissed, because the firm—through ignorance of a 2013 amendment to Rule 5.04(a), R. Civ. Proc.—failed to file a case within one year of service.

Yet another wake-up call is a recent public discipline issued to a lawyer for failure to supervise a paralegal. The 2019 case shows that higher standards are now being applied to lawyer supervision of staff. It involved a solo practitioner, Naros, who did not keep close enough tabs on a paralegal, J.U. J.U.'s employment by Naros began in 2009, but J.U.'s misconduct apparently did not begin until 2015. Unknown to Naros, J.U. repeatedly forged Naros's signature, communicated with courts and clients in the name of Naros, and used filing procedures that kept Naros in the dark.

Naros had policies prohibiting the misconduct that J.U. committed. However, Naros admitted that she did not have in place "measures to detect and prevent J.U. from engaging in serious misconduct related to numerous client files." More specifically, the discipline petition alleged and Naros admitted that "the policy makes clear that [Naros] is to sign all pleadings, but does not have any checks in place so that [Naros] can determine when pleadings are not signed by [Naros]. There is no requirement that signed pleadings must be placed in the client file."[5]

In re Naros served notice that the ethics rules applicable to supervisors require more than adopting well-intentioned policies. Ms. Naros' description of her situation is another wake-up call: "It was a supervising lawyer's worst nightmare come true. I was blindsided. I trusted this person who I had trained and worked with without incident for a decade. If this could happen to me, it can happen to anyone."

In 2019, another lawyer was publicly disciplined, in fact suspended, for offenses including lax supervision. But that attorney committed other misconduct, and his supervision was so lax that a staff member misappropriated more than $2.7 million in client funds.[6] In 2020, an estate planning lawyer agreed to be publicly disciplined for several related violations, one of which was insufficient supervision of a paralegal. The paralegal routinely answered client inquiries that involved giving legal advice, without copying the lawyer on e-mails or indicating whether the advice was given by or approved by the lawyer.[7]

Notwithstanding the wake-up calls and other disciplines, OLPR's pursuit of supervisory lawyers has not yet been militant in a general way. In 2018, just four of 117 admonitions were for supervisory offenses.

When OLPR disciplines lawyers who personally violate rules, it does not routinely discipline supervising lawyers unless they have very specific supervisory responsibility. For example, OLPR privately admonished a partner with direct supervisory authority for billing at regular rates the services of a subordinate attorney whom the supervisor knew was not current in licensure requirements.[8] In 2005, an alert appeared that general counsel in an organization "could face discipline [under Rule 5.1] for permitting other lawyers in the organization's law department to continue to practice law in Minnesota without being licensed."[9] The responsible attorney in a private firm would have the same exposures, but it does not appear that OLPR disciplined any supervisory partner when an attorney practiced in a private firm for 14 months while she had only an in-house license.[10]

Ethics policies and procedures: Subject areas

What are the ethics-related subjects on which a law firm should have formal policies and procedures? Trust accounting is the first and by far most important subject. Rule 1.15 extensively regulates trust accounts. Trust account books and records are prescribed by Rule 1.15(h) and by the Lawyers Board. Extensive trust account aids are available on the OLPR website.

A law firm's policies and procedures should also include:

- client intake and new matters;
- conflicts;
- business dealings with clients;
- deadlines and diligence;
- communication;
- accounting for client funds and property;
- protection of confidential information;
- marketing practices;
- security of technology;
- the unauthorized practice of law;
- lawyer impairment;
- reporting violations;
- social media use and abuse; and
- harassment and discrimination.[11]

Several of these topics deserve special comment.

Client intake and file-opening are very important areas for firm policy-making supervision, auditing, and ethics compliance. The policy should stress that no new client or new matter may be taken on unless required procedures are followed. The policy should prescribe client-naming conventions, e.g. "Jane Doe as the PR of the Estate of John Doe," rather than, "The Estate of John Doe." Engagement letters should be required and sample forms made available—deficiencies in retainer agreements are among the most common subjects of discipline. The policy should identify special risk areas, such as representing joint clients. Conflict issues most frequently arise in conjunction with new clients and new matters.

Business dealings with clients should be addressed. Most malpractice insurers exclude coverage of such dealings. The common law presumes fraud. Discipline is frequent and often severe. Lawyers may not realize that the governing rule is very broad. Rule 1.8(a) covers lawyers taking security interests in client property, taking stock in lieu of fees, and at least some barter exchanges for fee payments.

A policy on reporting duties and procedures would provide that firm lawyers should first report various matters, including rule violations, to a designated person in firm management, such as the ethics partner. The policy would state that the person making a report will not suffer an adverse consequence. The policy would explain Rule 8.3, Reporting Professional Misconduct, and cite OLPR and other commentaries on the rule.

A firm policy should cover notarization, signatures, and document dating. Again, there is frequent discipline and a need for firm standards. A policy covering harassment and discrimination is impor-

tant both for ethics compliance and for dealing with civil complaints.

Cybersecurity is an increasingly important issue. It is also an issue that should be specifically assigned to someone, inside or outside the firm, with special expertise.[12]

Ethics policies and procedures: Implementation and responsibility

Humiston's article identifies three measures for implementing the "reasonable efforts" and "reasonable assurance" provisions of Rule 5.1. First, a firm should have policies and procedures in the above areas. Second, the firm should train lawyers and staff in compliance. Third, the firm should audit to reasonably ensure compliance. The article takes the position that "only" when a firm has in place formal policies and procedures, training, and auditing can the firm "feel confident that you have 'measures' in place to 'assure' compliance, which is what the rule requires."

How should supervision and auditing be implemented? An article by an ethics expert explains the need for an ethics partner.[13] A small firm might instead divide responsibilities among partners or consult as needed with regular outside ethics counsel. "Auditing," at a minimum, involves periodic review of a representative sample of files as well as interviews with a sample of firm lawyers and staff to determine how the firm is complying with its policies.

How are "reasonable" efforts and assurances to be determined? Humiston takes positions based on what "seems to me" reasonable. The Director's judgment is no doubt important. "Reasonable" is, however, a defined term. "Reasonable" denotes "the conduct of a reasonably prudent and competent lawyer." Rule 1.0(i). Based on this definition, community standards are highly relevant to determining what is reasonable. The OLPR article does not attempt to anchor its prescriptions for "reasonable" supervision in the conduct of good law firms.

What are Minnesota law firms in fact doing to comply with Rules 5.1 and 5.3? Large firms now typically adopt policies and provide at least some ethics training. The profession could make use of model policies and procedures, but it appears that no such models have been created. Perhaps MSBA or MLM or OLPR/LPRB could take the lead.

Auditing, over and above an insurer's review, still appears to be far less than universal. I believe small firms are very unlikely to have formal, written policies and procedures, formal training, and audit programs, except for trust accounts. One assumes OLPR still expects less formality from small firms, but the discipline in *Naros* shows that small firms must take responsibilities for good systems and supervision seriously.

Examples are helpful in describing the nuts and bolts of implementation. To guard against unauthorized practice, a designated clerical person could check online attorney registration records quarterly to confirm that every lawyer in the firm has a current license and current CLE status. The person would make a regular written report to a designated partner. A designated "trust account" partner could certify in writing to all lawyers that the firm maintains the books and records required by the Lawyers Board.

A commitment to doing the right thing

Law firms must take some measures to ensure that their policies and procedures are not mere window-dressing. Rules, procedures, training, and even audits are insufficient if a firm does not make a serious commitment to doing the right thing. Lawyers in charge must do the right thing when problems arise. Rule 5.1(c) provides for discipline when a supervisory lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

A large firm in Maine is the poster child for how *not* to handle an ethics problem. The firm learned that a partner had misappropriated law firm funds, but nonetheless relied for months on the partner's false assurances that the misappropriation was isolated and did not involve client funds. Incredibly, the firm did not involve its ethics partner in handling the matter. When there is misconduct, those tasked with ethics responsibility must independently investigate to learn the extent of the problem. The Maine firm's Executive Committee members were found to have violated Rule 5.1 and the firm suffered enormous adverse publicity.[14] In contrast, several large firms in Minnesota have investigated, reported, and dealt with serious misconduct by their lawyers.[15]

The public, the courts, OLPR, and malpractice insurers have rising expectations of lawyers. The governing lawyers of any large firm should confirm that the firm has in place policies and procedures on important ethics subjects as well as training programs and periodic audit arrangements. For small firms, managing attorneys should at least consider how they would respond if OLPR investigated an ethics complaint that raised both issues of conduct by an individual and issues of proper supervision by firm management. A partner should have decided who is responsible long before receiving a notice of investigation that asks, "Who's responsible?" ▲

Notes

[1] Susan Humiston, "Your Ethical Duty of Supervision," Bench & Bar of Minn., Dec. 2019.

[2] Patrick J. Schiltz, "Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney," 82 MINN. L. REV. 705, 717 (1998).

[3] Marcia A. Johnson, "Responsibility for Others Redux," Bench & Bar of Minn., Dec. 1994.

[4] Craig D. Klausing, "Responsibility for the Conduct of Others," Minn. Law., Mar. 2, 2015, citing *In re Kaszynski*, 620 N.W.2d 708 (Minn. 2001) and *In re Voss*, 830 N.W.2d 867 (Minn. 2013). *See also,* Martin A. Cole, "Mentors, Supervisors and Professional Responsibility," Bench & Bar of Minn., July 2007; Cassie B. Hanson, "How Do You Know That Your Bookkeeper is Keeping Accurate Trust Account Records?", Minn. Law., 3/5/2012.

[5] *In re Naros,* 928 N.W.2d 915 (Minn. 2019). Petition for Disciplinary Action. *http://lprb.mncourts.gov/LawyerSearch/casedocs/PetitionsStipulations/NarosKristenKatheryn-PDA05152019.pdf*

[6] *In re Rosso,* 919 N.W.2d 477 (Minn. 2018).

[7] *In re Nelson,* Petition for Disciplinary Action, filed 5/20/2020.

[8] *In re Panel Case No. 23236*, 728 N.W.2d 254 (Minn. 2007).

[9] Kenneth L. Jorgensen & Margaret Fuller Corneille, "In-House Counsel and Unauthorized Practice," Bench & Bar of Minn., Nov. 2005.

[10] *In re Altschuler*, 879 N.W.2d 929 (Mem.) (Minn. 2016).

[11] This list overlaps with a list in Humiston's article, but that list omits several important topics.

[12] For consideration of lawyers' competence and confidentiality duties regarding cybersecurity, especially when remote locations are used, see ABA Formal Op. 447R (2017) and Pennsylvania Formal Op. 2020-30.

[13] Charles E. Lundberg, "Why Your Firm Needs an Ethics Partner. Now." Bench & Bar of Minn., Dec. 2016.

[14] *Bd. of Overseers of the Bar v. Warren, et al.*, 34 A.3d 1103 (Me. 2011).

[15] *In re O'Hagan*, 450 N.W.2d 571 (Minn. 1990); *In re Moskal*, 583 N.W.2d 282 (Minn. 1998); *In re Block*, 739 N.W.2d 917 (Minn. 2007); *In re Margulies*, 781 N.W.2d 249 (Minn. 2010).

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Understanding Minnesota's mandatory and voluntary reporting requirements involving child abuse and neglect

By James C. Backstrom

There is a role for everyone in ensuring that our children are as safe and secure as possible. As a career prosecutor, I can tell you that far too many children are abused and neglected each year in our state and nation. Tragically, only a small percentage of these cases ever get reported to child protection authorities, law enforcement, and prosecutors, thereby enabling these professionals to intervene to protect those children who have been harmed and hold accountable the perpetrators.

One way to improve the number of child abuse cases reported to the appropriate authorities is to periodically remind professionals who are mandatory reporters under the law what their responsibilities are and to encourage all other persons who witness or learn of a child being harmed or in danger to voluntarily report such information. Both mandatory and voluntary reporters of child abuse and neglect have legal protections, including confidentiality and immunity, unless the reporter does not act in good faith and knowingly files a false report. This article is intended to raise awareness within the legal profession of both mandatory and voluntary reporting laws in Minnesota and to encourage the reporting of these concerns to the proper authorities so immediate interventions can be undertaken.

In 1975, the Minnesota Legislature enacted Minn. Stat. §626.556 mandating that certain people report the maltreatment of minors. The statute has been amended several times since it was originally enacted, but its purpose has not changed:

> "The legislature hereby declares that the public policy of the state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse…
>
> In addition, it is the policy of this state to:
>
> (1) require the reporting of neglect or physical or sexual abuse of children in the home, school, and community settings;
> (2) provide for the voluntary reporting of abuse or neglect of children;
> (3) require an investigation when the report alleges sexual abuse or substantial child endangerment;
> (4) provide a family assessment, if appropriate, when the report does not allege sexual abuse or substantial child endangerment; and
> (5) provide protective, family support, and family preservation services when needed in appropriate cases."[1]

The persons who must report under this statute are those individuals who: (1) know or have reason to believe that a child is being neglected or physically or sexually abused as defined in the statute, or has been neglected or physically or sexually abused within the preceding three years;[2] (2) are a professional or a professional's delegate; and (3) are engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, correctional supervision, probation and correctional services, or law enforcement.[3] If a person is employed as a member of the clergy and received the information while engaged in ministerial duties, they must also report unless the information is privileged under Minn. Stat. §595.02, subd. 1(c).[4] In other words, "mandated reporters" include the professionals in the above-listed fields who regularly come into contact with families and children as part of their duties.

Many public employees are mandated reporters, such as:

- social workers and other professional staff in a social services department;
- law enforcement officers and other professional staff in a sheriff's office or police department;
- public health nurses and other professional staff in a public health department;
- county or city attorneys, assistant county or city attorneys, and other professional staff in the county or city attorney's office;
- probation officers, corrections officers, and other professional staff in a community corrections department;
- child support officers and other professional staff in a child support enforcement program; and
- professional workers in an employment / economic assistance department.

This list is not intended to be exhaustive, but it includes those who are clearly within the definition.

In addition, many others in the private sector are also mandated reporters, such as:

- health care professionals and other professional staff working with the health care professional;
- child care providers and other professional staff working with child care providers;
- education professionals and other professional staff working with the education professional.

This list is also not exhaustive.

A mandated reporter must report suspected incidents of neglect or abuse of a child, including both the direct observations of such abuse or neglect (e.g., personally seeing physical injury to a child) and indirect information that gives the mandated reporter reason to believe a child is being neglected or abused. The law requires a mandated reporter to report immediately (meaning within 24 hours)[5] the neglect or physical or sexual abuse to either the child protection agency of the county (or tribal agency), the county's sheriff's department, or the local police department (or tribal police department).[6] Child protection agencies and law enforcement agencies have the duty to cross-report incidents of reported child abuse or neglect. Such cross-reporting is not optional but required in all circumstances and, therefore, mandated reporters do not need to report to both agencies. If a mandated reporter knows or has reason to know that a child is being concealed or withheld from their parent or custodian in violation of Minn. Stat. §609.25 (Kidnapping) or §609.26 (Depriving Another of Custodial or Parental Rights), they must also make a report as outlined above.[7]

The terms neglect, physical abuse, and sexual abuse are all defined in the child protection statute (see these definitions in the endnote below).[8] It is important that all mandatory reporters be familiar with what constitutes neglect, physical abuse, and sexual abuse for reporting purposes.

Mandated reports involving possible physical abuse or neglect are required if the abuse or neglect is perpetrated by a "person responsible for the child's care," which includes, among others, parents, guardians, others in the family that provide care for the child, and others caring for the child in the community, such as teachers, school administrators, day-care providers, paid or unpaid babysitters, playground monitors, coaches, clergy, counselors, or other persons who have assumed responsibility for a child's care, even if this is on a temporary or short-term basis.[9] Mandated reports involving possible sexual abuse are required if the abuse is perpetrated by a "person responsible for the child's care," or by a person who has a "significant relationship" to the child, as defined in Minn. Stat. §609.341, subd. 15[10] or by a person in a "position of authority" over the child, as defined in Minn. Stat. §609.341, subd. 10.[11]

The law has a provision for immunity from civil and criminal liability for making a voluntary or mandated report if the reporter acts in good faith. In other words, filing a truthful report based upon observations or information obtained from others will not expose the reporter to civil liability or criminal charges.

Besides physical and sexual abuse and neglect, threatened injury and mental injury must also be reported. Threatened injury means a statement, overt act, condition, or status that represents a substantial risk of physical or sexual abuse or mental injury.[12] For example, leaving a child in the care of someone who has had their own parental rights involuntarily transferred or terminated would constitute a "threatened injury." Mental injury is an injury to the psychological capacity or emotional stability of the child.[13] This can be evidenced by any impairment in the child's ability to function "within a normal range of performance and behavior with due regard to the child's culture."[14]

The initial report by a mandated reporter (which can be oral or written) must be followed within 72 hours (excluding weekends and holidays) by a written report,[15] which must identify the child, any person believed to be responsible for the neglect or abuse, if known, the nature and extent of the abuse or neglect, and the name and address of the person reporting.[16] The name of the reporter is confidential, and can only be disclosed with the consent of the reporter or if a court finds that the report was false and made in bad faith.[17]

The statute provides that a mandated reporter who knows or has reason to believe that a child is being neglected or physically or sexually abused, or has been neglected or abused within the past three years, and fails to report, is guilty of a misdemeanor.[18] A mandated reporter who knows or has reason to believe that two or more children not related to the perpetrator have been physically or sexually abused by the same perpetrator within the preceding 10 years, and fails to report, is guilty of a gross misdemeanor.[19]

The law also has a provision for immunity from civil and criminal liability for making a voluntary or mandated report if the reporter acts in good faith. In other words, filing a truthful report based upon observations or information obtained from others will not expose the reporter to civil liability or criminal charges, even if it is later determined that no abuse had occurred.[20]

The question of whether a mandated reporter is required to report only when the information is received in the course of the mandated reporter's official duties and while actually on duty, or if the mandated reporter must report at all times (on duty or off) remains unclear. There are currently 19 states, including Wisconsin, Iowa, and North Dakota, that limit the mandated reporter's requirement to only report when they are acting in their "official capacity." Meanwhile, 14 states have declared that all citizens are mandated reporters and make no distinction regarding professions or certain job titles. Minnesota is one of 17 states that list the qualifications for a "mandated reporter," but Minnesota's statute is silent as to whether the scope of the requirement to report applies to information received while the mandated reporter is off duty. Since 2012, four states in this category have litigated the issue.

Delaware, Georgia, and Washington have all separately held that their state's respective mandatory reporting law did not extend a mandated reporter's duties outside of the mandated reporter's professional capacity.[21] In other words, in those states a mandated reporter is not required to report suspected abuse or neglect if it is learned of outside the scope of employment. Conversely, the Colorado Court of Appeals has recently ruled in the negative on this issue, holding that a "teacher's reporting duties do not cease when he or she leaves the classroom."[22] The wording of Minnesota's mandatory reporting statute is more similar to those in Delaware, Georgia and Washington, than to Colorado's law.[23] Based on these recent decisions, and the wording of the Minnesota statute, it does not appear that current Minnesota law requires mandatory reports outside of "on-duty" situations. Of course, voluntary reporting is always encouraged to protect vulnerable children.

Even if a person does not meet the definition of a mandated reporter, anyone can make voluntary reports whenever they have information that a child is being or has been neglected or physically or sexually abused, or threatened with abuse. Even if the abuse occurred some time ago, a voluntary report is encouraged as this may prevent further injury or harm to the child or other siblings. The same immunity applies whether a reporter makes a mandated or voluntary report, provided the report is made in good faith—i.e. that the report is not knowingly false.[24] It is important to remember that the purpose behind the mandatory reporting law is to protect children. Voluntary reports further this same purpose. Without these reports, there is no opportunity for law enforcement and child protection to investigate the situation and intervene to protect children when this is necessary. ▲

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Notes

[1] Minn. Stat. §626.556, subds. 1(a) and 1(b).
[2] Minn. Stat. §626.556, subd. 3(a).
[3] Minn. Stat. §626.556, subd. 3(a)(1).
[4] Minn. Stat. §626.556, subd. 3(a)(2).
[5] Minn. Stat. §626.556, subd. 3(e).
[6] Minn. Stat. §626.556, subd. 3(b).
[7] Minn. Stat. §626.556, subd. 3(a).
[8] Minn. Stat. §626.556, subd. 2(g) ""Neglect' means the commission or omission of any of the acts specified under clauses (1) to (9), other than by accidental means:
1) failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter, health, medical, or other care required for the child's physical or mental health when reasonably able to do so;
2) failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health when reasonably able to do so, including a growth delay, which may be referred to as a failure to thrive, that has been diagnosed by a physician and is due to parental neglect;
3) failure to provide for necessary supervision or child care arrangements appropriate for a child after considering factors as the child's age, mental ability, physical condition, length of absence, or environment, when the child is unable to care for the child's own basic needs or safety, or the basic needs or safety of another child in their care;
4) failure to ensure that the child is educated as defined in sections 120A.22 and 260C.163, subdivision 11 which does not include a parent's refusal to provide the parent's child with sympathomimetic medications, consistent with section 125A.091, subdivision 5;
5) nothing in this section shall be construed to mean that a child is neglected solely because the child's parent, guardian, or other person responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child in lieu of medical care; except that a parent, guardian, or caretaker, or a person mandated to report pursuant to subdivision 3, has a duty to report if a lack of medical care may cause serious danger to the child's health. This section does not impose upon persons, not otherwise legally responsible for providing a child with necessary food, clothing, shelter, education, or medical care, a duty to provide that care;
6) prenatal exposure to a controlled substance, as defined in section 253B.02, subdivision 2, used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, medical effects or developmental delays during the child's first year of life that medically indicate prenatal exposure to a controlled substance, or the presence of a fetal alcohol spectrum disorder;"
Minn. Stat. §626.555, subd. 2(k), "'Physical abuse' means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 125A.0942 or 245.825. Abuse does not include reasonable and moderate physical discipline of a child administered by a parent or legal guardian which does not result in an injury. Abuse does not include the use of reasonable force by a teacher, principal, or school employee as allowed by section 121A.582. Actions which are not reasonable and moderate include, but are not limited to, any of the following:
(1) throwing, kicking, burning, biting, or cutting a child;
(2) striking a child with a closed fist;
(3) shaking a child under age three;
(4) striking or other actions which result in any nonaccidental injury to a child under 18 months of age;
(5) unreasonable interference with a child's breathing;
(6) threatening a child with a weapon, as defined in section 609.02, subdivision 6;
(7) striking a child under age one on the face or head;
(8) striking a child who is at least age one but under age four on the face or head, which results in an injury;
(9) purposely giving a child poison, alcohol, or dangerous, harmful, or controlled substances which were not prescribed for the child by a practitioner, in order to control or punish the child; or other substances that substantially affect the child's behavior, motor coordination, or judgment or that results in sickness or internal injury, or subjects the child to medical procedures that would be unnecessary if the child were not exposed to the substances;
(10) unreasonable physical confinement or restraint not permitted under section 609.379, including but not limited to tying, caging, or chaining; or
(11) in a school facility or school zone, an act by a person responsible for the child's care that is a violation under section 121A.58."
Minn. Stat. §626.55, subd. 2(n) "'Sexual abuse' means the subjection of a child by a person responsible for the child's care, by a person who has a significant relationship to the child, as defined in section 609.341, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a violation of section 609.342 (criminal sexual conduct in the first degree), 609.343 (criminal sexual conduct in the second degree), 609.344 (criminal sexual conduct in the third degree), 609.345 (criminal sexual conduct in the fourth degree), or 609.3451 (criminal sexual conduct in the fifth degree). Sexual abuse also includes any act which involves a minor which constitutes a violation of prostitution offenses under sections 609.321 to 609.324 or 617.246. Effective May 29, 2017, sexual abuse includes all reports of known or suspected child sex trafficking involving a child who is identified as a victim of sex trafficking. Sexual abuse includes child sex trafficking as defined in section 609.321, subdivisions 7a and 7b. Sexual abuse includes threatened sexual abuse which includes the status of a parent or household member who has committed a violation which requires registration as an offender under section 243.166, subdivision 1b, paragraph (a) or (b), or required registration under section 243.166, subdivision 1b, paragraph (a) or (b)."
[9] Minn. Stat. §626.556, subd. 2(j).
[10] "Significant relationship" is defined as "a situation in which the actor is:
(1) the complainant's parent, stepparent, or guardian;
(2) any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great aunt; or
(3) an adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant's spouse."
[11] "Position of authority over a child" is defined as including but not limited to "any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act." For defined sexual contact, it includes a psychotherapist.
[12] Minn. Stat. §626.556, subd. 2(p).
[13] Minn. Stat. §626.556, subd. 2(f).
[14] Minn. Stat. §626.556, subd. 2(f).
[15] Minn. Stat. §626.556, subd. 7(a).
[16] Minn. Stat. §626.556, subd. 7(c).
[17] Minn. Stat. §626.556, subds. 7(i) and 11(a).
[18] Minn. Stat. §626.556, subd. 6(a).
[19] Minn. Stat. §626.556, subd. 6(b).
[20] Minn. Stat. §626.556, subd. 4(a).
[21] *See Delaware Board of Nursing v. Gillespie*, 41 A.3d 423 (Del. 2012); *May v. State*, 761 S.E.2d 38 (Ga. 2014); *State v. James-Buhl*, 415 P.3d 234 (Wash. 2018).
[22] *Heotis v. Colorado State Board of Education*, 2019 WL 1087027 (Colo. App. 2019).
[23] Colorado's statute includes limiting language regarding the duty to report in an official capacity in one subsection but not in another, creating an assumption that this silence was purposeful. The statute also includes two express exceptions for the mandated reporter; it can then be presumed that these express exceptions exclude all other implied exceptions in the statute. Minnesota's statute includes neither exceptions nor limiting language in any part of its mandated reporter statute.
[24] Minn. Stat. §626.556, subd. 4(a).\

The Urgency of Sleep and Well-Being

By Robin Wolpert

The National Task Force on Lawyer Well-Being urges us to create a national movement toward improving the health of the profession. During the bar year just past, MSBA President Tom Nelson led our statewide efforts to make it safe to say, "I'm not OK," and to ask for help in addressing our well-being. The Minnesota Supreme Court, Lawyers Concerned for Lawyers, and the Lawyers Professional Responsibility Board are unified behind this message.

It is challenging, of course, to do what the National Task Force tells us to do. How do we create this change in a profession that glorifies hard work at the expense of our own health and considers sleepless nights a badge of courage? We are shamed for asking for help. We are considered lazy for taking care of ourselves. We are labeled "weak" for admitting that we are anxious and stressed.

And now there is covid-19. We are all experiencing its devastating effects. The rug has been pulled out from under us. It is tough to find a silver lining in these circumstances, but it strikes me that our conversations around well-being have shifted in the past few months. *With our lives and careers starkly in jeopardy, it is now OK to say, "I'm not OK." It is now OK to take steps to protect and enhance our well-being.* As I teach CLEs to audiences from around the country, and invite dialogue among perfect strangers, we are refreshingly candid about our state of well-being. And we feel safe in doing so.

Against this backdrop, I write about one of the most important well-being topics—sleep—and ask you to consider two questions. First, will you make a commitment to yourself to take action to ensure that you get sufficient sleep? As I explain below, your life is at stake—not to mention your ability to meet your professional obligations as a lawyer. Second, will you commit to taking action to ensure that others with whom you interact also get sufficient sleep, especially the next generation of lawyers? As we will see, their lives are at stake as well.

Sleep is the foundation of health

October 31, 2019 was a big day in the field of neuroscience. Dr. Laura Lewis of Boston University and her team published the results of a pathbreaking study in the journal Science, demonstrating how toxins are cleared out of the brain during deep or NREM sleep.[1] During deep sleep, our neurons start to synchronize, turning on and off at the same time. When they all turn off, the level of blood flow diminishes and cerebrospinal fluid rushes in, filling the space left behind. The cerebrospinal fluid clears out toxic waste products, including amyloid-beta, which can contribute to neurodegenerative diseases like Alzheimer's. One in ten adults over the age of 65 now suffers from Alzheimer's disease.[2] Getting too little sleep across the adult lifespan significantly raises the risk of developing this disease.

Sleep is *the* foundation of good health.[3] Every aspect of our physiology is impacted by sleep.[4] Cognitive function is severely impaired by "short sleeping." Moreover, the leading causes of disease and death in the industrialized world are causally linked with lack of sleep—including cardiovascular disease, cancer, diabetes, dementia, and obesity.[5] The World Health Organization has declared a sleep loss epidemic throughout industrialized nations.

Dr. Matthew Walker, one of the world's most prominent experts on sleep, tells us "the shorter you sleep, the shorter your lifespan."[6] Human beings are the only species that deliberately deprives itself of sleep without legitimate gain.

We are supposed to spend about a third of our day sleeping. If you see this as a waste of time, you might change your mind if you knew what was happening while you sleep.

Sleep and cognitive function

Sleep is critical to memory—both before learning, to prepare your brain to make new memories, and after learning, to cement those memories and prevent forgetting.[7] During NREM sleep, the long-range brain waves of deep sleep move memory packets of recent experiences from a short-term, more fragile storage area to a safer long-term storage site.[8] It's like clicking "save" on our email inbox. By contrast, REM or dream sleep integrates and interconnects the past and present emotions, motivations, and memories with each other, generating a more accurate model of how the world works and sparking new creative insights.[9] REM sleep strengthens neural connections, giving us wisdom, creativity, emotional resilience, and emotional intelligence.[10]

After 16 hours of being awake, the brain begins to fail.[11] Humans need 7.5 to 9 hours of sleep each night to maintain cognitive performance. We cannot catch up on our sleep later. The brain does not work like a bank.[12] The brain can never recover the sleep it has missed.

Sleeping even seven hours per day for 10 days makes the brain just as dysfunctional as it would be after going without sleep for 24 hours.[13] Even worse, the human brain cannot accurately sense how sleep-deprived it is. We are like the person who consumes too much alcohol and says, "Give me the car keys—I'm just fine."

Going to bed late or getting up early has a surprising impact on our sleep. If we get up a few hours early, we are not just losing 25 percent of our sleep; we're losing 60 to 90 percent of our REM sleep.[14] This is because most of our REM sleep occurs in the late-morning hours of our sleep cycle. Alternatively, if we stay up late, we are losing a significant amount of NREM sleep because the majority of your NREM sleep occurs early in our sleep cycle.

Sleep and health

Every spring, there is a global experiment in which 1.6 billion people from roughly 70 countries are forced to reduce their sleep by one hour.[15] It's called daylight savings time. The result is a 24 percent increase in heart attacks the next day.[16] In the fall, when we gain an hour of sleep, the result is a 21 percent reduction in heart attacks the next day.

Sleep deprivation accelerates our heart rate, increases our blood pressure, and erodes the fabric of strained blood vessels, amplifying the calcification of coronary arteries.[17] Adults 45 or older who sleep less than six hours a night are 200 percent more likely to have a heart attack or stroke during their lifetime, compared to those sleeping seven to eight hours a night.[18]

Sleep loss impairs our immune system, making us more prone to getting the common cold and the flu and reducing the effectiveness of the standard flu vaccination.[19] Because short sleeping weakens our immune system, it negatively affects our ability to fight cancer.[20] Indeed, in one experiment, getting four hours of sleep for just one night resulted in a 70 percent drop in cancer-fighting immune cells.

Sleep loss increases food consumption, causing weight gain and reducing our ability to manage blood sugar and increasing the likelihood of developing type 2 diabetes.[21] Sleep disruption contributes to all major psychiatric conditions, including depression, anxiety, and suicidality.[22]

Our gene profile

Insufficient sleep alters the activity of our DNA. An experiment at the Surrey Sleep Research Center focused on the gene activity profiles of a group of healthy young men and women who were getting 8.5 hours for a week.[23] After this group was restricted to 6 hours of sleep for one week, a comparison of the profiles before and after the sleep restriction revealed that the activity of 711 genes was distorted. Half of the genes were amplified as a result of the loss of sleep and the activity of the other half was diminished or entirely shut down. The increased activity included genes linked to chronic inflammation, cellular stress, tumor growth, and factors that cause cardiovascular disease. Those turned down included genes that help maintain a stable metabolism and optimal immune responses.

SLEEP DISRUPTERS

Alcohol is a sedative—it knocks us out, but does not induce natural sleep.[24] Alcohol is one of the most powerful suppressors of REM sleep. Consuming even moderate amounts of alcohol in the afternoon or evening will deprive us of REM sleep and increase our chances of waking up throughout the night.

Caffeine blocks sleep and is one of the most common reasons why people cannot fall asleep.[25] It takes a long time for the body to process caffeine, so if we have a cup of coffee after dinner, at 7:30 p.m., 50 percent of that caffeine may still be active at 1:30 a.m.

LED lights disrupt our sleep. Artificial evening light tricks us into believing night is day and winds back our internal 24-hour clock by two to three hours, on average.[26] Using LED devices at night such as iPads, phones, and computers disrupts our natural sleep rhythms and hurts the quality and quantity of our sleep.[27]

SLEEP STRATEGIES [28]

1. Stick to a sleep schedule and go to bed and wake up at the same time each day.

2. Sleep in a dark, cool (65 to 67 degrees), gadget-free bedroom. Take a hot bath before bedtime, which will help you relax and drop your core body temperature.

3. Avoid alcohol, caffeine, and nicotine.

4. Avoid medications that interfere with sleep, if possible. Sleeping pills are a sedative and do not induce natural sleep.

5. Try to exercise no later than two to three hours before your bedtime.

6. Late at night, avoid large meals and beverages, which can interfere with sleep.

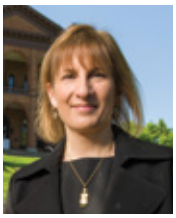
7. A nap as short as 20 minutes can offer a memory consolidation advantage, so long as it contains enough NREM sleep. Note that a nap does not allow an individual to forgo sufficient sleep night after night. Don't take naps after 3:00 p.m. because it makes it harder to fall asleep at night.

8. If you can't sleep, get up and leave your bedroom and do some relaxing activity until you feel sleepy. Then return to your bedroom. This will help reduce any association your brain makes between wakefulness and your bedroom.

9. Consider "sleep divorce." If your partner snores loudly or keeps you up at night, consider sleeping in a separate bedroom. If you are worried about decreased opportunities for intimacy, sleep enhances interest in intimacy as well as reproductive capabilities. ▲

Notes

[1] *https://www.scientificamerican.com/article/deep-sleep-gives-your-brain-a-deep-clean1/*
[2] Matthew Walker, *Why We Sleep* (2017) at 157.
[3] *Id.* at 164.
[4] *https://www.ted.com/talks/matt_walker_sleep_is_your_superpower*
[5] Walker, *Why We Sleep* at 164.
[6] *Id.* at 4.
[7] *Id.* at 109.
[8] *Id.* at 52.
[9] *Id.* at 53, 75.
[10] *Id.* at 74-75.
[11] *Id.* at 140.
[12] Id. at 138.
[13] *Id.* at 140.
[14] *Id.* at 46.
[15] *Id.* at 169.
[16] *https://www.businessinsider.com/daylight-saving-time-is-deadly-2018-3*
[17] Walker, *Why We Sleep,* at 166.
[18] *Id.* at 165.
[19] *Id.* at 182-83.
[20] *Id.* at 184.
[21] *Id.* at 169, 171.
[22] *Id.* at 3.
[23] *Id.* at 187-88.
[24] *Id.* at 272.
[25] *Id.* at 28.
[26] *Id.* at 267.
[27] *Id.* at 268-70.
[28] *Id.* at 341-42; *https://www.youtube.com/watch?v=CRKv_MG0bqM*



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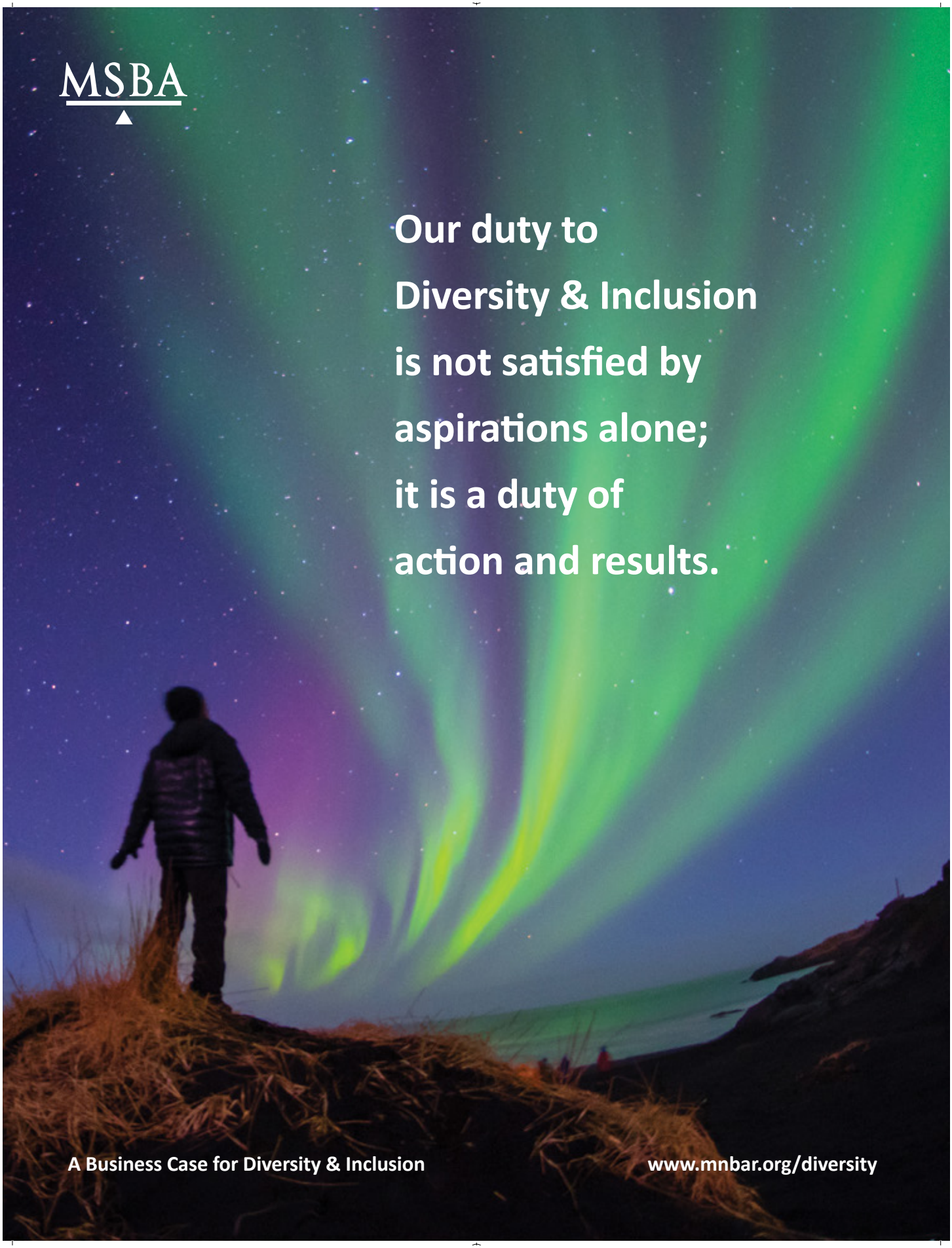
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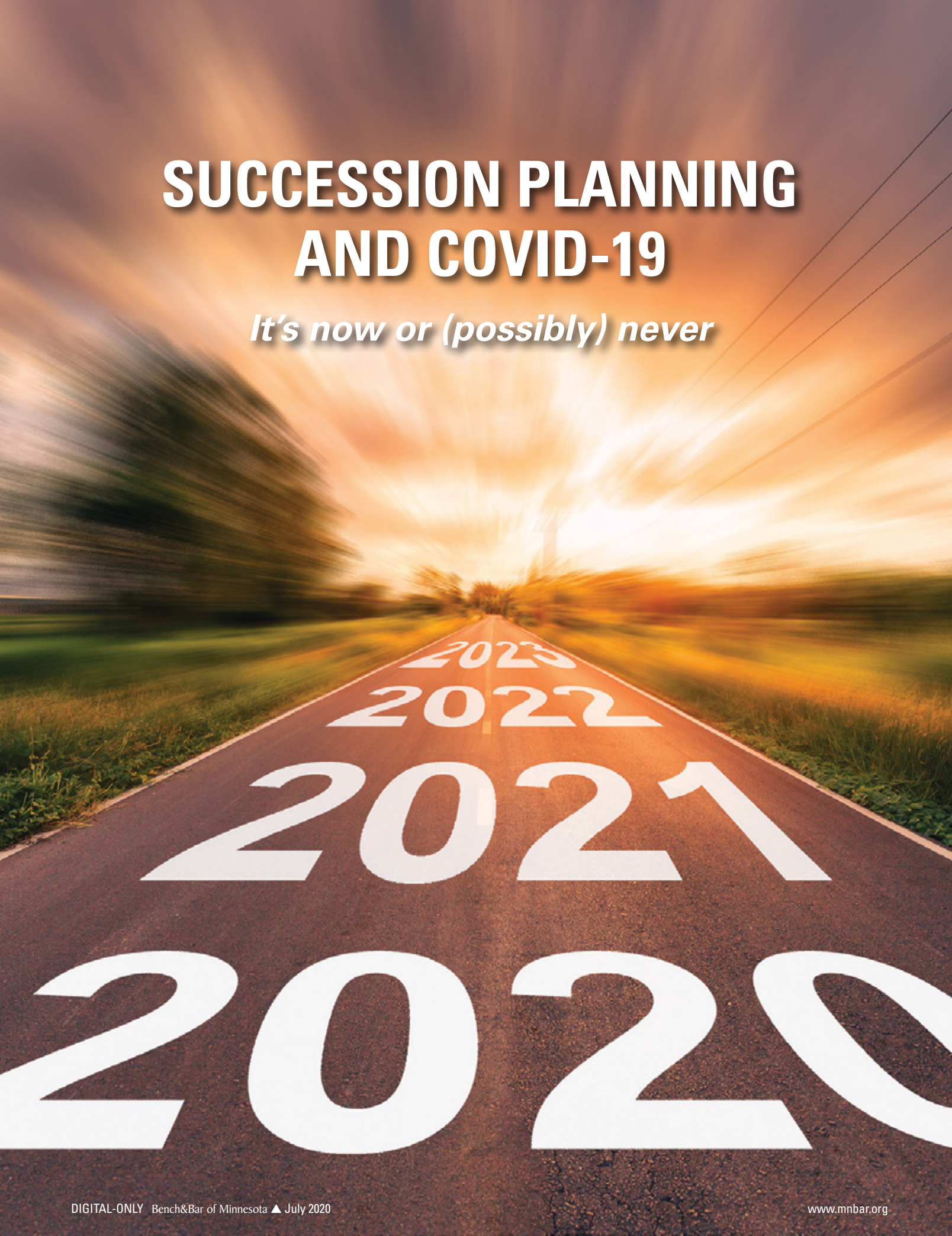
SUCCESSION PLANNING AND COVID-19

It's now or (possibly) never



By Roy S. Ginsburg

The covid-19 pandemic is a red alert for elderly solo and small law firm owners to put a succession plan in place if they haven't already done so. Unpalatable and difficult as it may be, it's time for practicing lawyers in their 60s or 70s to acknowledge their mortality and forge a plan.

Which mindset has held you back from making a plan?

Do any of these rationalizations sound familiar?

- You've been unable to save for a rainy day and your savings are woefully inadequate for retirement. All you have time to think about is paying the bills.
- You love what you do. All you have time to think about is closing the next deal or winning the next case.
- You hate what you do but you fear the unknown of retirement. You follow the mantra, "better the devil I know than the devil I don't." All you have time to think about is how you detest change.
- You don't see yourself as a strategic thinker and often say to yourself, "Everything has worked out fine so far, so why bother now?" All you have time to think about is how fortunate and lucky you've been.
- You believe you're indispensable to so many people: your family, clients, staff and community. All you have time to think about is how fortunate and lucky these people are to have you in their lives.
- Your identity is so wrapped up in being a lawyer you can't imagine going through life in any other way. All you have time to think about is how the law has been—and will always be—your only true love.

The real victims of your paralysis

If any of the foregoing rings true for you, you've fallen victim to succession planning paralysis. This paralysis doesn't only harm you, however. Let's examine who will suffer the consequences should you become seriously ill or die without a plan in place.

- **Your spouse or significant other.** If you're a solo, do you want your grieving spouse to make decisions about what to do with active cases and the future of your firm? Your spouse is likely not a lawyer. They aren't qualified to do this type of work under the best of circumstances; they certainly aren't under circumstances laden with emotion.

- **Lawyers and staff at your firm.** These will be the people on the front lines, along with your heirs, making the crucial decisions you should have already made. They may not be as burdened by emotion as your heirs, but they will likely be burdened by a lack of competence.

- **Clients.** Are you one of those lawyers who has been preaching for years how much you care about your clients? Well, how much care are you showing when you leave no guidance about who should handle their pending and future matters? By failing to plan, you're forcing your clients to fend for themselves and secure counsel—possibly counsel you've never liked or trusted.

- **Heirs.** You've already named the people in your will to receive the rewards of your successful career. If you're a solo, do you want the value of your firm determined in a "fire sale" atmosphere? If you're an owner who works with other attorneys and you don't have a buyout in place, your heirs will likely get nothing for the firm's value. Instead, the value will probably accrue to the firm's other lawyers—at no cost to them and no benefit to your loved ones.

I'm not going to lie to you; getting old sucks. But facing your departure from practice now and taking steps to protect what you've created is necessary. Failure to do so is a sign of selfishness, pure and simple.

Stop getting consumed by all the reasons you find to keep practicing law. Otherwise, there's no avoiding the train wreck ahead.

Take control now to decide the future of your practice

Planning your exit doesn't necessarily mean you'll be unable to practice law. Depending upon the plan you create, you can continue to practice. Will the circumstances be the same? Probably not. Will the benefits be the same? Not likely. You may lose flexibility, earn less, or even have to take orders from someone else. But at least you will have had the final say in how your practice lives on.

Are you planning to fail?

Winston Churchill once said, "He who fails to plan is planning to fail." Without a formal succession plan in place, a failure to plan during one's later years will inevitably bring anguish, distress, and despair to the people you've loved and cared about during your career. They deserve more from you. You deserve a better legacy. Stop planning to fail and get started on your law firm succession plan today. ▲

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NOT SO FAST TERMINATION

OF SALES REP AGREEMENTS UNDER MINNESOTA LAW

By V. John Ella

Minnesota has several statutes that protect small businesses from termination of certain contracts regardless of the actual terms of the agreements in question. Imagine a very large, New York-based company working with a sales representative firm based in Minnesota. The New York company decides to end its relationship with the representative to move sales operations in-house and save money on commissions. Its general counsel looks at the written agreement, which both parties signed, and concludes, based on the plain language of the contract, that it can be terminated with 30 days' notice by either side. The company sends a notice of termination letter and gets a response back from the Minnesota sales rep: "Not so fast." The company then goes through the five stages of denial, anger, bargaining, depression, and finally acceptance that the law is not on its side.

The concept that state laws can override commercial contracts may come as a surprise, but these laws have survived constitutional challenges. One treatise characterizes them as protecting small businesses that "depend on distributor agreements with large marketplace entities."[1] Thus, just as certain consumer protection laws can supersede consumer transactions, some laws trump contracts between large businesses and small businesses. The policy rationale behind these laws is that small ventures invest significant money, time, and effort to sell or distribute for national manufacturers and the loss of a single large account could be ruinous.[2] And, since large manufacturers are perceived to have disproportionate bargaining power, dealers and sales reps need legal protection that does not leave them vulnerable to arm's length negotiations.

For these reasons, Minnesota attorneys who represent distributors, dealers, sales representatives, manufacturers, large retailers, or other business clients that use sales intermediaries should be aware of these laws, including recent amendments.

Minnesota statutes protecting small businesses from termination of contract

The following are examples of Minnesota statutes that protect certain small businesses from termination of contract:

- The Minnesota Termination of Sales Representatives Act (MTSRA), Minn. Stat. §325E.37.
- The Minnesota Agricultural Equipment Dealership Act, Minn. Stat. Section 325E.061, *et seq.* (MAEDA).
- The Minnesota Heavy and Utility Equipment Manufacturers and Dealers Act, Minn. Stat. Section 325E.068, *et seq.* (MHUEMDA) The MAEDA and the MHUEMDA are sometimes lumped together as the "equipment statutes."[3]
- The Motor Vehicle Sale and Distribution Act, Minn. Stat. Chapter 80E.
- The Beer Dealers Act, Minn. Stat. §325B.

This balance of this article focuses on the MTSRA, but the concepts discussed herein may also be relevant to application of the other statutes listed above.

What is a "sales rep"? The Minnesota Termination of Sales Representative Act

The MTSRA (the Act) was passed in 1990 to provide legal protections for certain independent contractor sales representatives commonly known as "sales reps." Minnesota is home to many sales rep businesses that assist manufacturers who want to sell their products at one of the large Minnesota-based retail companies like Target and Best Buy. Sales reps serve an important role in helping companies navigate the complicated requirements of these large-store operations.

The purpose of the MTSRA "is to afford some protection to sales representatives by limiting the circumstances under which their agreements may be terminated."[4] The MTSRA defines a "sales representative" as "a person who contracts with a principal to solicit wholesale orders and who is compensated, in whole or in part, by commission."[5] Under the Act, "'[p]erson means a natural person, but also includes a partnership, corporation, and all other entities."[6] This means that both individuals and business entities can qualify as sales representatives under the Act. The MTSRA applies to sales representatives who reside in, maintain a principal place of business in, or whose geographic territory includes Minnesota. The term "sales representative" does not include a person who:

(1) is an employee of the principal;
(2) places orders or purchases for the person's own account for resale;
(3) holds the goods on a consignment basis for the principal's account for resale; or
(4) distributes, sells, or offers the goods, other than samples, to end users, not for resale.[7]

A door-to-door salesperson, therefore, is not considered a sales rep protected under the MTSRA because she would be selling to "end users." Salespeople who are employees are also not protected by the Act, nor are sub-agents.[8]

In 2017, the MTSRA was amended to address an ambiguity in its application to reps who sell components to manufacturers that use them to make products then sold to the general public. The amendment clarified that "wholesale orders" means the solicitation of orders for goods by persons in the distribution chain for ultimate sale at retail, and includes material, component, or part orders for use or incorporation into a product, and later resold.[9] As such, reps who sell components to manufacturers are now covered by the Act.

Limits on termination of sales representative agreements

The MTSRA limits the ability of a manufacturer to terminate a sales representative. The Act states that:

A manufacturer, wholesaler, assembler, or importer may not terminate a sales representative agreement unless the person has good cause and:

(1) that person has given written notice setting forth the reason(s) for the termination at least 90 days in advance of termination; and
(2) the recipient of the notice fails to correct the reasons stated for termination in the notice within 60 days of receipt of the notice.[10]

"Good cause" means a material breach of one or more provisions of a written sales representative agreement—or, in the absence of a written agreement, failure by the sales representative to substantially comply with the material and reasonable requirements imposed by the manufacturer. The Act therefore imposes a "good cause" standard in all sales rep contracts.

And if the manufacturer is unaware of the Act, it may miss the 90-day written notice requirement, thus delaying termination even if good cause exists. In extremely narrow circumstances, such as bankruptcy of the sales rep or conviction of a crime, the principal is entitled to terminate the sales representative agreement effective immediately.[11]

In a situation where the sales rep is performing its duties, but the manufacturer simply wishes to end the relationship, it cannot. But is the manufacturer locked into the contact forever? What if the contract has an expiration date? What if it does not? The Act also addresses non-renewal. It states that "no person may fail to renew a sales representative agreement unless the sales representative has been given written notice of the intention not to renew at least 90 days in advance of the expiration of the agreement."[12] Thus, if a one-year contract expires on December 31 and the manufacturer does not provide notice of non-renewal by October 1, the contract will be deemed to have been renewed for another one year. But if the manufacturer is aware of the requirement under the Act, it can terminate the relationship with 90 days' notice.

If the sales rep agreement does not have an expiration date, or if there is no written agreement, the MTRSA also has an answer: "*a sales representative agreement of indefinite duration shall be treated as if it were for a definite duration expiring 180 days after the giving of written notice of intention not to continue the agreement.*"[13] Because most sales representative-manufacturer relationships can be terminated for any or no reason with at least 180 days' notice, the damages for improper notice of termination logically amount to 180 days' worth of commissions, less the amount of notice that was provided. The 180-day provision is therefore often the fulcrum of discussion in litigation and settlement—especially those involving expired agreements or informal arrangements. As one Minnesota practitioner put it, claims by the rep under the MTSRA for unlawful termination of a sales rep contract generally have a "street value" of 180 days of commissions.[14]

Choice-of-law provisions no longer provide a defense

For years, a choice-of-law provision in a sales rep agreement stating that it would be governed by the law of a state other than Minnesota was an effective, and common, means for manufacturers to avoid claims under MTRSA. [15] In 2014, however, the Act was amended to prohibit certain terms from being enforceable in sales representative agreements. The amendment provides:

> (a) No manufacturer, wholesaler, assembler, or importer shall circumvent compliance with this section by including in a sales representative agreement a term or provision, whether express or implied, that includes or purports to include:
>
> (1) an application or choice of law of any other state; or
>
> (2) a waiver of any provision this section.
>
> (b) Any term or provision described in paragraph (a) is void and unenforceable.[16]

The new law became effective on August 1, 2014 and "applies to sales representative agreements entered into, renewed, or amended on or after that date."[17] A choice of law and forum selection defense, however, may still be applicable to agreements preceding that date.

Litigation and arbitration under the MTSRA

A sales rep with a claim under the MTSRA has the option of proceeding in arbitration with the American Arbitration Association (AAA) or bringing the claim in district court.[18] Legal remedies available under the Act include reinstatement,[19] actual damages, payment of commissions, and recovery of reasonable attorney's fees and costs to the prevailing sales representative. The fee-shifting provision of the Act means that early resolution of these cases often makes strategic sense for the manufacturer. Attorneys representing sales reps should also consider the potential applicability of Minn. Stat. §181.145, which provides penalties for non-payment of commissions owed to an independent contractor.[20]

Payment of six months of commissions may be a common basis for settlement discussions, but it is important to note that damages are not limited to 180 days. In *Wingert & Associates, Inc. v. Paramount Apparel International, Inc.*,[21] the 8th Circuit Court of Appeals affirmed a jury award to Wingert, the sales rep, for the manufacturer's violation of the Act in an amount exceeding $1 million. The court in that case noted that, "[s]ubdivision 5 of the Act provides for damages in addition to commission payments for the 180-day period under subdivision 4, and it does not limit the period for which such damages may be awarded."[22] The court rejected the manufacturer's argument that the Act did not permit damages beyond the 180-day notice period, holding that such an interpretation of the plain language would make the statutory subdivisions incompatible and therefore unreasonable.

Manufacturers seeking to resist application of the MTRSA have employed a number of interesting tactics, generally without success. In one situation the author was involved in, the manufacturer attempted to reduce the list of products allowed to be sold (i.e. from 1,000 to 1), as arguably contemplated by the terms of that specific agreement, without technically terminating the contract. The sales rep firm argued constructive termination and the matter settled.[23] In some cases, manufacturers have tried to sue first for declaratory judgment in a manufacturer-friendly forum in another state, but that strategy is not without its costs and risks.[24] In other circumstances the manufacturer may cry "bad faith" if it believes the sales rep knew of the Act at the time of negotiating the agreement but did not mention it. Although knowledge of the law is presumed by all parties, sales reps in Minnesota should strive to craft agreements that are consistent with the law rather than seek to hide the ball.

Constitutional challenges to the MTSRA

Minnesota courts have repeatedly affirmed the constitutionality of the MTSRA. Both the United States Constitution and the Minnesota Constitution contain provisions that prohibit the state from passing laws "impairing the obligation of contracts."[25] Both state and federal courts in Minnesota have found that the MTRSA does not unlawfully impair contracts. In *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*,[26] the manufacturer claimed that the Act created an unconstitutional impairment of its freedom of contract by imposing the "good cause" requirement for termination.[27] The Minnesota Court of Appeals, however, ruled that any impairment of the parties' right to contract was not substantial, since the Act merely increased the notice period already agreed upon by the parties in the terms of the sales representative agreement, and permitted the manufacturer to end the agreement without cause by way of the Act's non-renewal provisions.[28] The court also noted that, even if a substantial impairment was found to exist, the court could still have

upheld the law if the state demonstrated that there is a significant and legitimate public purpose for the law, but declined to address the issue of whether the Act *is* supported by a significant and legitimate public purpose.[29] A federal district judge in the District of Minnesota, however, has held that the retroactive application of the Act to pre-existing contracts *did* violate the Contracts Clause where the pre-existing contract was for an indefinite term, because the contract could not be renewed by mere continuation of a prior contractual relationship.[30]

The Act has survived challenges under other provisions of the Constitution as well. In *RIO/Bill Blass v. Bredeson Associates, Inc.*,[31] the Minnesota Court of Appeals held that the Act also does not violate the Commerce Clause.[32] This conclusion was reiterated in *Synergy Marketing, Inc. v. Home Products International*[33] (holding that the the Act, "does not necessarily exert extraterritorial reach and does not unnecessarily burden interstate commerce in violation of the Commerce Clause.").[34]

Conclusion

The protections of the MTSRA are powerful. Rep firms, manufacturers, and their counsel should be aware of its application and purpose when drafting and terminating sales rep agreements. Denial is not a defense. ▲

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Notes

[1] *Consumer Fraud and Deceptive Trade Practice Regulation in Minnesota*, 2nd ed., © 2009 Minnesota CLE, at p. 10-39.

[2] When a sales rep takes on a new manufacturer, it invests significant time on the front end to build up capabilities without initially earning a financial return. It often requires many months or even years to convince a major retailer to approve a new manufacturer or category product line. Sales reps typically work nine to twelve months out with the retailer on displays, planograms, and seasonal orders. Sales reps view the Act as allowing them to recoup enough from their investment to allow them time to land another account to build up.

[3] *Tri-State Bobcat, Inc. v. FINN Corp.*, 338 F.Supp.3d 971 (D. Minn. 2018).

[4] *Cooperman v. R.G. Barry Corp.*, No. 4-91-633, 1992 WL 699500, at *8 (D. Minn. 1/10/1992).

[5] Minn. Stat. §325E.37, subd. 1(d).

[6] Minn. Stat. §325E.37, subd. 1(c).

[7] Minn. Stat. §325E.37, subd. 1(d).

[8] *Dachtera v. Whitehouse*, 609 N.W.2d 248 (Minn. Ct. App. 2000)

[9] Minn. Stat. §325E.37, subd. 1(f) (2017)

[10] Minn. Stat. §325E.37, subd. 2(a)

[11] Minn. Stat. §325E.37, subd. 2(b).

[12] Minn. Stat. §325E.37, subd. 3

[13] Minn. Stat. §325E.37, subd. 3

[14] The best reading of the statute, and the best evidence, suggests that damages should be calculated from the actual sales during the 180-day period *following* improper termination. Sometimes, however, if a dispute is resolved before the 180 period is over, the parties may agree to look at historic commissions for the 180 days prior to termination. *E.g. Synergy Marketing, Inc. v. Home Products, International*, No 00-796, 2001 WL 1628691 (D. Minn. 2001), at n. 13. If sales for the products in question have a seasonal fluctuation, however, waiting for actual sales data may be necessary.

[15] *E.g. Rowlette & Associates v Calphalon Corporation*, No. C8-99-1667, 2000 WL 385502 (Minn. Ct. App. 2000). A sales rep that is not based in Minnesota and whose territory does not include Minnesota is not protected by the Act even if the agreement has a Minnesota choice of law provision. *N. Coast Tech. Sales, Inc. v. Pentair Tech. Prod., Inc.*, 12-CV-1272 PJS/LIB, 2013 WL 785941, at *2 (D. Minn. 3/4/2013).

[16] Minn. Stat. §325E.37, subd. 7.

[17] The effective date is found in the Session Law, 2014 Minn. Sess. Law Serv. Ch. 165 (S.F. 2108).

[18] Minn. Stat. §325E.37, Subd. 5. Arbitration is the sole remedy for a manufacturer who alleges a violation of the Act, but arbitration is optional for the rep unless the sales rep agreement itself contains an arbitration provision. In that case arbitration is mandatory. *A.J. Lights, LLC v. Synergy Design Group, Inc.*, 690 N.W.2d 567 (Minn. Ct. App. 2005).

[19] In *Apex Technology, Inc. v. Leviton Manufacturing, Inc.*, No. 17-2019 SRN/HB, 2017 WL 2731312 (D. Minn. 2017), the sales rep successfully moved for and obtained a temporary injunction pursuant to the MTSRA enjoining the manufacturer from terminating a sales rep agreement.

[20] At least one court has held that Section 181.145 only applies to commissions actually earned through the last day of the relationship, not to damages for the 180-day period following improper termination. *Synergy Marketing, Inc. v. Home Products, International* at *7. Often in these situations, however, there is also a dispute regarding commissions actually earned as of the date of termination, especially if there is a lag time in payment.

[21] 458 F.3d 740 (8th Cir. 2006).

[22] *Wingert* at 744.

[23] *See Rodney L. Cooperman Manufacturer's Representatives, Inc. v. R.G. Barry Corp.*, Civ. No. 4-91-633, 1992 U.S. Dist. LEXIS 12411, at *24–25 (D. Minn. 1/10/1992) for a discussion of constructive termination.

[24] In *Q Holding Company v. Repco, Inc.*, No. 5:17-CV-445, 2017 WL 2226730 (N. D. Ohio 2017), the manufacturer sued the sales rep in Ohio for fraudulent inducement and declaratory judgment regarding a non-compete provision of the sales rep agreement which contained an Ohio choice of law and choice of forum provision. The rep argued that MTRSA blocked the claim in the Northern District of Ohio but the court there disagreed and declined to dismiss the action.

[25] U.S. Const. art. 1, §10; Minn. Const. art. I, §11.

[26] 552 N.W.2d 254 (Minn. Ct. App. 1996).

[27] *Id.* at 264.

[28] *Id.* at 265.

[29] *Id.*

[30] *Angostura Int'l, Ltd. v. Melemed*, 25 F. Supp. 2d 1008, 1010–11 (D. Minn. 1998).

[31] No. C6-97-1386, 1998 Minn. App. LEXIS 82 (Minn. Ct. App. 1/27/1998).

[32] Id.

[33] Civ. No. 00-796, 2001 WL 1628691, at *4–5 (D. Minn. 9/6/2001).

[34] Id. at *4.

Uncertain Times, Unresolved Issues

2020 Minnesota legislative session recap

By Bryan Lake

"Normal is the Holy Grail and only those without it know its value."
– Sarah Crossan, One (2015)

The 2020 Minnesota legislative session was anything but normal. When it began on February 11, the DFL-controlled House and GOP-controlled Senate had clear priorities. Democrats wanted funding increases for childcare and early childhood education. Republicans wanted to cut taxes. Both sides supported a bonding bill, albeit of differing size and scope. And despite the partisan split between House and Senate, some type of grand compromise seemed likely because the state's coffers were bulging with a $1.5 billion budget surplus.

Then covid-19 arrived and everything changed.

With the onset of the pandemic, what had been a relatively routine legislative session suddenly became uniquely difficult. The coronavirus produced a flood of urgent new issues that required lawmakers' immediate attention even as the pandemic made it impossible to craft policies using the Legislature's traditional processes. To their credit, legislators worked in a bipartisan fashion to provide much-needed support and leadership during the early days of the coronavirus crisis. But partisan divisions re-emerged and the session ended with the House and Senate unable to complete deals on several major issues.

Coronavirus response

In early March, lawmakers responded to the coronavirus pandemic by transferring $21 million to the state's public health response contingency account. It seemed like a reasonable sum at the time, but just a week later, with the crisis rapidly escalating, legislators allocated $200 million to support health care

providers and then went into an extended recess because it was too risky to conduct business at the Capitol.

At that point, a new legislative process had to be invented on the fly. Legislators began holding private quasi-committee meetings via teleconference. To get around open meeting laws, the meetings were conducted with just one caucus at a time. Lawmakers then briefly returned to the Capitol to pass a $330 million covid-19 relief bill using creative seating arrangements and voting methods to maintain social distancing, a process they continued through the remainder of the session.

By April the Legislature was conducting normal committee meetings remotely via videoconference, which improved transparency and public participation. Still, it was a dramatic change from the normally bustling Capitol, and it slowed down an institution built on relationships and in-person communication.

Because conditions made policymaking more challenging, and because the health crisis created myriad new issues that required quick action, the Legislature's agenda was severely constricted. From mid-March on, lawmakers were focused almost exclusively on matters related to the pandemic. As a result, the MSBA's focus shifted as well.

The MSBA agenda

The coronavirus pandemic triggered an increased interest in estate planning—particularly among high-risk individuals—but health fears and social distancing requirements made it more difficult to properly execute wills. Anecdotal evidence suggested that some individuals (particularly those unrepresented by counsel) were using unconventional execution methods that have not been addressed by Minnesota courts, such as remote video witnessing. Consequently, concerns arose that many improperly executed wills might be invalidated.

In response, the MSBA's Probate & Trust Law Section proposed adopting a Uniform Probate Code provision that allows nonconforming wills to be probated if execution defects are shown by clear and convincing evidence to be harmless errors. This proposal was enacted as part of **Chapter 74** (see Article 1, Section 2). Attorney Lauren Barron, who worked on the proposal, said, "The harmless error rule will serve justice and allow courts to salvage some wills that might otherwise be invalidated by execution technicalities." The new law is effective for documents executed between March 13, 2020 and February 15, 2021.

Chapter 74 also included language requested by the state court system to suspend statutory deadlines governing district and appellate court proceedings (see Article 1, Section 16). The suspension period applies to deadlines that were triggered on or after March 13, and it expires 60 days after the peacetime emergency ends. The new law incorporated MSBA-suggested language providing that courts may continue to hold hearings, require appearances, or issue orders if "circumstances relevant to public safety, personal safety, or other emergency matters require action in a specific case."

Near the end of the session, the Legislature found time to return to a handful of pre-pandemic bills, including a pair of MSBA proposals. The first proposal sought to repeal statutory publication criteria for the court of appeals. The MSBA believes publication criteria would be more appropriately established by court rule, and the separation-of-powers argument received strong support at the Capitol. The proposal passed as part of an omnibus bill (**Chapter 82**, Section 3) and it applies to cases filed with the court of appeals on or after August 1, 2020.

The final MSBA proposal modernizes the Uniform Transfers to Minors Act (UTMA) with updates suggested by the Probate & Trust Law Section. Attorney Cameron Seybolt, who was involved in crafting the bill, said, "These welcome changes will benefit minors, custodians, and banks, and will eliminate unnecessary court proceedings." The language was included as part of an omnibus bill (**Chapter 86**, Article 2) and becomes effective August 1, 2020.

A number of legislators played key roles in getting the MSBA's agenda across the finish line, but special thanks are due to the chief authors of the original bills and the omnibus bills they were included in: Sen. Warren Limmer (R-Maple Grove) and lawyer-legislators Rep. John Lesch (DFL-St. Paul), Sen. Mark Johnson (R-East Grand Forks), Rep. Kelly Moller (DFL-Shoreview), and Sen. Scott Newman (R-Hutchinson).

Other action of interest to attorneys

- **Chapter 74,** Article 1, Section 17 extended until June 30 the deadline for contesting a child support cost-of-living increase, which is set at 4.7 percent this year. Courts will also have discretion to accept a motion filed by October 31 if the obligor cannot meet the June 30 deadline due to covid-19-related circumstances.
- **Chapter 76** prohibits minors from marrying. (*Effective 8/1/20.)*
- **Chapter 85** establishes new financial exploitation protections for older adults and vulnerable adults. (*Effective 8/1/20.)*
- **Chapter 86** contains guardianship and conservatorship modifications (Article 1), new procedures for approving and consenting to changes in common interest community governing documents (Article 3), and updates to wage garnishment provisions (Article 4). (*Effective 8/1/20.)*
- **Chapter 89,** Article 4, Section 33 makes veterinarians immune from liability for good faith reports of suspected animal cruelty. (*Effective 8/1/20.)*
- **Chapter 90** requires the Peace Officers Standards & Training Board to develop model eyewitness identification policies (and law enforcement agencies would have to adopt similar policies) that are consistent with recommendations from the National Academies of Science.
- **Chapter 92** allows local governments to accept certain documents electronically or by fax. (*Effective 5/17/20 and expires the earlier of 1/6/21 or 60 days after the peacetime public health emergency ends.)*
- **Chapter 96** responds to a recent Minnesota Supreme Court case by adopting federal mental state and causation standards for harassment. (*Effective 8/1/20.)*
- **Chapter 110** eliminates restrictions on conservation officers enforcing DWI laws and creates misdemeanor and gross misdemeanor offenses for operating drones above state prisons. (*Effective 8/1/20.)*

It promises to be a long, hot summer at the Capitol, with nothing resembling normalcy on the horizon.

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Long, hot summer

As the coronavirus swept across America it created a deep economic crisis, which in turn drastically altered the fiscal outlook for state governments, including here in Minnesota. A late February budget projection showed that the state had a $1.5 billion surplus for the current fiscal biennium. But by early May the surplus had vanished and was replaced by a $2.4 billion deficit—a stunning, nearly $4 billion reversal in just 10 weeks.

The revised budget forecast arrived with limited time remaining before the Legislature's constitutionally mandated May 18 adjournment deadline. Legislative leaders and Gov. Walz raced to negotiate deals on the budget deficit as well as other top-line issues, like a bonding bill and a tax bill, but they could not reach agreements before the final bell.

One of the reasons no global deal got done was that everyone anticipated a special session this summer. Indeed, when Gov. Walz extended his peacetime emergency order on June 12, it triggered a special session, and created an opportunity for lawmakers to revisit tax, bonding, budget, and coronavirus issues.

But sad news seems to pile on top of bad news this year, and in between the regular and special sessions, the George Floyd tragedy put a glaring spotlight on public safety and law enforcement issues that had been roiling for years, adding to the Legislature's list of urgent matters. Unfortunately, the weeklong special session ended without agreements on police reforms, bonding, distribution of federal coronavirus funds, and other prominent matters.

At the time this article was written, lawmakers had retreated to their districts to focus on campaigns that will decide control of the House and Senate, and the path forward on major legislative issues was unclear. Another special session remained possible. Or not. Deals could be achieved. Or not. The only certainty was that it promises to be a long, hot summer at the Capitol, with nothing resembling normalcy on the horizon. ▲

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.

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CRIMINAL LAW

JUDICIAL LAW

Juvenile: Court not required to adjudicate only least severe delinquency offense. Adjudication was withheld for C.A.R.'s gross misdemeanor drug offense in September 2018. In October 2018, he was charged with fourth-degree sale and third-degree aiding and abetting sale of a controlled substance. C.A.R. pleaded guilty to the amended charge of fifth-degree possession. Disposition was consolidated with a probation violation hearing regarding C.A.R.'s gross misdemeanor case. The district court withheld adjudication in the gross misdemeanor case, but adjudicated C.A.R. delinquent on the felony offense, and C.A.R. appealed.

The district court has broad discretion in determining whether to continue adjudication in a delinquency proceeding. While the court must take "the least drastic step necessary to restore law-abiding conduct," the "least-dramatic-step requirement does not apply to the question of whether to adjudicate delinquency." The court of appeals rejected C.A.R.'s argument that a district court abuses its discretion by adjudicating a felony delinquency where a gross misdemeanor delinquency is available to be adjudicated. Here, the record supports the district court's adjudication of delinquency in C.A.R.'s felony case. ***In re Welfare of C.A.R.***, 941 N.W.2d 420 (Minn. Ct. App. 2020), *review denied* (5/19/2020).

Procedure: By pleading guilty, appellant waived issue of whether Minn. Stat. §611.21(a) authorizes payment for out-of-court interpreter services for public defender-client communications. Appellant, who speaks little to no English, was appointed a public defender in his second-degree assault and attempted second-degree murder case. Appellant requested funding under Minn. Stat. §611.211(a) for interpreter services for out-of-court meetings with his attorney, because the public defender's office did not have funds remaining in its budget. The district court denied his requests. The court of appeals affirmed the district court and, shortly thereafter, appellant pleaded guilty to second-degree assault. A year later, he filed a petition for review.

The Supreme Court is unable to resolve the question of whether a defendant represented by a public defender may request funding under Minn. Stat. §611.21(a) for out-of-court interpreter services to facilitate attorney-client communication, due to appellant's guilty plea. A valid guilty plea waives all non-jurisdictional defects arising prior to entry of the plea. Appellant does not challenge his guilty plea and there is no evidence of a jurisdictional defect. Appellant's appeal is dismissed. ***State v. Cruz Montanez***, 940 N.W.2d 162 (Minn. 3/11/2020).

Search and seizure: Client files seized from attorney's office were held in good faith as potential evidence. Attorney K.M. represented M.W. and J.S. in a controlled substance investigation. K.M. allegedly brokered a deal with the police that would allow M.W. to avoid charges by paying a substantial amount of money to the police. M.W. gave that money to K.M. as a cashier's check made payable to K.M. After M.W. and J.S. retained new counsel, law enforcement launched an investigation into the alleged deal brokered by K.M. A search warrant authorized entry into K.M.'s home, where she also operated her law office. Police seized electronics containing 1,500 to 2,000 of K.M.'s current and former client files.

K.M. filed a motion requesting that the search warrant be declared invalid and that the seized property be returned. The district court ultimately determined that "the seized property [was] being held in good faith as potential evidence in a matter that [was] uncharged at [that] time." K.M. then filed a petition for a writ of prohibition, again requesting the return of the seized property, but the court of appeals denied the petition.

Both the district court and the court of appeals construed K.M.'s motion before the district court as a motion under Minn. Stat. §626.04, which creates a remedy for the return of property seized by law enforcement with or without a warrant. The Supreme Court finds it reasonable to construe K.M.'s motion in such a manner.

The Supreme Court also finds that the district court did not err in its application of section 626.04. Section 626.04(a)(1) provides that seized property should not be returned if, among other reasons, it "is being held in good faith as potential evidence in any matter, charged or uncharged." The district court's finding that K.M.'s client files fall within section 626.04(a)(1) is supported by the evidence, including sworn testimony and exhibits regarding the ongoing criminal investigation into K.M.'s activities.

The Court limits its decision to the narrow issue under section 626.04, and notes that the many constitutional and privilege issues raised by K.M., the intervenors, and amici can and should be fully litigated in the pending criminal case, or potential civil cases. The Supreme Court also emphasizes that copies of the seized client files should have been immediately returned to K.M. This issue is moot, however, because law enforcement did eventually provide copies to K.M. ***In re K.M.***, 940 N.W.2d 164 (Minn. 3/11/2020).

■ **Solicitation: Soliciting a prostitute in public requires proof that the act of solicitation actually occurred in a public location.** Respondents were charged with soliciting a prostitute as part of a human trafficking sting. Each of the four respondents texted a fictional prostitute, making arrangements to exchange money for sexual contact, and were arrested at the hotel to which the fictional prostitute directed them. The district court granted respondents' motions to dismiss for lack of probable cause, finding the record did not establish respondents were in a public place when they solicited prostitution.

The court of appeals interprets Minn. Stat. §609.324, subd. 2(2), which prohibits soliciting prostitution in a public place. This subdivision makes it a gross misdemeanor for a person, acting as a patron and while in a public place, to hire, offer to hire, or agree to hire another to engage in sexual penetration or sexual contact. "Public place" is defined in section 609.324, subd. 12, but the statute does not define "hires," "offers to hire," or "agrees to hire." The court looks to the dictionary definitions of "hire": "[t]o engage in labor or services of another for wages or other payment" or "[t]o grant the temporary use of services."

Here, all of respondents' solicitation activity—the hiring, offers to hire, or agreements to hire a prostitute—occurred online and via text messages, and their locations at the time of that activity is unknown. Because the state did not prove that respondents' solicitation activity occurred in a public place, the district court properly dismissed the charges for lack of probable cause. ***State v. Suspitsyn***, 941 N.W.2d 423 (Minn. Ct. App. 3/16/2020).

■ **Robbery: Force element of simple robbery is satisfied the moment a defendant uses force to overcome another's resistance.** A wine shop employee observed appellant and another woman put bottles in their handbags. The employee and appellant struggled both inside and outside the store, during which appellant tried to bite the employee, the employee's shirt and necklace were ripped, and the employee sprained his ankle. The employee was able to recover the bottles of wine from appellant's handbag and appellant ran away. Appellant was found guilty of simple robbery. The court of appeals sustained her conviction.

The Supreme Court addresses the question of what force is necessary for the offense of simple robbery under Minn. Stat. §609.24. Section 609.24 states: "Whoever… takes personal property from the person or in the presence of another and *uses* or threatens the imminent use of *force against any person to overcome the person's resistance* or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery…" The Court focuses on the italicized portion of section 609.24. The Court finds that "to overcome" functions as an adverb that describes the purpose for using force. Thus, an actor is required to use force for the purpose of overcoming another person's resistance to the taking or carrying away of property. Rejecting appellant's argument, the Court notes that the actor's use or threat of force need not successfully overcome another's resistance to satisfy the force requirement.

Ultimately, the Court finds sufficient evidence to sustain appellant's conviction, based on the testimonial evidence of appellant's struggle with the store employee. ***State v. Townsend***, 941 N.W.2d 108 (Minn. 3/25/2020).

■ **Double jeopardy: A defendant cannot be convicted and sentenced for possession of both a firearm and ammunition based on possession of a single loaded firearm.** During a marijuana sale, appellant put a gun to the victim's head and demanded his belongings. Afterward, he was apprehended inside a nearby market, where police found a gun hidden behind cans of soup. Appellant was convicted of first-degree aggravated robbery, possession of a firearm by an ineligible person, and possession of ammunition by an ineligible person. He was sentenced on all three counts.

The court of appeals holds that appellant could only be convicted and sentenced on either possession of a firearm by an ineligible person *or* possession of ammunition by an ineligible person, because his possession of a firearm and ammunition involved a single course of conduct.

As part of constitutional double jeopardy protections, Minnesota law prohibits convicting and sentencing a defendant for more than one crime if his conduct is part of the same behavioral incident. Here, appellant's possession of the loaded gun constitutes more than one offense, but the unlawful conduct was part of the same behavioral incident. However, Minn. Stat. §609.035, subd. 3, provides that "a prosecution for or conviction of a violation of section… 624.713, subdivision 1, clause (2) [possession of a firearm or ammunition by an ineligible person], is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct." The question is whether "any other crime" removes the bar against multiple convictions and sentences so appellant can be punished separately for possessing a firearm and possessing ammunition.

Looking to case law, the court of appeals concludes that "any other crime" in section 609.035, subd. 3, refers to a crime other than a violation of section 624.713, subd. 1(2). Thus, appellant cannot be convicted and punished for two unlawful possession offenses for possessing a single loaded firearm. The two unlawful possession counts were different means to commit the same crime. Thus, the possession offenses constituted a single course of conduct—possessing a single firearm loaded with ammunition—and is not subject to multiple convictions and sentences. Reversed and remanded. ***State v. Nowels***, 941 N.W.2d 430 (Minn. Ct. App. 3/30/2020).

Sex offender registration: Registration is required for out-of-state conviction if proving out-of-state offense would necessarily prove a violation of a Minnesota offense that requires registration. In 1992, appellant was convicted of sexual battery in California. While incarcerated in Minnesota in 2005, he refused to sign a form registering him as a predatory offender in Minnesota due to his California conviction. From 2005 to 2016, appellant registered intermittently. After his release from prison in 2007, he was intermittently homeless and required to check in at a local police station weekly, but he did not do so. He was charged with failing to register as a predatory offender and the district court found him guilty. The court of appeals found that California's sexual battery statute is sufficiently similar to Minnesota's fourth-degree criminal sexual conduct statute to trigger a lifetime registration requirement.

The state argues that appellant is required to register under section 243.166, subd. 6(c). This provision requires the state to prove appellant was convicted in another state of an offense that would be a violation of law described in section 243.166, subd. 1b(a), that appellant is required to register under the laws of California, that appellant failed to register in 2016, and that appellant was living in Minnesota at the time he failed to register. The state contends the California sexual battery conviction would be fourth-degree criminal sexual conduct using force or coercion in Minnesota, which is an offense listed in section 243.166, subd. 1b(a).

To determine whether an out-of-state conviction would be a violation of a Minnesota law under section 243.166, subd. 1b, the Supreme Court holds that an out-of-state conviction would be a violation of a Minnesota offense requiring registration if proving the elements of the out-of-state offense would necessarily prove a violation of that Minnesota law.

The Supreme Court then compares Minnesota's fourth-degree criminal sexual conduct using force or coercion with California's sexual battery offense. The two offenses share three elements: the prohibited touching of similarly defined "intimate parts," (2) the nonconsensual nature of the touching, and (3) the sexual purpose of the touching. However, the California offense also requires that the victim be unlawfully restrained. The Supreme Court finds that, under California's case law, a victim may be unlawfully restrained without the defendant using force or coercion to accomplish the sexu-

al contact. Thus, California's criminal sexual battery offense could be proven without proving a violation of Minnesota's fourth-degree criminal sexual conduct by force or coercion offense. As such, appellant's 1992 California conviction did not trigger Minnesota's registration requirements. ***State v. Martin***, 941 N.W.2d 119 (Minn. 4/1/2020).

■ **Deprivation of parenting rights: Intent required by Minn. Stat. 609.26, subd. 1(3), is objective standard focusing on defendant's actions, rather than defendant's subjective intent.** Respondent and D.E. share a young child. D.E. often did not receive his parenting time, so the district court ordered a parenting time schedule. Respondent failed to follow the order on numerous occasions. She was arrested for and convicted of violating section 609.26, subd. 1(3), which makes it a felony to intentionally "take[], obtain[], restrain[], or fail[] to return a minor child from or to the parent in violation of a court order, where the action manifests an intent substantially to deprive that parent of rights to parenting time or custody." On appeal, respondent argued the circumstances proven supported a reasonable inference that she did not intend to substantially deprive D.E. of his parental rights. The court of appeals agreed and reversed respondent's conviction, relying on text messages from respondent to D.E. expressing a willingness to reschedule parenting time and evidence that respondent did not "conceal" the child's whereabouts from D.E.

The Supreme Court agrees with the state that "manifests an intent substantially to deprive that parent of rights to parenting time or custody" creates an objective standard that does not look to whether the defendant subjectively intended to substantially deprive the other parent of his or her parenting rights. The quoted phrase refers to a condition in which the defendant's action shows or reveals an objective intent to substantially deprive a parent of parenting time. Section 609.26, subd. 1(3), therefore, does not require that the defendant subjectively intend to substantially deprive the parent of his or her parenting rights.

Even under an objective intent standard, respondent argues the evidence did not establish that her actions manifested an intent to *substantially* deprive D.E. of parenting time. "Substantially" is not defined in section 609.26, but, based on the common and accepted usage of "substantial," the Supreme Court holds that section 609.26, subd. 1(3), requires a deprivation of parental rights that is "considerable in importance, value, degree, amount or extent." The Court further concludes that both qualitative and quantitative factors (nature of days as well as number of days missed) must be examined to determine whether a defendant's actions show or reveal the necessary objective intent.

Looking at both the qualitative and quantitative factors here, the Court finds that the only reasonable inference that can be drawn from the circumstances proved is that respondent's actions show an intent to substantially deprive D.E. of his court-ordered parenting time. Reversed and remanded. ***State v. Culver***, 941 N.W.2d 134 (Minn. 4/1/2020).

■ **Sentencing: Appellant entitled to resentencing under amelioration doctrine.** Appellant argues he should be resentenced on a first-degree criminal sexual conduct charge, based on recent changes to the sentencing guidelines that would reduce his criminal history score. The district court sentenced appellant to 168 months, the presumptive sentence for a severity level A offense and a criminal history score of two.

When the offense was committed, the sentencing guidelines assigned a custody status point if the offender was discharged from probation but the offense was committed within the initial period of probation pronounced by the court. Appellant received a custody status point under this provision. The guidelines, specifically 2.B.2, were revised in 2019, becoming effective while appellant's appeal was pending, eliminating this provision. A custody status point is now assigned only if the offender was actually on probation at the time of the offense in question.

Appellant argues for the application of the amelioration doctrine, which requires that a law that mitigates punishment be applied to acts committed before the law's effective date, so long as no final judgment has been reached and the Legislature has not explicitly expressed contrary intent. The state argues that a policy statement adopted by the guidelines commission, but without express legislative approval, operates as a statement of intent by the Legislature.

In addition to proposed changes to the guidelines themselves, the guidelines commission submitted proposed policy modifications to guidelines 3.G.1 that would have the effect of making any future changes to the guidelines prospective only. The Legislature did not take any action on the proposed policy modifications, which the state argues is the equivalent of a statement evincing the Legislature's intent to abrogate the amelioration doctrine.

However, the court of appeals rejected this argument, noting that Minn. Stat. §244.09, subd. 11, does not provide for legislative adoption of modifications that do not amend the sentencing grid or result in the reduction of any sentence or in the early release of any inmate. Moreover, the court finds no statement by the Legislature establishing its intent to abrogate the amelioration doctrine with regard to the modification to guideline 2.B.2. The case is reversed and remanded for resentencing in accordance with the modified sentencing guidelines. ***State v. Robinette***, __ N.W.2d __, 2020 WL 1909348 (Minn. Ct. App. 4/2/2020).


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ENVIRONMENTAL LAW

JUDICIAL LAW

5th Circuit upholds EPA's position limiting the scope of Title V reviews. The U.S. Court of Appeals for the 5th Circuit issued a unanimous decision in *Environmental Integrity Project (EIP), et al. v. EPA*, in which the court deferred to the position recently adopted by the U.S. Environmental Protection Agency (EPA) that when reviewing Clean Air Act (CAA) Title V air emission permits, the agency is not required to reevaluate the substantive validity of underlying Title I preconstruction permits or states' determinations regarding whether a source was properly classified as "major" or "minor."

By way of brief background, Title I of the CAA, passed in 1977, establishes the new source review (NSR) program, which requires operators to obtain a preconstruction permit before building a new facility or modifying an old one. States issue NSR permits through EPA-approved state implementation plans (SIPs). Title I establishes significantly more stringent NSR permit requirements for sources classified as "major" (having the potential to emit 100 tons per year or more of any air pollutant) compared to those that are "minor."

Relevant to this case, EPA in 2002 adopted a rule allowing sources to obtain a 10-year plant-wide applicability limitation (PAL) permit. Under a PAL permit, a facility is not required to undergo major NSR for modifications to parts of the facility, so long as overall emissions from the whole facility do not exceed levels specified in the PAL permit.

Finally, Title V of the CAA, added by Congress in 1990, was designed to provide each source a single operating permit that consolidates all the various requirements from the source's other air permits, including NSR permits, PAL permits, and applicable state-only requirements, but generally does not add any new substantive requirements. Title V permits have been described as "a source-specific bible for Clean Air Act compliance." *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). Like NSR and PAL permits, Title V permits are issued by states, subject to review by EPA. The CAA requires Title V permits to include, among other things, emissions limits, monitoring requirements, and "such other conditions as are necessary to assure compliance *with applicable requirements of this chapter*, including the requirements of the applicable [SIP]." 42 U.S.C. §7661c(a).

EPA has defined the key term "applicable requirements" to mean the terms and conditions of the source's NSR permit(s) as well as "[a]ny standard or other requirement provided for in the applicable [SIP]…" 40 C.F.R. §70.2. EPA originally took the position that the underlying NSR permit defined the universe of "applicable requirements" that must be included in the Title V permit; so long as those terms and conditions were included in the Title V permit, EPA would not "second-guess the results of any State's NSR program." *EIP v. EPA* at 6 (citations omitted). Subsequently, EPA expanded its view, concluding for instance that §70.2 allowed EPA, when reviewing Title V permit reissuances, to evaluate whether the state had properly classified the source as a major or minor source and had properly included all necessary conditions arising under the CAA, EPA regulations, and the SIP. *Id.* at 6–7. In 2017, however, EPA reverted to its original, more narrow interpretation, issuing an administrative order indicating that in Title V reviews, neither EPA nor state permitting authorities must determine whether the source received the right kind of preconstruction permit. It is enough that the Title V permit reflects the result of the state preconstruction permitting decision. *Id.* at 7.

The 5th Circuit's *EIP v. EPA* decision was the first to test EPA's most recent interpretation of the scope of Title V reviews, and is thus likely to have nationwide ramifications, including in Minnesota, for facilities seeking reissuances of their Title V permits. The case involved ExxonMobil's construction of a new ethylene production facility at its Baytown, Texas Olefins plant. The Texas Commission on Environmental Quality (TCEQ) determined that only a minor new-source permit was required, because under the plant's PAL permit, the construction could occur without exceeding the PAL permit limits. When ExxonMobil subsequently applied to TCEQ to modify the plant's Title V to incorporate the new minor-source permit, EIP and other environmental groups petitioned EPA to object to the Title V permit, arguing, among other things, that the PAL permit was invalid. EPA denied the petition based upon its recent narrow interpretation of the scope of Title V review. The environmental groups appealed.

The 5th Circuit deferred to EPA's interpretation under the *Skidmore* standard of deference to agency interpretations of ambiguous statutory language, which provides that a court need not apply the

broader *Chevron* analytic framework if the agency's interpretation is persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). "We find persuasive EPA's position that Title V lacks a specific textual mandate requiring the agency to revisit the Title I adequacy of preconstruction permits," the court concluded. The court's own review of Title V found no "explicit requirement" to this effect, and no language guiding EPA on how it would conduct reviews of NSR permits during Title V reviews; accordingly, the court refused to read into the statute a matter it does not include, noting that "Congress does not hide elephants in mouseholes by altering the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *EIP v. EPA* at 13, 15. (citations omitted). Finally, the court emphasized that its decision does not affect the petitioners' ability to challenge the underlying NSR and PAL permits in other contexts. ***Environmental Integrity Project (EIP), et al. v. EPA***, No. 18-60384 (5th Cir. 5/29/2020).

LEGISLATIVE ACTION

Minnesota bans use of TCE in permitted facilities. On 5/16/2020, Minnesota Gov. Tim Walz signed into law SF 4073—known as the "White Bear Area Neighborhood Concerned Citizens Group Ban TCE Act"—which, subject to limited exceptions, bans the use of Trichloroethylene (TCE), beginning on 6/1/2022, in facilities required to have an air emissions permit from the Minnesota Pollution Control Agency (MPCA). The prohibition will be made enforceable in the air permits of affected facilities or through other enforceable agreements. The law provides a process for small businesses to seek up to one additional year to come into compliance and provides $250,000 in zero-interest loans to assist small businesses in transitioning away from TCE. The MPCA must grant exceptions to the prohibition in three specific situations so long as the Department of Health health-based value (HBV) and health risk limits (HRL) for TCE have been met: (1) use of trichloroethylene in closed systems so that no trichloroethylene is emitted from the facility; (2) holding trichloroethylene or products containing trichloroethylene for distribution to a third party; and (3) a hospital licensed under sections 144.50 to 144.56, or an academic medical facility. The law also allows MPCA to grant variance applications that meet the agency's variance requirements in Minn. R. 7000.700, and where compliance with the HBV and HRL are demonstrated, by facilities that use TCE solely for research and development purposes, or by facilities that process TCE for waste disposal.

TCE is a nonflammable, colorless liquid that has been primarily used as a solvent to remove grease from metal parts. It has also been a frequent ingredient in adhesives, paint removers, typewriter correction fluids, and spot removers. Exposure to TCE has been linked to various adverse health effects, ranging from headaches, dizziness, and sleepiness for minor exposure to heart and liver impacts and even death for more prolonged or greater exposure. See *www.atsdr.cdc.gov.*

ADMINISTRATIVE ACTION

EPA finalizes rule updating CWA 401 certification requirements. On 6/1/2020, the U.S. Environmental Protection Agency (EPA) published the final rule to update and clarify substantive and procedural requirements for water quality certification under Section 401 of the Clean Water Act (CWA). 40 C.F.R. §121. EPA reviewed and proposed changes to Section 401 in response to Executive Order 13868 (4/10/2019), "Promoting Energy Infrastructure and Economic Growth," which directed the agency to determine whether the section's regulations and guidance should be updated or clarified.

Section 401 prohibits a federal agency from issuing a permit or license to conduct activity that may result in any discharge into waters of the United States unless the state or authorized tribe in which the proposed discharge would occur certifies that the discharge complies with applicable state water quality requirements. Furthermore, Section 401 allows states to input conditions upon the certification of the project if it determines the project will have a negative impact on the water quality within the state.

The final rule updates and addresses many substantive and procedural requirements for Section 401 certification. Most notably, the final rule narrows the scope of Section 401 certification to be based on the potential for a project to result in actual point source discharge into waters of the United States, rather than the overall activity of which the discharge is a part. In addition, the final rule clarifies that the scope of Section 401 certification must comply with "water quality requirements," defined as "applicable provisions of section 301, 302, 303, 306, and 307 of the Clean Water Act and state or tribal regulatory requirements of point source discharges into waters of the United States." This means, for example, that a state's consideration of broader issues such as air emission or transportation effects as part of the section 401 review process would exceed the final rule's scope.

Another notable change clarifies procedures regarding the period in which a state or tribe must issue or waive certification. The final rule requires that states act on a certification request within a "reasonable period of time" and specifies that the action on a certification request must not take longer than one year. The rule does not allow for the "reasonable period of time" to be stopped or tolled and specifies that if the state does not take action during the reasonable period of time, the state's certification is waived. The final rule will become effective 60 days after the publication in the Federal Register. **Docket ID: EPA-HQ-OW-2019-0405.**

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FAMILY LAW

JUDICIAL LAW

Court considers a party's refusal to file a joint income tax return in equitably dividing marital property. At the end of their 20-year marriage, husband and wife tried issues relative to property division and spousal maintenance to the district court. Among the disputes was whether wife should contribute toward $10,384 in additional tax debt that husband incurred as a result of wife electing a married-separate filing status. Based on testimony from the parties' tax consultant, the district court deducted $10,384 from the property awarded to husband (effectively requiring wife to reimburse husband for half that amount). Wife appealed on several grounds, arguing *inter alia* the district court abused its discretion with respect to this tax liability.

While reversing the district court in several respects, the Minnesota Court of Appeals affirmed the treatment of husband's additional tax liability. Citing wife's fiduciary obligations under Minn. Stat. §518.58, subd. 1a, the appellate court reasoned the court was authorized to compensate husband to the extent wife's filing status amounted to dissipation without his consent. The court of appeals further acknowledged that while federal law authorized wife to file

separately, prior unpublished opinions permitted district courts to account for a party's decision to file separately as part of the property division. *See Toso v. Toso*, No. A12-1033 (Minn. Ct. App. 6/17/2013) (assigning a tax liability to a party who refused to file jointly despite being ordered to cooperate with a joint return); *Tiedke v. Tiedke*, No. A18-1492 (Minn. Ct. App. 8/5/2019) (recognizing that assignment of a tax liability may be appropriate, with proper proof).

Notably, the court of appeals reversed the district court on several other grounds, including improperly calculating husband's net income and expenses, attributing income to wife without support in the record, and double-counting homeowner's insurance proceeds that were both awarded as a separate asset and needed to return the home to its appraised value. ***In re the Marriage of Aufenthie v. Aufenthie***, No. A19-0883 (Minn. Ct. App. 6/8/2020).

■ **Court may refuse to grant an order for protection where the respondent's actions are deemed "reasonable self-defense."** Wife sought an order for protection following an incident in the family home. After an argument about the end of their marriage escalated, husband began recording the argument on his phone. Wife tried to take husband's phone, leading husband to "slap" wife's hand and wife to "punch" husband in the leg. The argument intensified and, with the parties' daughter looking on, wife "attacked husband unprovoked" leading husband to grab wife, take her to the kitchen, and bring her to the kitchen floor where he held her for 20 seconds. Wife immediately reported the matter to law enforcement and husband was arrested. After granting an *ex parte* emergency order, the district court received testimony from eight witnesses and ultimately dismissed the order for protection petition following a hearing. Crediting husband's testimony and discounting wife's, the district court reasoned that "if all that [it] heard testimony about was [husband] doing those actions that would constitute assault." But the court declined to only "consider evidence just in a vacuum," finding that husband's actions were reasonable self-defense. Wife appealed, arguing the district court misapplied the definition of "domestic abuse" in Minn. Stat. §518B.01.

The court of appeals affirmed, relying heavily on the Minnesota Supreme Court's 2018 decision in *Thompson v. Schrimsher*. 906 N.W.2d 495 (Minn. 2018). Consistent with *Thompson*, the

appellate court acknowledged that considering an order for protection petition requires two steps. First, the district court must determine whether domestic abuse occurred as defined by statute. Second, the district court is then permitted to examine "all relevant circumstances" to determine whether an order for protection should issue. Here, the court of appeals held that the district court did precisely that, acknowledging that husband's actions did amount to domestic abuse, but declining to issue an order based on the totality of the circumstances, including what it believed to be husband's "reasonable self-defense." The appellate court also noted that the absence of a self-defense exception in the Domestic Abuse Act did not preclude the district court from placing husband's actions in context. ***In re the Matter of Sobiech v. Sobiech***, No. A19-1928 (Minn. Ct. App. 6/8/2020).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Diversity jurisdiction; amount in controversy.** Where the plaintiffs brought three defamation claims, each of which sought "in excess of $20,000" plus unspecified punitive damages, and the defendants removed the action, asserting that "a reasonable fact finder might conclude the damages are greater than the requisite amount," the 8th Circuit ordered supplemental briefing on the amount in controversy question and ultimately concluded that the amount in controversy requirement was met based on a "reasonable reading of the value of the rights being litigated." ***Turntine v. Peterson***, 959 F.3d 873 (8th Cir. 2020).

■ **Punitive damages; due process.** Where a jury awarded the plaintiff just over $20,000 in compensatory and incidental damages and also awarded $5.8 million in punitive damages, the district court reduced the punitive damage award to $500,000 on due process grounds, and both sides appealed the punitive damages ruling, the 8th Circuit affirmed the district court's ruling, finding the original $5.8 million award to be "grossly excessive," while finding that $500,000 was reasonable. ***Adeli v. Silverstar Automotive, Inc.***, ___ F.3d ___ (8th Cir. 2020).

■ **First-filed; stay; intervention; Fed. R. Civ. P. 24(a); adequacy of representation.** Where two nearly identical putative class actions were filed, a settlement was reached in the second-filed action, the first-filed plaintiff's motion to intervene in or stay the second-filed action was denied, and the first-filed plaintiff appealed, the 8th Circuit held that the first-filed plaintiff did not meet the requirements for intervention because his interests were adequately represented, and that it lacked pendent appellate jurisdiction to consider his appeal of the denial of the motion to stay. ***Swinton v. SquareTrade, Inc.***, ___ F.3d ___ (8th Cir. 2020).

■ **Removal; remand; multiple cases.** Where the defendants removed an action brought by a Minnesota corporation on the basis of diversity jurisdiction and the plaintiff moved to remand, Judge Wright found that one defendant had not met his burden to rebut the presumption that he remained domiciled in Minnesota as of the date the action was commenced. Accordingly, plaintiff's motion to remand was granted. ***Blattner Energy, Inc. v. Jones***, 2020 WL 2848181 (D. Minn. 6/2/2020).

Granting the plaintiff's motion to remand, Judge Nelson noted in a footnote that a Minnesota action that has been commenced but not yet filed can be removed. However, the opinion makes no mention of 28 U.S.C. §1446(d)'s requirement that a copy of the notice of removal be filed with the clerk of the state court. ***TallBear v. Soldi Inc.***, 2020 WL 2490047 (D. Minn. 5/14/2020).

Judge Tostrud held that defendants' attempt at removal was improper when they had *received* a copy of the complaint but had not yet been *served* with the complaint, meaning that the action had not yet been "commenced" as required by 28 U.S.C. §1441(a). Accordingly, the action was remanded. ***Metivier v. Deutsche Bank Trust Co. Ams.***, 2020 WL 2215725 (D. Minn. 5/7/2020).

■ **Fed. R. Civ. P. 15; Minn. Stat. §549.191; punitive damages.** Magistrate Judge Wright joined the "large majority" in the District of Minnesota in finding that motions to amend to add a claim for punitive damages are governed by Fed. R. Civ. P. 15(a) rather than Minn. Stat. §549.191. ***Hamilton v. FranChoice, Inc.***, 2020 WL 2191219 (D. Minn. 5/6/2020).

■ **First-filed rule; compelling circumstances exception.** Chief Judge Tunheim found "red flags" that warranted denial of the first-filed plaintiff's motion to dismiss the second filed case in the District of Minnesota, where the first-filed plaintiff was "on notice" that an action was about to be filed by the first-filed defendant, the first-filed action consisted primarily of declaratory judgment claims, and the first-filed plaintiff had acted in "bad faith" in seeking more time to respond to a letter and then filing his lawsuit. ***Brand Advantage Group, Inc. v. Henshaw***, 2020 WL 1891772 (D. Minn. 4/16/2020).

■ **Fed. R. Civ. P. 41(a)(2); motion for voluntary dismissal denied.** After Magistrate Judge Schultz recommended the dismissal of certain defendants and claims but also recommended that the plaintiff be permitted 30 days to replead those claims, and the plaintiff responded by filing a motion for voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(2), Judge Davis denied the Rule 41(a)(2) motion, finding that the matter had been pending for more than a year and that granting the motion would "allow Plaintiff to avoid the consequences of the Court's ruling on Defendant's motion to dismiss." ***C.H. Robinson Worldwide, Inc. v. Traffic Tech, Inc.***, 2020 WL 2490030 (D. Minn. 5/14/2020).

■ **Sanctions; multiple cases.** Magistrate Judge Schultz ordered plaintiff's counsel to pay more than $14,000 in attorney's fees and expenses for "contravening court orders" and her "lack of candor" to the court. ***Rolandson v. Ethicon, Inc.***, 2020 WL 2086279 (D. Minn. 4/30/2020).

While declining to impose "dispositive sanctions," Magistrate Judge Menendez ordered defendants and their counsel to pay more than $66,000 in attorney's fees plus additional attorney's fees in an amount to be determined for their violation of multiple discovery orders and counsel's "vexatious conduct." ***Mgmt. Registry, Inc. v. A.W. Cos.***, 2020 WL 1910589 (D. Minn. 4/20/2020).

Adopting a report and recommendation by Magistrate Judge Menendez, Chief Judge Tunheim cited both Fed. R. Civ. P. 37(b)(2) and inherent powers in ordering plaintiff and/or his counsel to pay more than $19,500 in attorney's fees and costs for their failure to comply with a discovery order and their "abuse of the discovery process." ***Darmer v. State Farm Fire & Cas. Co.***, 2020 WL 1550725 (D. Minn. 4/1/2020).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Courts may review factual challenges to a CAT order.** On 6/1/2020, the United States Supreme Court reversed the 11th Circuit Court of Appeals when it found that while 8 U.S.C. §§1252(a)(2)(C) and (D) preclude judicial review of a noncitizen's factual challenges to a "final order of removal," they do not preclude judicial review of factual challenges to an order denying relief under the Convention Against Torture (CAT). The Court found that a CAT order (a form of relief protecting noncitizens from removal to a country where they would likely face torture) is distinct from a "final order of removal" that concludes a foreign national is deportable or orders his/her deportation under 8 U.S.C. §1101(a)(47)(A). "An order granting CAT relief means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country." Notwithstanding this finding, the Court noted that judicial review of factual challenges to CAT orders are highly deferential, subject to the substantial evidence standard. That is, findings of fact are conclusive unless a reasonable adjudicator is compelled to conclude otherwise. The Court deferred a decision on the applicability of its holding to statutory withholding of removal under 8 U.S.C. §1231(b)(3)(A) to another day (i.e., preventing the removal of a noncitizen to a country where the noncitizen's "life or freedom would be threatened" because of the noncitizen's "race, religion, nationality, membership in a particular social group, or political opinion."). ***Nasrallah v. Barr***, 590 U.S. ____, No. 18-1432, *slip op.* at 8, 13 (2020). *https://www.supremecourt.gov/opinions/19pdf/18-1432_e2pg.pdf*

■ **Lack of evidence supporting a claim of persecution based on opposition to joining gang.** On 5/28/2020, the 8th Circuit Court of Appeals found the Board of Immigration Appeals' denial of asylum to the Salvadoran petitioner, claiming persecution on account of his opposition to becoming a member of the Mara 18 gang, was supported by substantial evidence in the record. "Although the Mara 18 gang may have some political motivations, the record here supports a finding that Prieto-Pineda was harassed for refusing to provide rides, not for any political opposition to the gang." ***Prieto-Pineda v. Barr***, No. 19-1347, *slip op.* (8th Cir. 5/28/2020). *https://ecf.ca8.uscourts.gov/opndir/20/05/191347P.pdf*

■ **No persecution on account of social group membership composed of family members of son kidnapped and murdered by drug cartel.** On 4/23/2020, the 8th Circuit Court of Appeals held substantial evidence supported the Board of Immigration Appeals' determination that the Mexican petitioner did not suffer past persecution or have a well-founded fear of future persecution on account of membership in a social group consisting of "immediate family members" of her son. "In any case, Meza failed to present any evidence to suggest that this alleged persecution of [her son] Alberto was on account of his family relationship, 'as opposed to the fact that, as [a business owner], [he was an] obvious target[] for extortionate demands.' *Cambara-Cambara v. Lynch*, 837 F.3d 822, 826 (8th Cir. 2016)." ***Meza Cano v. Barr***, No. 19-1506, *slip op.* (8th Cir. 4/23/2020). *https://ecf.ca8.uscourts.gov/opndir/20/04/191506P.pdf*

■ **No persecution based on membership in the social group, "individuals with schizophrenia exhibiting erratic behavior."** On 3/9/2020, the 8th Circuit Court of Appeals upheld the Board of Immigration Appeals' denial of the petitioner's application for asylum based on his claim that he was a member of the particular social group, "individuals with schizophrenia who exhibit erratic behavior." The court concluded "the evidence that the Mexican government persecutes certain mentally-ill citizens on account of group membership is not so substantial as to compel remand." ***Perez-Rodriguez v. Barr***, No. 18-3269, *slip op.* (8th Cir. 3/9/2020). *https://ecf.ca8.uscourts.gov/opndir/20/03/183269P.pdf*

ADMINISTRATIVE ACTION

■ **President Trump suspends entry of certain Chinese national students.** On 5/29/2020, President Trump signed a proclamation suspending entry of certain Chinese nationals seeking entry into the United States on a J or F visa to study or carry out research in the United States (with the exception of those students seeking to pursue undergraduate study) who either receive funding from or are currently employed by, study at, or conduct research at or on behalf of, or have been employed by, studied at, or conducted research at or on behalf of, an entity in the People's Republic of China (PRC) that implements or supports the PRC's "military-civil fusion strategy." The suspension does not apply to the following:

any lawful permanent resident of the United States;

(ii) any alien who is the spouse of a United States citizen or lawful permanent resident;

(iii) any alien who is a member of the United States Armed Forces and any alien who is a spouse or child of a member of the United States Armed Forces;

(iv) any alien whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement or who would otherwise be allowed entry into the United States pursuant to United States obligations under applicable international agreements;

(v) any alien who is studying or conducting research in a field involving information that would not contribute to the PRC's military-civil fusion strategy, as determined by the Secretary of State and the Secretary of Homeland Security, in consultation with the appropriate executive departments and agencies (agencies);

(vi) any alien whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee; or

(vii) any alien whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

The proclamation went into effect on 6/1/2020 at 12:00pm (EDT). **85 Fed. Reg., 34,353-55** (6/4/2020). *https://www.govinfo.gov/content/pkg/FR-2020-06-04/pdf/2020-12217.pdf*

■ **Liberian Refugee Immigration Fairness (LRIF): An update.** On 4/20/2020, U.S. Citizenship and Immigration Services (USCIS) announced additional instructions regarding eligibility requirements for applicants (and their family members), grounds of inadmissibility, and the filing and adjudication of permanent residence applications—all based on the Liberian Refugee Immigration Fairness provision of the National Defense Authorization Act for Fiscal Year 2020 that was signed into existence on 12/20/2019. The application period runs to 12/20/2020. Further information about LRIF and the process may be found at the webpage set up by USCIS. *https://www.uscis.gov/green-card/other-ways-get-green-card/liberian-refugee-immigration-fairness*

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REAL PROPERTY

JUDICIAL LAW

■ **Tax court affirmed.** Medline, the owner of a 300,000 square foot warehouse, appealed a tax court decision that reduced $15 million valuations for two years by $274,000 and $315,000. The tax court rejected the county's appraiser's opinion concerning the highest and best use of the property, but then relied on other portions of his analysis. The Supreme Court held that doing so was not erroneous given that the usage opinion did not fatally damage his other opinions and the court did not overly rely on any of his opinions. Of the comparable sales relied on by the parties' appraisers, the tax court chose four comparable sales and did not rely on the property owner's primary comparable, a sale that occurred after the valuation date. The Supreme Court held that the tax court's decision not to rely on one sale, particularly when it explained that all post-valuation-date sales were entitled to less weight and did not demonstrate that it improperly refused to consider that sale. The tax court also refused to use the property owner's capitalization rate and instead applied two different rates closer to that offered by the county. The Supreme Court held that the capitalization rate analysis was not erroneous because it was within the range used by the parties' competing experts. The Supreme Court also rejected other arguments by the property owner, holding that the tax court's decisions were within its discretion. ***Medline Indus., Inc. v. County of Hennepin***, 941 N.W.2d 127 (Minn. 2020) (*https://mn.gov/law-library-stat/archive/supct/2020/OPA191420-040120.pdf*).

■ **County's decision denying conditional use permit application affirmed.** An owner of a five-acre parcel on Long Lake in Hubbard County sought a conditional use permit to build and operate a 14-site RV park. After receiving materials from the applicant, a county staff report listing prior environmental violations on the property, a report and testimony from the DNR with recommendations to avoid lake-bottom damages and aquaculture damage, and public testimony in opposition to the application, the County Planning Commission voted 3-2 to recommend approval of the CUP, with 22 conditions. The County Board of Commissioners, however, voted 3-2 to deny the application. On appeal, the landowner asserted that the board erred in denying the application on the basis of its alleged lack of compatibility with adjacent land uses when such a standard was not stated within the shoreland management ordinance and that the use was not incompatible given the planned placement of the RVs and a boundary fence. The owner also alleged that the county erred in finding that the lake was not suited to the proposed use and was unable to accommodate it, and that the decision unlawfully interfered with his riparian rights.

The court of appeals affirmed, holding that the county was able to consider adjacent uses of land even though the ordinance did not include such a standard and that sufficient evidence supported the county's finding of incompatible land uses. Further, it held that adequate evidence supported the county's findings concerning the likely impacts of the proposed use on the lake. Finally, it held that the county's decision to deny the application despite the owner's riparian rights was not arbitrary and capricious because the ordinance did not prohibit the building of a dock on the property and the denial of the application was based on reasonable concerns relating to the likely impacts of the proposed use on the lake. ***Matter of Bolton***, No. A19-1208, 2020 WL 211073 (Minn. App. 5/4/2020).

■ **Anti-transfer provision in contract for deed triggered by TODD.** Husband and wife Krumries sold their family farm on a contract for deed to their then-son-in law Jeffrey Woodard. The contract contained an anti-transfer provision. Twenty-four years later, shortly before he died, Jeffrey signed a transfer-on-death deed transferring his interest in the contract to his son, Skyler. Krumries served a notice of cancellation. Skyler brought suit, seeking to enjoin the cancellation of the contract for deed. Skyler lost on summary judgment. On appeal, he argued that the TODD did not violate the anti-transfer clause, that it was not a material breach, that the Krumries did not follow the statutory procedure for cancellation, and that equity supported his claims. In affirming the district court, the court of appeals held that a TODD is a transfer of an interest in the property, and that the contract for deed was breached. It held further that the breach was material, noting that the anti-transfer provision was one of only two additions to a standard contract for deed form. The court found that the Krumries had complied with the statutory cancellation procedure, even though the default could not be cured, and that the equities did not need to be considered when a written contract controls. ***Woodward v. Krumrie***, A19-

0800, 2020 WL 996746 (Minn. App., 3/2/2020) (unpublished).

■ **Drainage appeal dismissed due to service attempted by a party.** Landowners (including Timothy Gieseke) sought to appeal an order by the Nicollet County Drainage Authority regarding improvements to a drainage ditch. Minn. Stat. §103E.091 requires service on the county auditor. Timothy Gieseke personally handed the notice of appeal to an administrative support employee, who then handed the notice to her supervisor, J.K, who acts as the county auditor. J.K. signed a document captioned "Admission of Service." The county later moved to dismiss the appeal for insufficient service of process, which was granted. The court of appeals affirmed. It noted that the rules of civil procedure apply to a drainage action, and that Rule 4.02 does not allow a party to serve a summons or other process. It held that the admission of service document merely reflected that J.K. had received the notice of appeal, and not that she waived the requirement that a non-party must serve such a notice. As Timothy Gieseke was a party to the drainage appeal, the court held that his attempt at personal service was not effective. ***Gieseke v. Nicollet County Drainage Authority***, A19-0955, 2020 WL 1129962 (Minn. App., 3/9/2020).

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TAX LAW

JUDICIAL LAW

■ **Scrutiny of conservation easements continues; regulation upheld.** According to the Nature Conservancy, "conservation easements are one of the most powerful, effective tools available for the permanent conservation of private lands in the United States." Conservation easements permit landowners to retain most rights of private ownership but limit certain types of use or development on the land. When the limitations on the use of the land create a public benefit—for example, if the easement protects natural habitats or preserves land for public recreational or educational use—the private landowner might be entitled to a tax deduction under Section 170(f)(3)(B)(iii). The nonprofit Land Trust Alliance estimates that more than 50 million acres of land in the United States are protected by some type of land trust—and over 1 million of those protected acres are in Minnesota. (Land Trust Alliance, 2015 National Land Trust Census Report.)

Despite the popularity of these easements, some taxpayers took advantage of the tax benefit by grossly overestimating the value of the conservation easement. The Service took notice. In recent years, the Service has stepped up scrutiny of conservation easements and has added abusive easements to its list of "Recognized Abusive and Listed Transactions.' *E.g.*, Notice 2017-10, Listing Notice—Syndicated Conservation Easement Transactions; *see also* I.R.S. Notice 2017-10, 2017-4 I.R.B. 544; Recognized Abusive and Listed Transactions, Internal Revenue Serv., *https://www.irs.gov/businesses/corporations/listed-transactions* (last updated 1/31/2020).

One such conservation easement dispute drew two opinions: in the first opinion, Judge Holmes addressed the dispute without passing on the validity of a disputed regulation. ***Oakbrook Land Holdings, LLC, William Duane Horton, Tax Matter Partner v. Comm'r***, TCM (RIA) 2020-054 (T.C. 5/12/2020). Holmes began by observing that "[i]n recent years the Commissioner has attacked a popular form of charitable contribution—the donation of conservation easements." In addition to pursuing the gross overvaluations, Holmes explained that the Commissioner "has… launched three sorties—all predicated on the requirement that such easements be "perpetual"—that he hopes will cause more widespread casualties: an attack on the power of donor and donee to change the terms of the easement after its contribution; an attack on the retained right of the donor to add improvements to the property described in the easement; and an attack on a clause commonly found in easements… that divides between donor and donee future hypothetical proceeds from a future hypothetical extinguishment of the easement in a way that he claims violates one of his regulations."

In this opinion in the *Oakbrook* case, Holmes wrestles with the last of these sorties by parsing the language of Regulation 1.170A-14(g)(6)(ii), Tennessee property law, and the language of the deed granting the easement. Ultimately, the court denied "any deduction for Oakbrook's donation of the conservation easement because the provisions in the Deed violated the extinguishment-proceeds clause in the regulation." The court did not, however, sustain the

penalty that the commissioner assessed, reasoning that the taxpayer's position was reasonable and the taxpayer in good faith relied "on what he saw as the safety of form language that echoed the PLR."

The legitimacy of Reg. 1.170A-14(g)(6) is addressed in the related opinion, ***Oakbrook Land Holdings, LLC v. Comm'r***, 154 T.C. No. 10, 2020 WL 2395992 (5/12/2020). The majority upholds the regulation as properly promulgated and valid under the Administrative Procedure Act and further holds that the construction of Code Section 170(h)(5) as set forth in sec. 1.170A-14(g)(6), Income Tax Regs., is valid under *Chevron*. Judge Toro concurred in the result but would not have reached the question of the regulation's validity because "applying the text of the statute to the terms of the easement before us suffices to resolve the dispute before the Court." Judge Holmes, who wrote for the court in the other *Oakbrook* opinion, dissents here. Judge Holmes laments: "I fear that our efforts to clear cut and brush hog our way out of the volume of conservation-easement cases we have to deal with has left us a field far stumpier than when we began." *See also Woodland Prop. Holdings, LLC v. Comm'r*, T.C.M. (RIA) 2020-055 (T.C. 2020) (holding that the conservation purpose underlying the easement at issue was not "protected in perpetuity" as required by section 170(h)(5)(A) and granting the commissioner's motion for partial summary judgment).

For an example of a conservation easement case focused on valuation dispute, see *Johnson v. Commissioner,* T.C.M. (RIA) 2020-079 (T.C. 2020), in which the court reduced the value of a conservation easement from a claimed $610,000 to $372,919.

■ **Commissioner intentionally violated scheduling order; court grants appellants attorney's fees and other expenses.** In an appeal of an order to pay individual income tax penalty and interest, the parties submitted a proposed scheduling order that was fully adopted by the court on 12/3/2018. The scheduling order provided in part that the exhibit list must specify all exhibits that a party reasonably foresees introducing, and the exhibit lists had to be filed no later than 7/31/2019. The order further addressed circumstances in which the order could or could not be modified. In part, the order states that extensions or continuances will not be granted except by written motion supported by an affidavit showing good cause. The order cautioned that substitution of counsel does not create any right to a continuance of any deadline.

Six weeks after the parties timely filed a joint exhibit list and supplemental stipulation of facts, the commissioner filed an amended commissioner's separate exhibit list containing 27 additional exhibits and comprising approximately 300 pages of material. The amended list was not accompanied by a written motion to amend the scheduling order. Appellants filed a motion *in limine* asking the court to exclude the commissioner's untimely exhibits, arguing that the commissioner violated the scheduling order and admittance of the evidence would be prejudicial. The commissioner responded by trying to shift the burden to appellants, stating that they failed to demonstrate that the late-filed exhibits were irrelevant or inadmissible. The commissioner made no acknowledgement of violating the scheduling order.

Minnesota Rules of Civil Procedure 16.06 authorizes a court to sanction a party for failing to abide by a scheduling order. The rule states, in part, that if a party fails to obey a scheduling or pretrial order, in lieu of or in addition to any other sanction, the court shall require the party to pay reasonable expenses incurred due to noncompliance with this rule.

On 1/3/2020, the court heard appellants' motion *in limine*. Ruling from the bench, the court found that the commissioner intentionally violated the scheduling order without substantial justification and awarded the appellants $32,465 in attorney fees and $301 in other expenses. ***Mark L v. Comm'r***, 2020 WL 2478861 (Minn. Tax Court 5/7/20).

■ **Court lacks authority to waive statutory deadlines; petitioner application denied.** Petitioner Thumper Pond, a Brainerd resort, filed a petition contesting the assessed value of real property located in Otter Tail County. The application for permission to continue with prosecution without payment of the tax was due on 5/6/2020. Thumper Pond filed the application on 5/7/2020. Thumper Pond asserts that paying the first half of taxes would impose an undue hardship on the resort since it has been closed since March 17, 2020 due to the covid-19 pandemic. Thumper Pond requested that the court waive the statutory filing requirements.

Minn. Stat. §278.03, subd. 1 states, in relevant part, that the petitioner may apply to the court for permission to continue prosecution without payment if there is probable cause to believe that the property may be held exempt from the tax levied or that the tax may be determined to be less than 50 percent of the amount levied, and that it would place hardship upon the petitioner to pay the taxes due.

When the Legislature wishes the court to have authority to waive notice and filing requirements, it expressly grants it by statute. The statute grants no such authority and, the court has previously ruled that failure to timely serve a section 278.03 application deprives the court of jurisdiction to entertain that application.

Because Thumper Pond's section 278.03 application was not timely filed and served, and because the court cannot waive the statutory filing deadlines, Thumper Pond's application to continue prosecution without payment of tax was denied. ***Thumper Pond Resort v. Otter Tail Cty***, 2020 WL 2564892 (Minn. Tax Court 5/13/20).

■ **Commissioner incorrectly interprets clause requiring non-corporate taxpayers to file as corporations.** Appellants own and operate taconite mines near Hibbing and Eveleth. Due to their mining activities, appellants were required to pay the occupation tax imposed by Minn. Stat. §298.01, subd. 4 (2012), and each timely filed returns with the state for the tax years ending 12/31/2012 and 12/31/2013. The parties agreed that for occupation tax purposes, appellants were entitled to federal percentage-depletion deductions as provided in I.R.C. §§611-14 (2012). The parties disagreed over the interpretation of several statutes. Minn. Stat. §298.01, subd. 4's directive that the occupation tax be "*determined in the same manner as*" Minnesota's corporate franchise tax required appellants, which are not corporations, to be treated as such and to reduce their deduction amounts by 20% under I.R.C. §291(a)(2) (2012). In computing taxable income, appellants each claimed a federal percentage-depletion deduction *without* applying the 20% reduction. The commissioner audited appellants' occupation tax returns and applied the 20% reduction to their percentage-depletion deductions. Appellants timely appealed and moved for summary judgment. The commissioner opposed appellants' motion and asserted that she was entitled to judgment as a matter of law.

Minn. Stat. §298.01, subd. 4 imposes an occupation tax on persons in the business of mining or production of taconite. By statute, the occupation tax

is determined in the same manner as the tax imposed by the corporate franchise tax—by measuring taxable income.

The commissioner argued that because the occupation tax is determined in the same manner as the corporate franchise tax, all persons subject to the occupation tax are deemed to be corporations, and therefore, appellants must recompute their federal percentage-depletion deductions as if they were corporations. Appellants argued that the commissioner ignored the plain language of the IRC, which expressly applies only in the case of a corporation.

The court considered the meaning of the disputed clause, analyzed the differences between corporate franchise and occupation taxes, and concluded that appellants need not recompute their federal percentage-depletion deductions, and granted appellants' motion for summary judgment. ***Hibbing Taconite Co v. Comm'r***, 2020 WL 2843472 (Minn. T.C. 5/27/20).

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TORTS & INSURANCE

JUDICIAL LAW

Defamation; legislative immunity. Defendant, who serves as a state representative for Minnesota District 66B, which includes part of the City of Saint Paul, sent a letter to the new mayor of Saint Paul, Mayor Melvin Carter. The letter was written on defendant's official letterhead from the Minnesota House of Representatives, but the letter was marked "**PERSONAL AND CONFIDENTIAL**." In the letter, defendant wrote about a variety of topics, including general references to "the upcoming legislative session" and "lobbying" issues but without any specificity. The letter goes on to comment on the city attorney's office, stating that the office's decisions are often subject to great public scrutiny. He noted that he was "surprised" by the mayor's "choice for City Attorney." Defendant contends that the plaintiff had a "track record of integrity questions and management problems" and suggested that plaintiff is not the right person for such an important position. Defendant then requested four types of information specifically about plaintiff before closing the letter by stating: "Mayor Carter, this is a personal letter from me to you. I have not copied it to any member of the press or even to the Saint Paul Delegation, as I am hoping we can resolve it internally." After plaintiff filed suit for defamation, defendant moved to dismiss the complaint, asserting legislative immunity under the speech or debate clause of the Minnesota Constitution, Minn. Const. art. IV, §10, and under the legislative immunity provision in Minn. Stat. §540.13 (2018). The district court denied defendant's motion to dismiss based on legislative immunity, and the court of appeals affirmed.

The Minnesota Supreme Court affirmed the decisions of the district court and the court of appeals. The first question for the Court was whether the speech or debate clause of the Minnesota Constitution or Minn. Stat. §540.13 grants legislative immunity to defendant for the statements made in his letter to Mayor Carter. Looking to federal case law for guidance, the Court indicated that immunity is applicable "[i]f it is determined that Members are acting within the 'legitimate legislative sphere[.]'" However, immunity does not apply to "activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." The Court held that the letter at issue "is not protected legislative activity under the Minnesota Constitution's Speech or Debate Clause" because it does not fall "within the sphere of legitimate legislative activity." In support of its conclusion, the Court noted that the letter was sent "at a time when the Legislature was not in session," "nothing in the letter indicates that [defendant] was acting pursuant to his duties as a legislator," that defendant "effectively disclaims any connection to legislative activity when he writes that he hopes he and the mayor can resolve the matter 'internally,'" and that "the thrust of the letter is clearly personal." The Court went on to hold that while Minn. Stat. §540.13 extends broader immunities than the speech or debate clause, it did not protect the statements at issue because they were made in defendant's personal capacity and not connected to his legislative duties. ***Olson v. Lesch***, No. A18-1694 (Minn. 5/27/2020). *https://mn.gov/law-library-stat/archive/supct/2020/OPA181694-052720.pdf*

JEFF MULDER
Bassford Remele
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NICHOLAS J. SIDERAS joined Gregerson, Rosow, Johnson & Nilan, Ltd. as an associate. Sideras is a 2015 graduate of the University of Wisconsin Law School. He joins the firm after serving as a judicial law clerk at the Minnesota Court of Appeals.

MARISSA R. WUNDERLICH joined the Owatonna law firm Walbran & Furness as an associate attorney. Wunderlich graduated from the Mitchell Hamline School of Law in January.

The Minnesota State Bar Association announced the certification of PAULA R. JOHNSTON of Education Minnesota; BRIAN T. ROCHEL of Teske, Katz, Kitzer & Rochel; and JONATHAN P. NORRIE of Bassford Remele as MSBA Board Certified Labor and Employment Law Specialists. This certification program is administered by the MSBA and approved by the State Board of Legal Certification.

JODI DESCHANE joined Ballard Spahr as of counsel in the firm's intellectual property department. Her practice centers on trademark, copyright, advertising, social media, and internet-related matters.

THOMAS HAINJE has rejoined Messerli Kramer with the banking & finance group. His practice focuses on banking, finance, real estate transactions and litigation, creditor's remedies, and bankruptcy.

KATHERYN A. GETTMAN has joined Cozen O'Connor, bringing nearly two decades of experience as an internal/external corporate counsel to the firm's corporate practice.

DANIEL A. BECKMAN has joined Erickson, Bell, Beckman & Quinn PA in an of counsel position, focusing his practice in the areas of real estate, banking, business, estate planning, and litigation.


DRIGGS

JAIME DRIGGS was selected to be an American Academy of Matrimonial Lawyers fellow. This honor is bestowed on a limited number of attorneys with a high level of knowledge, substantial courtroom experience, and a proven track record in the practice of family law. Driggs is an attorney at Henson Efron.

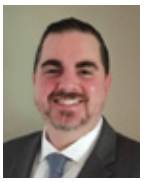

FALLON

Gov. Walz appointed MARTIN FALLON as a district court judge in Minnesota's 1st Judicial District. Fallon will replace Hon. Kevin Eide. He will be chambered in Carver County. Fallon is currently a partner at Maslon LLP, where he represents a wide range of businesses in complex commercial litigation in federal and state courts and arbitration hearings.


GAÏTAS

Gov. Walz appointed Judge THEODORA GAÏTAS to the Minnesota Court of Appeals. Judge Gaïtas will fill the vacancy occurring upon the retirement of Hon. John Rodenberg. This seat is designated as an at-large seat. Judge Gaïtas currently serves as a judge in the 4th Judicial District in Minneapolis.

AARON SIMON has joined Meagher + Geer, PLLP. Simon focuses his litigation practice on professional liability, insurance coverage, and complex general liability matters.


SIMON

JACOB M. ABDO has joined Fredrikson & Byron in the advertising, marketing & trademark, intellectual property, and sports & entertainment groups.


ABDO

In Memoriam

Michael J. Garvey, Jr., age 87 of Woodbury, passed away peacefully at Saint Therese of Woodbury on April 15, 2020. He graduated from William Mitchell College of Law. His legal expertise was personal injury.

James Harlow Johnson, age 87, of Minneapolis died April 20, 2020. In 1961 his legal career began in St. Cloud with the Quinlivan firm. From St. Cloud, he moved to Benson, MN, where he served as county attorney for several years.

John Harold Kraft passed away on April 20, 2020 at the age of 78. In 1966, John moved to Olivia, MN to begin his law career at a firm that eventually became Willette, Kraft, Walser, Nelson & Hettig. He served as the Minnesota State Bar Association's 12th District president. John proudly devoted 39 years to the practice, and today the firm is known as Kraft Walser Law Office.

Kathleen Korzec Goddard, age 70 of Minneapolis, MN passed away on April 29, 2020. In 1995, she earned her JD from William Mitchell College of Law and went on to foster a fruitful and fulfilling tax and probate law practice in Minneapolis.

Brian O'Neill died at his Minnetonka home on May 6, 2020 from ALS. He was 72. O'Neill served in the Army, graduated from the University of Michigan Law School, and went to work at the Pentagon's Army General Counsel Office. He went on to work at Faegre & Benson for 34 years, becoming a partner, and head of the environmental practice protecting natural resources.

John S. Hibbs, age 85 of Edina, passed on May 9, 2020. He practiced tax, corporate, and health care law for 40 years before retiring in 1999.

Robynn Joleen (Johnson) Faricy of Edina died on May 30, 2020, at age 43. She graduated from William Mitchell College of Law. She worked as a legal assistant at many Twin Cities law firms, including Briggs & Morgan, Lindquist & Vennum, and Dorsey & Whitney.

Longtime lawyer and retired *Judge Robert E. (Bob) Bowen* died on May 15, 2020. He was 96 years old. Bob's 23-year career as a lawyer began with a solo practice and concluded as a partner in the firm known most recently as Gray Plant Mooty. In 1973, he was appointed to the Hennepin County Municipal Court. In 1980 he was appointed to the Minnesota District Court and was subsequently re-elected to the bench. He also taught trial advocacy at William Mitchell College of Law, and was twice nominated to the Minnesota Supreme Court. He retired in 1988 and spent the next 20 years as a court-appointed special master and as a mediator and arbitrator in civil cases before finally retiring at age 85.

David Wayne Blaeser, age 60, of Eagan, MN passed away on May 25, 2020. In 1995 he opened his own law practice, which he nurtured and developed for 25 years.

Clinton A. Schroeder died at his home in Edina, MN, on March 12, 2020. He was 89. In 1957, Clint joined the Minneapolis-based firm of Cant, Haverstock, Beardsley, Gray and Plant, later known as Gray Plant Mooty, after having been honorably discharged from the US Army, Captain, active duty 1955-1957. He remained a principal with the firm until 2016. In his practice, Clint represented individuals, corporations, colleges, universities, and foundations.

Mark Raymond Suel, age 54 of St. Paul, passed away on June 11, 2020. Raymond earned his JD from William Mitchell College of Law. His professional career included management and senior level positions within the energy and mining & aggregates industries.

Thomas L. Johnson passed away on June 8, 2020. In 1973, he was first elected to the Minneapolis City Council at the age of 28. He went on to serve as Hennepin County Attorney for 12 years and then practiced law with Gray Plant Mooty. He took a 10-year sabbatical from the firm to head up the Council on Crime and Justice. Until shortly before his death, he served as the volunteer ombudsman for clerical sexual abuse for the Archdiocese of St. Paul Minneapolis and as a founder and active board member of the Minnesota Justice Research Center.

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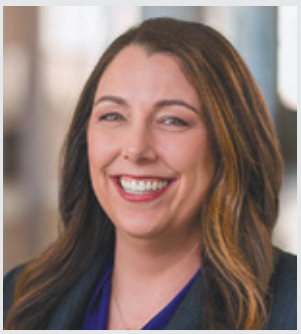

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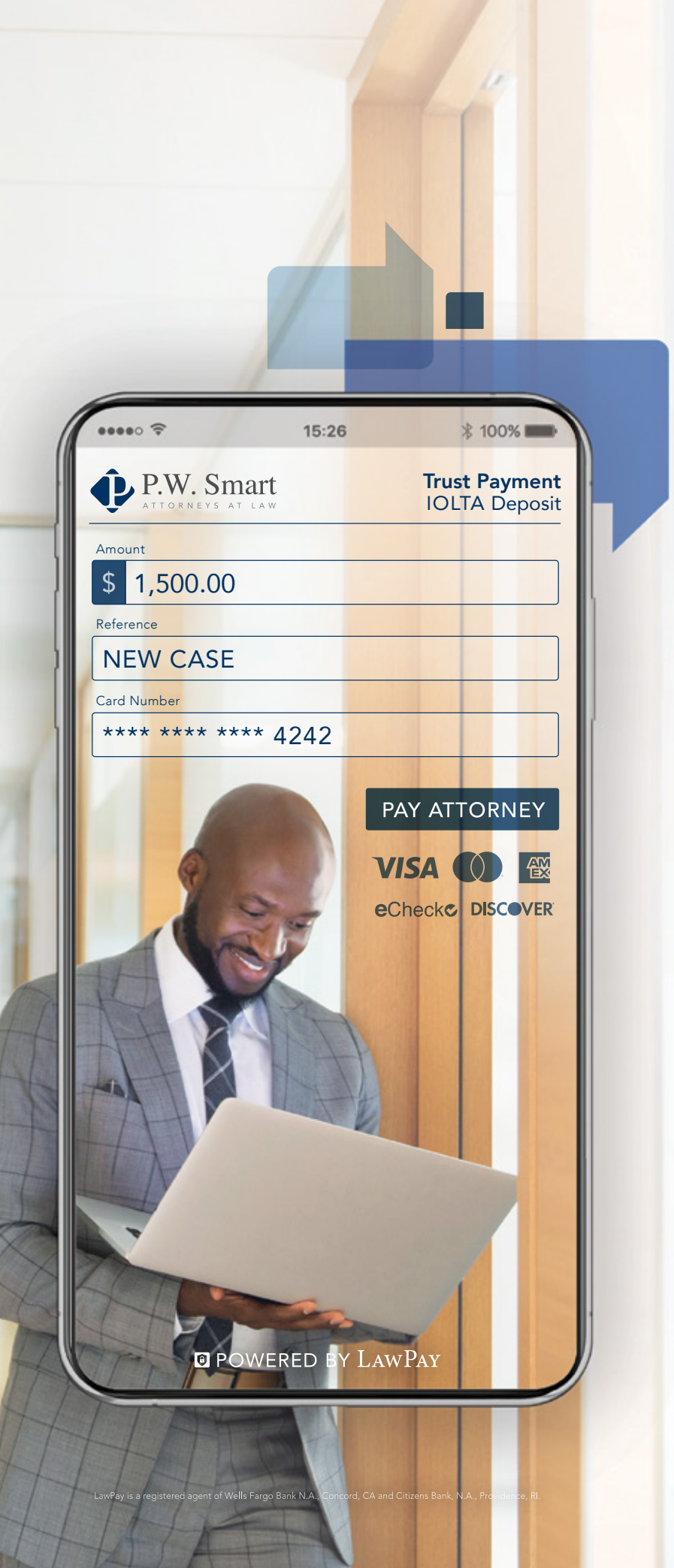

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