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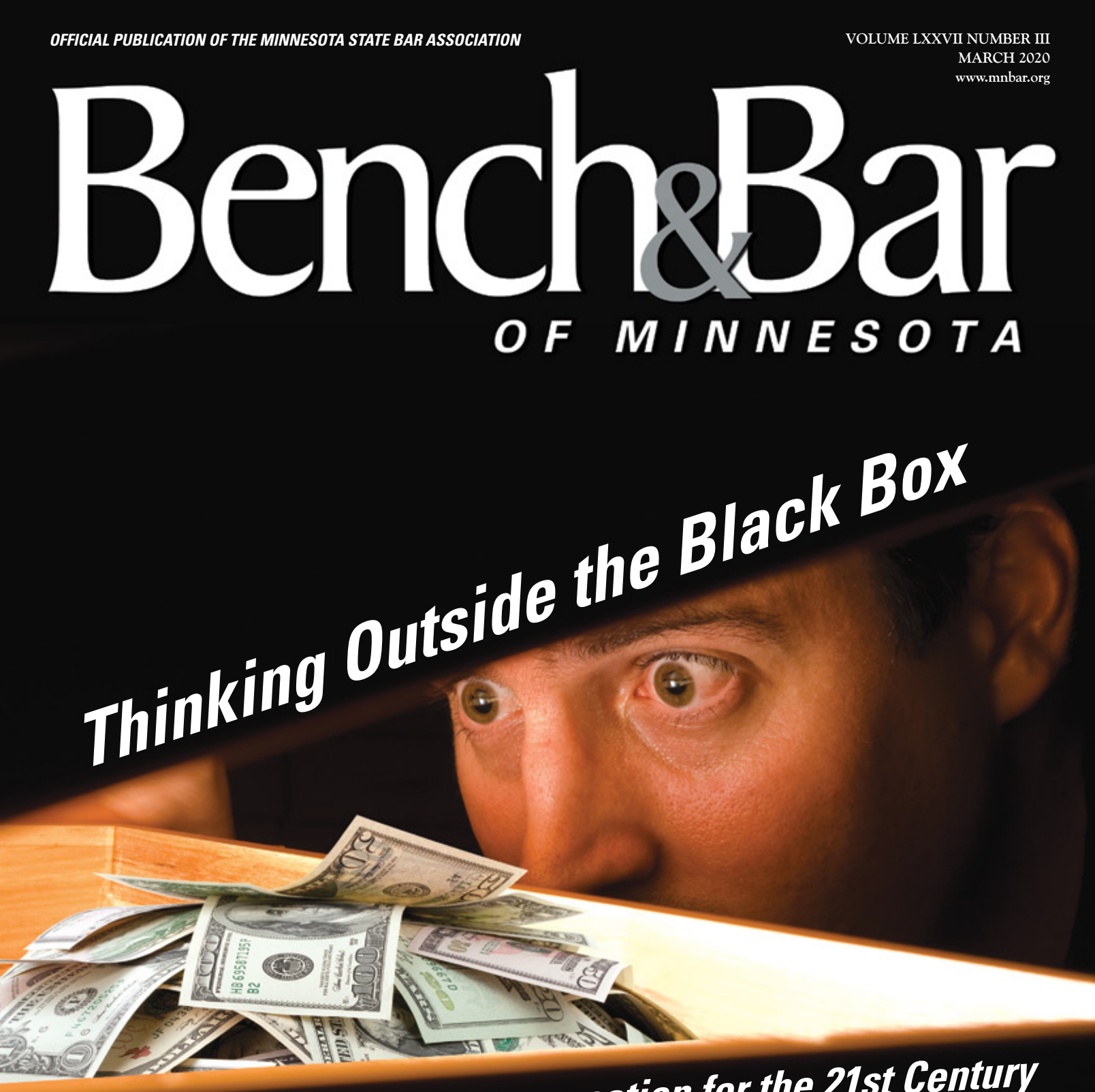

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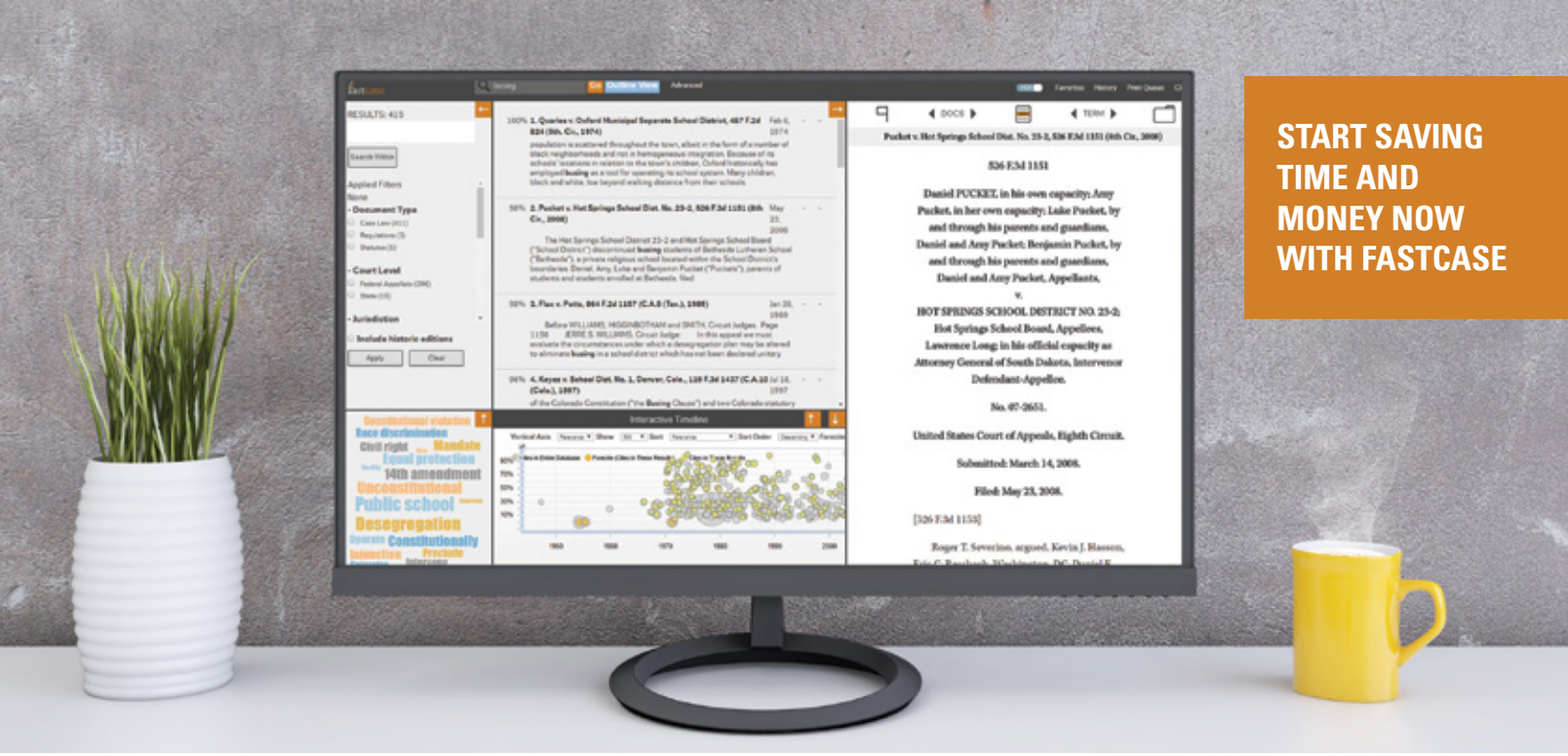

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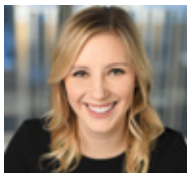

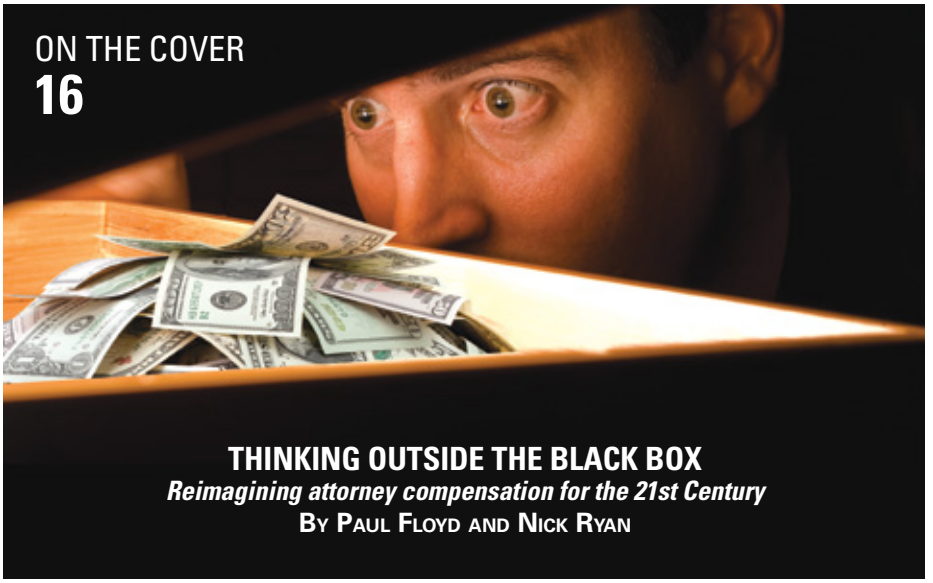

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Access To Justice (And Dignity)

It turns out that Minnesota has a special connection to the promise: "Equal Justice Under Law." So, quickly now: where does that phrase come from? It's on the front of the United States Supreme Court building, and in the lobby of our Minneapolis federal courthouse, and it's lurking in our Pledge of Allegiance. But it's not in the Constitution or any of our founding documents. Instead, it came from the Supreme Court's architects—headed by Cass Gilbert, the architect for our state Capitol building. Put simply, it had just the right number of letters for the otherwise-blank space above the court's front door. The phrase "fits" in more ways than one; it is apt, inspiring, and meant to be relied upon. That's no doubt why the Supreme Court adopted it. It is at the very core of our commitment to the rule of law, equal protection, due process, and access to justice.

Unfortunately, access to justice is an especially timely topic these days. It should be straightforward. Our legal system should be fair to those who need and enter into it, and that fairness shouldn't depend upon whom you know or how much money you have. But our scales of justice are out of balance when it comes to the unmet civil legal needs of those amongst us of no, low, or modest means. The numbers aren't working. We're doing a lot, but it isn't enough.

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

We have just under 300 state court trial judges; each year they handle roughly 1.5 million matters. Fully 500,000 of our fellow Minnesotans struggle to get by at or below 125% of the federal poverty level (just over $30,000 a year for a family of four), and an additional over 800,000 live at or below the 200% level. Their critical civil legal needs (shelter, safety, sustenance, and health care) are largely unmet. They may be "eligible" for civil legal aid, but 60% of the people who seek help and are eligible are turned away because of insufficient resources. We are fortunate to have around 260 dedicated civil legal aid lawyers, but their average salaries are lower than all other public service lawyers, and their salaries fall further behind each year. Recruiting and retention issues naturally abound. We're in the midst of a cultural collision between two demanding realities: current court capacity, and the promise of equal access to justice. Public and private funding for civil legal aid is material, but insufficient.

Where can we get the necessary additional resources? Value can be either cash or innovative ideas and initiatives, so here are a few thoughts:

- Minnesota was one of the very first states to establish a statewide website, 20 years ago, to help people navigate our legal system: LawHelpMN. It is a remarkable accomplishment by our civil legal aid community, recently enhanced with a "triage portal" to help those who need not only information but also representation. A virtual courthouse door. Great start.
- The emerging "paraprofessional pilot" may be a modest one, but it is an important and promising court-ordered exploration. The Chief Justice has said that we can no longer "admire the problem" created by the tsunami of self-represented litigants. I agree. Maybe helping with evictions; maybe selected arenas of family law. Some legal advice and some court appearances, by qualified paraprofessionals, supervised by a licensed Minnesota attorney. Stay tuned.
- Minnesota's legislators, 25 of whom are our lawyer colleagues, can surely help. This coming session is a non-budget year, but maybe this is a good time to set the stage for a robust budgetary discussion the next time around. More money? More judges? New kinds of judges? On the national legislative front, our MSBA and the ABA will be working again to strengthen civil legal aid funding.
- "Civil Gideon" anyone? Technically, "the civil right to counsel." Maybe the time has come. It's literally knocking at our door, at least in the housing realm. Maybe it's time to listen to the trumpet sounded in *Gideon vs. Wainwright*.
- And yes, back to pro bono publico. You know the rule (i.e., 6.1). Basically 50 hours a year of legal services to people unable to pay—or, as an alternative, financial support to "organizations providing free legal services to persons of limited means," in the amount that would be "reasonably equivalent to the value of the hours of service that would have been otherwise provided." Time is money; but here, the absence of time might lead to the giving of money. Of course, if all 25,000 of our Minnesota attorneys called up to plan their 50 annual hours, it might be difficult to manage. But if those same lawyers called to ask about the payee for the check they'd like to write, that could be of enormous, even transformational, help.

"Access to Justice" doesn't mean that Minnesotans of modest means will or should win all of their cases. That's not the point. But it does mean that they will be justly treated. Meaningful access to justice brings with it access to respect, and dignity. In that light, "Equal Justice Under Law," whether chiseled in stone, or penciled on lined prison paper (as was Mr. Gideon's petition), will strengthen faith in the rule of law as we all, but especially lawyers, strive to form "a more perfect union." ▲

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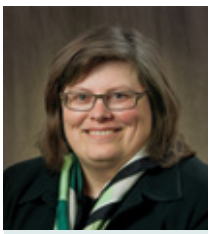
2019 private discipline

In 2019 the Director's Office closed 107 complaints with admonitions—a form of private discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. This number was down from 2018, when 117 admonitions were issued. Another 14 complaints were closed with private probation, a stipulated form of private discipline approved by the Lawyers Board chair. Private probation is generally appropriate where a lawyer has a few nonserious violations in situations that suggest supervision may be of benefit. Interestingly, this number is identical to private probation dispositions in 2018 and 2017.

The rule violations that lead to private discipline run the gamut, and a table of admonition violations by rule can be found in the annual report issued each July. Generally, the most violated rules are Rule 1.3 (Diligence) and Rule 1.4 (Communication). Other frequently violated rules, particularly in the private discipline context, occur when declining or terminating representation (Rule 1.16), making fee arrangements (Rule 1.5), and safekeeping client property (Rule 1.15). Let's look at some specific rules and situations that tripped up lawyers in 2019.



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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Fee-sharing

Rule 1.5(e), MRPC, sets forth the rule regarding sharing fees with a lawyer who is not in the same firm. Remember, you cannot provide anything of value to someone (lawyer or nonlawyer) for recommending your services.[1] Thus, general referral fees and finder's fees are unethical. But lawyers may divide a fee with another lawyer who is not in their firm if three conditions are met:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.[2]

The rule is conjunctive, so each prong must be satisfied. Lawyers tell me frequently of their concerns that others are violating this rule. An attorney who has represented lawyers in proceedings with the Office for years recommended just this week that I cover this rule in this column. Most violations of this rule occur because lawyers miss the express requirements of Rule 1.5(e)(2), MRPC. Sometimes the client has no knowledge of the fee-sharing, a violation of the rule. Sometimes the client knows that a fee will be shared but does not understand the particulars, including the share each lawyer will receive—a violation of the rule. Sometimes, although the client agrees and understands the particulars, the client's agreement is not confirmed in writing—a violation of the rule.

An admonition from 2019 illustrates another variation on fee-sharing that occurs less frequently but violates the rule nonetheless. Attorney A initially agreed to represent an injured driver and injured passenger in a one-car accident. (Don't do this, by the way, because it usually involves a non-consentable conflict.) When it quickly became apparent that the injured passenger would have to sue the injured driver on the liability claim, Attorney A referred the injured passenger to Attorney B, with the injured passenger's agreement that Attorney A and B would split the 1/3 fee recovery equally if a recovery was secured. While the client agreed to the arrangement, the share each lawyer received was agreed to by the client, the agreement was confirmed in writing, and the total fee (a 1/3 contingency) was reasonable, Rule 1.5(e)(1) was nonetheless violated—because the non-consentable conflict meant that each lawyer could not assume joint responsibility for the representation. Nor was the fee split in proportion to the services performed by each. An admonition was issued to Attorney B for violation of Rule 1.5(e), MRPC.

I know that many lawyers are frustrated with the fee-sharing rules, and there are good arguments that the inability to more freely share fees among lawyers (and, probably more controversially, with nonlawyers) inhibits innovation in the profession. Irrespective of what you think the rules should be, please remember to review the ethics rules in order to avoid discipline if you are contemplating sharing fees with another.

Withdrawal from representation

One of the most common areas of inquiry on our ethics line, and a frequent source of missteps, is ethically terminating a representation. Two admonitions in 2019 illustrate this point. Attorney A was representing a client in a felony criminal matter in federal court as local counsel. After conviction, the client grew dissatisfied with Attorney B (outstate trial counsel) and planned to continue on appeal with Attorney A. While the matter was pending with the appellate court, client and Attorney A's relationship soured. Client did not fire Attorney A, but Attorney A moved to withdraw as counsel on appeal.

In support of his motion, Attorney A went into great detail in an affidavit that detailed how the attorney-client relationship had broken down by specifically describing requests the client had made to Attorney A that Attorney A believed were unreasonable, specifically describing communications with the client that Attorney A believed

to be "badgering," and disclosing specific information regarding the fee agreement. The appellate court denied the motion to withdraw, primarily because it did not address the issue of successor counsel. Attorney A then renewed his motion to withdraw, and provided additional confidential information about the client's assets (gleaned from Attorney A's representation of the client in his divorce), suggesting the client had ample funds to retain successor private counsel. An admonition was issued for violations of Rule 1.6(a), MRPC, and Rule 1.16(d), MRPC.

In another criminal case, the attorney agreed to represent a client on an initially straightforward gross misdemeanor matter for a flat fee, to include trial if applicable. As sometimes happens, though, matters were not what they initially appeared to be. Soon the attorney concluded she did not wish to continue the representation—this attorney was also planning a move out of state—and terminated the representation. Because this was a criminal matter, court rules require permission to withdraw, which the attorney did not seek. Nor did the attorney make a refund of any portion of the flat fee, even though it was undisputed that the attorney did not complete the representation. An admonition was issued for violations of Rules 1.16(c) and (d), MRPC. Rule 1.16(c) provides "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." Rule 1.16(d) provides "Upon termination of representation, a lawyer shall... refund[] any advance payment of fees or expenses that has not been earned or incurred."

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. I'm sure, however, that the more than 100 attorneys who received private discipline last year do not take any comfort from these low numbers. Most attorneys care deeply about their compliance with the ethics rules but may forget that to be ethical is more than just "doing right"—there are a lot of specific requirements in the rules. If it has been a while (say, since law school), please do your practice and your peace of mind a favor and review the rules. You can even skip the comments if you like, though they are very helpful. You will find the time well spent. And, remember, we are available to answer your ethics questions—651-296-3952. ▲

Notes

[1] Rule 7.2(b), MRPC ("A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this rule; (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; (3) pay for a law practice in accordance with Rule 1.17; and (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement"); *see also* Rule 5.4(a), MRPC (A lawyer shall not share legal fees with a nonlawyer except under certain enumerated circumstances).

[2] Rule 1.5(e), MRPC.

Doxxing made easy: social media

In a recent article, I wrote about doxxing and the potentially unsolvable problems associated with trying to remove all of one's personal information from the worldwide web. In the digital space we live in, where instant communication and the ability to share information within seconds is an ingrained reality, controlling our personal data online is difficult if not impossible. Even if someone were to go through the trouble of carefully combing through 50 sites' (often confusing) opt-out pages and removing their information, there is no guarantee that another reseller website won't pop up the next day with the same information—or that those 50 websites won't simply repopulate within a few months' time. Though we often forget—or deliberately ignore—the fact, anonymity on the internet simply does not exist. But perhaps more troubling is that anonymity in our "real" lives is greatly diminished as well as a result of what can be found online.

We do have a measure of control in one of the digital realms of greatest risk—our own social media accounts. A simple adage comes to mind: Think before you post. It's often easier said than done. After all, some of our wittiest commentaries or observations beg to be shared quickly. Even though most people would likely admit to their lack of anonymity in the social media space, it is also true that many people post and forget. Or they believe that their social media presence is entirely distinct from their professional lives. Many job candidates are horrified to learn that their Facebook posts are up for review just as much as their painstakingly polished resumes.

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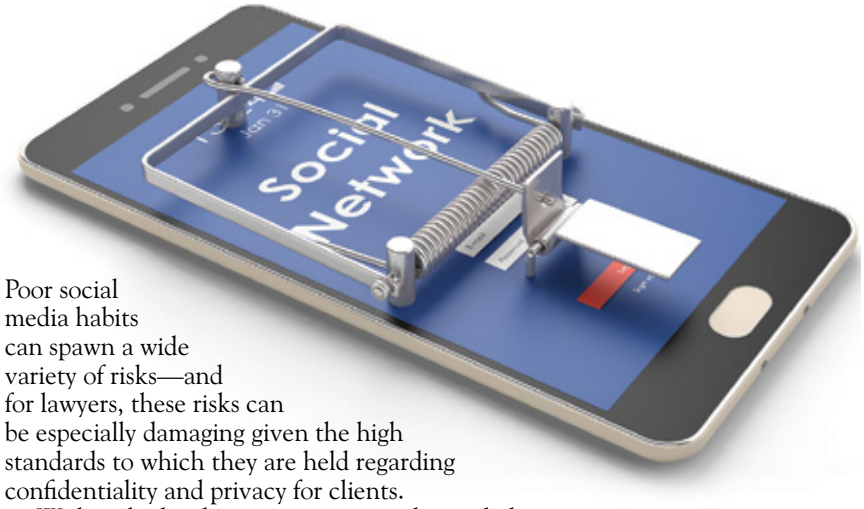
Those seeking positions with security clearances are even more at risk of having their social media presence factor into their assessment as job candidates. For up and coming generations that have used social media for the majority of their lives, it's often a tough truth to accept that once something is "out there," it's never truly gone and might affect their real lives.



Poor social media habits can spawn a wide variety of risks—and for lawyers, these risks can be especially damaging given the high standards to which they are held regarding confidentiality and privacy for clients.

Within the legal community, a poorly worded post or an inappropriate picture can cost a firm in more than one way. A damaged reputation can cost a firm clients, and oversharing online can facilitate cyberattacks, as I have discussed in a previous article, "Social media and managing reputational risk." Doxxing, the process by which personal information is gathered online—often with the intent to maliciously disseminate it—can start with a cybercriminal reviewing a target's social media pages. A seemingly innocent post about going on vacation can be invaluable in personalizing a phishing attack or strengthening a social engineering scheme. Anything shared online can potentially be used to harm a firm financially, operationally, or reputationally. I frequently advise people to not post anything online that they wouldn't want their moms to read. It might be better to also advise people not to post anything that they wouldn't want a cybercriminal to read.

Being mindful of our social media activities can seem overbearing and perhaps a bit paranoid. Surely, a little Tweet can't be that big of a deal, right? Who cares? And maybe the majority of the time, nobody will care. But taking responsibility for the security of our organizations and firms requires an acknowledgement of the risks and threats that our digital lives present. With social media, people often end up their own worst enemies thanks to what they choose to share. Doxxing isn't always a complicated treasure hunt that requires carefully surveying multiple reseller websites. It can also be a quick trip to the potential victim's Facebook page. ▲

"Doxxing isn't always a complicated treasure hunt that requires carefully surveying multiple reseller websites. It can also be a quick trip to the potential victim's Facebook page."

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'A member of a team and part of a community'

BLAIR HARRINGTON is an attorney at Taft, Stettinius & Hollister LLP. Blair is a member of Taft's employment law group and represents employers in a broad range of litigated disputes and advising matters. Blair's practice is focused on finding the most effective solutions for her client's business needs, whether inside or outside the courtroom.

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Why did you go to law school?

I ultimately chose to go to law school after a month-long service learning trip I took to South Africa while in college. I volunteered with a non-governmental organization in Khayelitsha, an informal township outside of Cape Town, assisting with various projects, including HIV/AIDS education and awareness. While working in Khayelitsha, I witnessed the difficulties the NGO faced with the HIV/AIDS relief funding it received from the United States. I was struck by the way United States laws and policies restricted the way the NGO was able to utilize the relief funding. After writing a paper tailored to this topic and based on my experiences, I knew I wanted to go to law school.

I also went to law school because I like to read, write, problem-solve, and—most importantly—argue. I felt this skill set would be best suited to a career in the law, and that I would enjoy it.

How did you come to focus on employment law and business litigation?

Trial and error! While in law school, I knew I was interested in business litigation but had not considered employment law. The first job I landed, however, was at a personal injury firm. After trying it out for a few months, I knew personal injury was not my ideal practice area. It took me a year after law school to transition to a business litigation firm. During my time there, I worked closely with employers, advising on and litigating employment law cases with increased frequency. I started to enjoy it so much that I decided to shift into a practice group focused on employment law at Taft, Stettinius & Hollister LLP.

If you had not become a lawyer, what do you think you'd be doing for a living?

I would be a professional writer and traveler, sitting on a beach writing my next great novel.

Even though I chose to become a lawyer, I still hope to achieve two major bucket list items of mine: writing a novel and living abroad again. I love to write and have concentrated on it in the past through classes and journaling. Right now I am focused on building my legal career but one day I want to sit down and write a novel. In college, I studied abroad in Mendoza, Argentina for six months, and it was one of the best experiences of my life. I hope to experience the joys and challenges that come with living abroad again in the future. If I can write a novel while living in a foreign country, I will be able to cross two items off my bucket list at once.

You've been pretty deeply involved in the bar association, and this year you're serving as the New Lawyers Section chair as well as a member of the MSBA Council. What are the most valuable things you've gained from your volunteer work with the bar?

The most valuable thing I have gained from my experience in the bar association is being connected to, and having a voice in, the legal profession as a whole. In private practice, you are singularly focused on serving the needs of your clients. Being an active member of the bar allows you to focus on the bigger picture and address important issues facing the profession. But the value I get out of the bar association goes beyond that. As the New Lawyers Section chair and an MSBA council member, I have been a member of a team and part of a community. These roles have also given me the opportunity to expand my leadership skills and interact with attorneys at different stages of their legal careers.

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

I like to spend time with both friends and family outside of work sharing meals, traveling, and staying active. I consider myself a "foodie" and enjoy trying out a new recipe at home just as much as the new hot spot in town. I also have a passion for travel and love exploring new and old destinations both at home and abroad. Food is also a big focus in my travels! Most of all, I like spending time with my husband and our golden retriever, Huxley, taking walks and going to our local coffee shop or brewery. ▲

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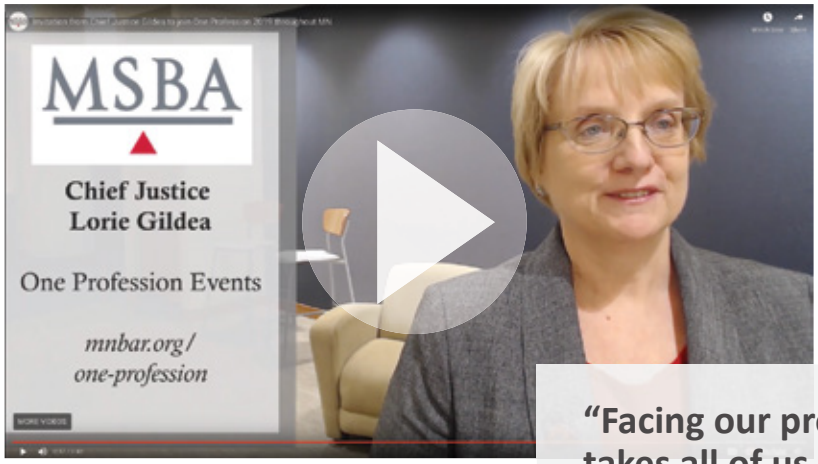

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Mitchell Hamline Law Review editor in chief is first in the nation from a blended-learning enrollment option

Missouri woman handles duties remotely and in person

BY TIM POST

Amber Fitzgerald, of Washington, Missouri, is the first editor in chief of the Mitchell Hamline Law Review to come from the school's blended-learning enrollment option.

Fitzgerald, 27, says her election shows that Mitchell Hamline's part-time, in-person/online track—the first in the nation at an ABA-approved law school—is as rigorous as the full-time program and offers students the same opportunities.

"It says that this program really does work and this approach works," she says.

The third-year student admits her election last year left her a bit shocked, but she's been enjoying the challenge.

"The board is fantastic," she says. "I think we're going to knock it out of the park."

One challenge that Fitzgerald is facing head-on is how to handle the duties of editor in chief from her home in Missouri.

Her approach is similar to the way she attends law school as a blended-learning student—she travels to campus a few times a year and handles everything else remotely.

Fitzgerald makes the drive from Missouri for important weekend events (she calls the more than eight-hour drive "doable, albeit long"). She also meets with the board in person two or three times a year when she's on campus for the in-person portion of her J.D. program. The rest of her duties are handled over email, phone, and Skype. Holding meetings via a video call isn't just to accommodate her schedule; it allows all members more flexibility, whether they're on campus full time or part time.

"We are all extremely busy with competing priorities," Fitzgerald says. "Being able to have a board meeting without having to commit to making one more trip to campus is beneficial to this board."

Fitzgerald also works to make sure all new Law Review associates, regardless of which program they're in, are paired with a mentor to learn the ins and out of the publication. The work of the Law Review is done by its associates and editors, all Mitchell Hamline students, and includes articles of regional, national, and international interest for attorneys, legal scholars, and lawmakers.

Professor Michael Steenson, faculty adviser for the Law Review, says Fitzgerald was chosen as editor in chief because the board's editors were "highly impressed" with her work as an associate on the previous year's Law Review. He says

her election proves students in the partially online, partially on-campus offering are as prepared as any to take on big roles.

"I have never seen distinctions between our law students," Steenson said. "Amber has demonstrated that there aren't."

Fitzgerald has wanted to be an attorney for as long as she can remember. She says blended learning is the only way she could attend law school and continue her full-time job as a quality assurance manager for a health care finance company.

Fitzgerald is focusing on health law at Mitchell Hamline and hopes to work in the health care field after she graduates in the spring of 2020.

The Case for MDL Reform

Addressing the flaws in a critical system

We won't say *his* name, but one of your authors has a car that makes a horrible noise. The kind of noise that strikes fear into the heart of any non-savvy owner and suggests that it's not a question of *whether* the car will blow up, but when. We can only hope that the author in question takes his car in before it becomes a car fire that shuts down traffic on 35W. Multidistrict litigation (MDL), as it happens, is a lot like a noisy car in need of a close look under the hood.

The MDL system was designed to coordinate and consolidate pretrial proceedings for just and efficient case management.[1] Under 28 U.S.C. §1407, the Judicial Panel on Multidistrict Litigation (JPML) is authorized to transfer federal civil actions pending in more than one district and involving common questions of fact to any district for coordinated and consolidated pretrial proceedings. The JPML must determine that transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions."[2]

The MDL mechanism is highly utilized by litigants in the 21st century, but flaws in the system have been exposed. This article explores (1) a brief history of MDLs and their purpose; (2) the MDL system's ailments; and (3) suggested paths to reform.

The MDL system as intended

MDLs arose from the successful prosecution of antitrust laws against electrical equipment manufacturers in the 1960s.[3] Nearly 2,000 private treble-damage actions involving 25,000 claims were filed in 35 federal judicial districts.[4] To manage them, U.S. Supreme Court Chief Justice Earl Warren appointed nine federal judges to a Coordinating Committee for Multiple Litigation.[5] The committee disposed of the cases, primarily through voluntary cooperation in consolidated pretrial proceedings and through settlements.[6]

Seeing wisdom in the coordination of complex litigation, Congress in 1968 enacted 28 U.S.C. §1407, thereby creating the JPML.

Aggregation of similar claims in an MDL still retains value. Aggregation can maximize fair and efficient case management, minimize duplication, reduce cost and delay, enhance the prospect of settlement, promote consistent outcomes, and increase procedural fairness.[7] The need for the MDL system is supported by statistics demonstrating its increasingly heavy use. Between 1968 and 2019, the JPML considered motions for transfer in over 2,900 groups of cases, or "dockets," centralizing approximately 722,146 actions or claims.[8] Of the dockets considered by the JPML, 1,168 motions to transfer did not result in centralization.[9]

In 2019, MDL proceedings made up more than 50 percent of the federal court docket for the first time ever, comprising 202 MDLs pending in 46 different federal districts, in 32 different states, and before 160 different transferee judges.[10] Seventy of the 202 MDLs (over one-third) were product liability cases, an increase from 16 percent in 2005.[11] Of those 70 MDLs, 50 percent involved pharmaceutical products and/or medical devices.[12] Obviously, the need for the MDL system exists, so what is the problem?

The ailments of the MDL system

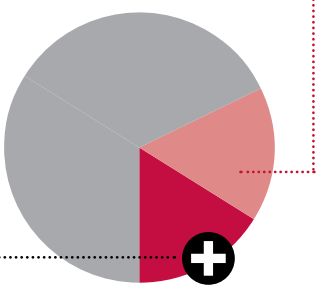
Though the MDL system faces several issues and worrisome inconsistencies, we focus here on four of the primary problems plaguing the system.[13]

First, the rules governing pleadings, discovery, motion practice, and appellate review are often applied inconsistently.[14]

Second, an abundance of meritless claims exist in MDL actions; some estimates indicate more than 40 percent of claimants in an MDL are unable to show any evidence of exposure to the alleged harm.[15] These meritless claims convey false information, making it difficult to evaluate settlement and select meaningful bellwether cases for trial.

50% of the 2019 federal court docket consisted of MDL proceedings

1/3 of the MDL proceedings were product liability case



50% of the MDL product liability cases involved pharmaceutical products and/or medical devices

Third, the MDL process needs to address third-party litigation funding, which has grown substantially in recent years. Third-party litigation funding presents serious issues regarding conflicts of interests, ethical issues, potential violations of state laws that prohibit a disinterested party from meddling in a lawsuit for personal gain,[16] whether class action counsel will adequately represent the class, and whether the funder is vested with undue influence or control over the underlying litigation.[17]

Finally, appellate review is asymmetrical: While plaintiffs can immediately appeal a motion to dismiss or a motion for summary judgment because a dispositive ruling is considered a final order, defendants have no instant remedy for a denial of a dispositive motion.[18] Instead, defendants must wait until a final verdict is reached in one of the cases in the MDL proceedings.

As MDL proceedings have increased as a share of the federal caseload, so too have calls for MDL reform. In August 2017, the Advisory Committee on Civil Rules created an MDL subcommittee to explore revisions to the FRCP. The MDL subcommittee issued a request to the Federal Judicial Center and others regarding proposals for amending the FRCP to address management of MDL proceedings. More recently, in October 2019, 45 general counsel from large companies signed a letter to the advisory committee supporting review of MDL procedures. The GCs describe MDL proceedings as having reached "a point of crisis."[19]

Popular paths to reform

Proposals for reform are numerous; here, we focus on a few of the most popular. In August 2017, Lawyers for Civil Justice (LCJ) formalized a request to the advisory committee asking members to consider various amendments to the FRCP.[20] The proposed reforms included adding "master complaints" and "master answers" to acceptable pleadings identified in FRCP 7, amending FRCP 26 to account for early-screening techniques and third-party litigation financing, and creating a vehicle for interlocutory review of pretrial motions via FRCP 54.

In its request to the committee, LCJ suggested that amending FRCP 7 would address concerns surrounding MDL pleadings.[21] Master complaints combine and refine common allegations within a single document that invites a corresponding master answer. FRCP 7 does not formally recognize or regulate master complaints or answers despite their widespread use in MDL proceedings. In the absence of formal FRCP acknowledgement, some courts have declined to treat master complaints/answers as pleadings. This is particularly troublesome when it comes to deciding pretrial motions under, for example, FRCPs 8, 9, and 12. These rules apply specifically to pleadings, and MDL litigants are denied some of the traditional protections of the FRCP when courts decline to recognize master complaints/answers as pleadings. Consequently, FRCP 7 should be amended to formally recognize master complaints and answers as pleadings.

Early screening techniques represent another area of potential MDL reform, since defense counsel regularly employ these tools to establish the existence or dearth of evidence underlying a plaintiff's claims. Such tools include plaintiff fact sheets[22] (PFS), defendant fact sheets (DFS), and Lone Pine orders,[23] and their use is widespread in discovery. In 2019, at the direction of the advisory committee, the Federal Judicial Center conducted a study on the use of PFS and other case management tools in MDL proceedings.[24] Between 2008 and 2018, PFS were ordered in 57 percent of all MDL proceedings and in 87 percent of proceedings with more than 1,000 total actions.[25] LCJ identified this area as "[o]ne of the FRCP's most visible and important failures in the MDL context." To formally recognize the utility and ubiquity of these tools, FRCP 26 should be amended to require early disclosure of evidentiary support for factual and injury-related allegations in consolidated proceedings.[26] Doing so would provide uniformity among PFS, DFS, and Lone Pine orders already utilized in MDL proceedings.

Third-party litigation similarly implicates FRCP 26 as an opportunity for MDL reform. The business of lead generation is booming and has drawn the attention (and ire) of several organizations, including the American Medical Association and the Federal Trade Commission.[27] Lead generators profit by producing as many mass tort plaintiffs as possible. But verifying the merits of these claims is a murky business, one that is challenged by competing interests in financial gain. Amending FRCP 26 to require disclosure of third-party litigation financers would provide transparency to courts and parties so that both discovery and potential settlement value may be appropriately adjusted. Transparency would also help counter the insinuation that a high number of plaintiffs implies defendant guilt. Plaintiffs would benefit from such an amendment as well; indeed, such an amendment to FRCP 26 could help plaintiffs with legitimate claims avoid an "unjust dismissal of their own claims hidden amongst the non-meritorious and fraudulent ones."[28]

Interlocutory review is another area of proposed reform receiving increased attention. An amendment to FRCP 54 would address the issue of inconsistent access to interlocutory review by permitting parties to seek appellate review of material rulings.[29] In 2019, the advisory committee considered whether to draft such an amendment.[30] Judge Robert Dow, the head of the MDL subcommittee, observed that "a court rule or legislation are the only available means" for accomplishing opportunities for interlocutory appellate review of MDL court rulings.[31] Material rulings might include (among others) Daubert motions, preemption motions, decisions to proceed with a bellwether trial, and any ruling that the FRCP do not apply to the consolidated proceedings.[32] Expanding immediate access to appellate review would lead to more just and consistent results, provide guidance to future parties and courts, and facilitate timely case resolution without needlessly wasting resources.

In conclusion, fix your car, stop slowing down to ogle those who don't make good automotive choices, and get ready for some revolutionary MDL reform. It is coming. ▲

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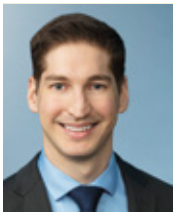

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Notes

[1] Herr, David F., Multidistrict Lit Man §1:1 Overview of the Panel's Role (May 2019).

[2] 28 U.S.C. §1407.

[3] *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harvard L. Rev. 1001, fn. 1 (1974).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Herr, David F., Multidistrict Lit Man §22.312 Overview of the Panel's Role (May 2019).

[8] United States Judicial Panel on Multidistrict Litigation – Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. §1407 Fiscal Year 2019 – Cumulative from September 1968 through 9/30/2019, available at *https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf*); *In re: Sitagliptin Phosphate ('608 & '921) Patent Litig.*, MDL No. 2902, 402 F.Supp. 3d 1366 (JPML 8/8/2019) (the 2902nd case assigned an MDL number).

[9] *Id.* There are several reasons a docket may not be transferred, including the JPML denying the motion, the motion was withdrawn, or the motion was deemed moot.

[10] Vickery, Alan & Zoha Barkeshli, *The Trend Toward MDLs in Products Cases*, Faegre Drinker on Products (8/6/2019), available at *https://www.faegredrinkeronproducts.com/2019/08/the-trend-toward-mdls-in-products-cases/#page=1* (last visited 2/7/2020).

[11] *Id.*

[12] *Id.*

[13] Letter from 45 General Counsel to Ms. Rebecca A. Womeldorf, Secretary, the Committee on Rules of Practice and Procedure (10/3/2019), available at *http://www.lfcj.com/uploads/1/1/2/0/112061707/letter_from_45_companies_urging_frcp_amendments_for_mdl_cases_10-3-19.pdf* (last visited 2/7/2020); *see also* Advisory Committee Rules of Civil Procedure, MDL Subcommittee Report, 11/1/2018 at 142.

[14] *Id.*

[15] *Id.*

[16] For those who enjoy legalese, this doctrine is referred to as "champerty and maintenance."

[17] Supra note 13; *see also* Letter from Advanced Medical Technology Association et al. to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (3/27/2019).

[18] Supra note 13.

[19] *Id.*

[20] Lawyers for Civil Justice, *Request for Rulemaking to the Advisory Committee on Civil Rules* (2017), *https://www.uscourts.gov/sites/default/files/17-cv-rrrrr-suggestion_lcj_0.pdf*

[21] *Id.*

[22] PFS are "standardized questionnaires that serve the same function as interrogatories and requests for production." They are often utilized in large MDLs to separate the meritorious claims from the ones lacking supporting evidence. Margaret S. Williams, Emery G. Lee, & Jason A. Cantone, *Plaintiff Fact Sheets in Multidistrict Litigation*, Fed. Judicial Ctr. (2019), *https://www.fjc.gov/sites/default/files/materials/49/PFS%20in%20MDL.pdf*

[23] *Id.* Lone Pine orders require plaintiffs to produce expert affidavits identifying case-specific evidence on causation and are typically issued later in proceedings than PFS.

[24] *Id.*

[25] *Id.*

[26] Supra note 20.

[27] *See* Am. Med. Ass'n, *Attorney Ads on Drug Side Effects H-105.985* (last modified 2019) *https://policysearch.ama-assn.org/policyfinder/detail/Attorney%20Ads%20on%20Drug%20Side%20Effects%20H105.985?uri=%2FAMADoc%2FHOD-105.985.xml* ; U.S. Fed. Trade Comm'n, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits* (9/24/2019), *https://www.ftc.gov/news-events/press-releases/2019/09/ftc-flags-potentially-unlawful-tv-ads-prescription-drug-lawsuits*

[28] Supra note 20.

[29] *Id.*

[30] *See* Agenda Book, Advisory Committee on Civil Rules (Apr. 2-3, 2019 meeting), at 212-14 (MDL Subcommittee Report).

[31] See Agenda Book, Advisory Committee on Civil Rules (10/29/2019 meeting) at 106 (MDL Subcommittee Report).

32 Supra note 20.

Thinking Outside the Black Box

Reimagining attorney compensation for the 21st Century

By Paul Floyd and Nick Ryan

Traditionally, due to the fact that lawyers cannot be restricted by non-compete agreements, attorney compensation has been a major part of the glue that kept lawyers tied to their firms and vice versa. Inertia, uncertainty, and reluctance to assume the risks of leaving the firm without the next steady paycheck in view have also acted as incentives for lawyers to remain at their current firms, even if the compensation system was less than ideal. Sometimes "If it ain't broke, don't fix it" is a good strategy, especially when it comes to attorney compensation.

But since before the end of the 20th Century, long-term loyalty on the part of lawyers and firms has become a thing of the past.[1] Given its demise, and the elimination of the concomitant rewards of seniority and increased compensation for length of service in the firm, attorney compensation models are continuingly changing, a shift further complicated by the recent question of pay transparency. As a result, attorney compensation is undergoing some profound and rapid changes. Since compensation models by their nature reinforce the values and culture of the law firm and its lawyers, the handling of attorney compensation is evolving as values change. And in some cases, the old compensation models are slowing giving way to new ones.[2]

Purposes of attorney compensation plans

Attorney compensation can serve any number of purposes in a law firm, including to:

- ☐ reflect the law firm and attorneys' culture and value;
- ☐ reward producers who generate revenue for the firm;
- ☐ return to the owner their "risk and reward" investment in the firm;
- ☐ redistribute revenues to accomplish firm goals and values;
- ☐ rouse and reward work incentives, team incentives, and business development incentives; and
- ☐ recruit new attorneys, both associates and partners, to the firm.

The actual compensation model employed at a law firm may change over time as the values and purposes that inform attorney compensation change. Currently, there are six or so basic compensation models, from the "black box" (no pay transparency and compensation amounts set by a management committee) to complete pay transparency with 360-degree attorney and staff input in both job performance and compensation. The latter approach is a new development in attorney compensation and merits a bit more discussion before summarizing the various compensation models and concluding with a few pros and cons of each plan.

Next generation thinking: Pay transparency—the open model

Enter the next generation of lawyers, which is rethinking the "hows and whys" of attorney compensation by using more state-of-the-art business compensation models to set the attorneys' paychecks and determine how to reward contributions to the firm's culture and values. One major topic of interest is pay transparency in law firms. This trend is being influenced by tech companies that have upended business as usual by embracing pay transparency, which has resulted in an increase in productivity and performance, especially among top performers, as well as in firm hiring.[3]

As David Burkus, a proponent of pay transparency, notes:

> The idea of sharing salaries tends to make people uncomfortable, and privacy concerns quickly follow. However, research suggests that pay secrecy may actually lower overall employee performance and produce more distress in the workplace. In my new book, Under New Management, I look at the research on the effects of pay secrecy and sharing salaries, and the findings are very supportive of transparency.[4]

While fear is probably the main reason that firms are reluctant to adopt pay transparency, Burkus argues that fear is beginning to melt away thanks in part to more robust research on pay transparency and new regulations on pay equity in many states.[5] Yet pay transparency is not the panacea for productivity that some would argue. Todd Zenger, in a 2016 Harvard Business Review (HBR) article entitled "The Case Against Pay Transparency," cautions that pay transparency may reinforce what the business studies already demonstrate that people tend to do:

> Widely publicizing pay simply reminds the vast majority of employees, nearly all of whom possess exaggerated self-perceptions of their performance, that their current pay is well below where they think it should be. Transparency creates an expanded playground for our comparisons, potentially heightening our attention and obsession with it and elevating the negative emotions and behaviors that result.[6]

It is easy to see how self-aggrandizement and its effects play out in many law firms. Being aware of this tendency among attorneys as a profession should help when realistically evaluating individual attorney compensation in light of others in the firm.

Moreover, top-to-bottom pay transparency can be a stronger motivator than simply offering peer disclosures of compensation, since it encourages those aspiring to move up in the firm.[7] As a recent HBR article pointed out:

> The effect of knowing manager salary was more substantial for employees who learned about the pay of managers who were only a few promotions away, whose shoes they could realistically aspire to fill. We find that, when the boss is fewer than five promotions away, for each 10% increase in the perceived salary of the boss, employees spend 4.3% more hours in the office, send 1.85% more emails, and sell 4.4% more. We also found that, after realizing that these managers get paid more, employees became more optimistic about the salaries they will earn themselves five years in the future. On the other hand, we found no effects on effort, output, or salary expectations when the employees learned about managers several promotions away (e.g., an analyst learning about C-suite salaries).

> There is a caveat, though. While employees seemed perfectly capable of handling this vertical inequality, they did not handle horizontal inequality nearly as well.[8]

In short, it seems that for now the viability and effectiveness of pay transparency, especially in law firms, remains an open issue.

It matters, too, that advances in technology have made moving law practices easier today than ever before. Law firms of the past may have been less transparent about compensation because they were not as concerned about lawyers actually packing up all of their paper files and trying to find a new office. Today, however, a lawyer leaving a law firm only really needs a computer and a cell phone. Attorneys can easily access client files, meet with clients through video calling services like Zoom, and often do not even need a permanent office space. Younger lawyers who feel left out today are in a better position to grab their computer and start their own remote firm than attorneys who were locked into a physical office. Thus, firms would be wise to consider whether increasing transparency might prove beneficial in keeping younger lawyers from leaving.

Finally, the use of frequent, brief, personal check-ins by management can greatly reduce attorneys' anxiety surrounding job performance and compensation reviews. Research has shown that even something as simple as "How you doing?" or "How can we/I support you?" can greatly impact a person's feeling of "belonging" at the law firm.[9] Simply put, investing in your attorneys so that they feel a genuine sense of belonging is crucial to being competitive in the marketplace in the next decade.

What didn't seem to matter for belonging?

> Face time with senior leadership that wasn't personal. Being invited to big or external events or presentations by senior leaders, as well as being copied on their emails, was simply less meaningful to employees when it came to feeling a sense of belonging.[10]

No real surprises here. Personal relationships, even in brief check-ins, matter much more than well-intentioned overtures from senior management.

Current attorney compensation models

Today, attorney compensation models run the gamut from a primary focus on the individual lawyer to a team or firm-wide focus; from an objective system using only fee revenue factors to a totally subjective system using both billable and non-billable factors; and from no pay transparency to full pay transparency—including, in some cases, not only evaluating each attorney's contributions to the firm, but allowing all attorneys to participate in setting each other's final compensation for the year.

Is fee generation (billings and receipts) on client files the primary or sole consideration when setting an individual attorney's compensation? Or is it only one of many factors used in setting the compensation, along with such non-billable items as marketing, CLE, business development, attorney self-development, etc.? In the end, it is important for the attorneys who are determining compensation to be clear with all of the attorneys what factors are being used to set each attorney's final compensation.

The various plans used to set attorney compensation usually fall within one of the following categories.

The black box/subjective model

The "black box" is the least transparent of all compensation models, since the management committee sets the compensation for each attorney and no one outside the management committee knows what any other attorney received or the factors that figured in the decision.

The advantages of this model lie in its simplicity and finality. Only the management or compensation committee members know everyone's compensation, and the management committee's decision is usually final and non-appealable. This model is problematic if the attorneys do not trust firm management, and attorneys who do not agree with their total compensation for the year have little recourse other than leaving the firm. While it may help to keep "kvetching" about the compensation of others to a minimum, it usually falls short as a competition motivator among attorneys. Still, a number of large law firms continue to use this model.

This system can lead to frustration and confusion for attorneys who feel like the "goal post is moving." For example, an attorney with a consistent book of business that brings in just about the same amount from one year to the next may become upset if bonuses vary without explanation. If it is not clear what factors were looked at in determining the compensation, then an attorney might feel the management committee was unfair or the process was arbitrary and capricious. This may well lead to an attorney moving to a firm where the factors are more clearly defined at the start of the year.

The lock-step model

The lock-step compensation model has been used in a number of large law firms to compensate associates and partner attorneys at the same specified levels based upon tenure and seniority and without regard to merit or production. It allows for complete transparency because each attorney knows where he or she falls within the firm's seniority. One primary advantage of this model is that client matters are more likely to be handled by the attorneys in the firm most competent to handle the matter; contrast this with the incentives of a 100 percent eat-what-you-kill compensation model (described below). One disadvantage is that attorneys who are major rainmakers or who are driven to seek productivity rewards will likely feel held back and inadequately rewarded. For example, an associate with five years at the firm who believes he produced more or was a more important member of his team might feel discouraged by the fact that all fifth-year associates receive the same compensation. Some large firms have fixed this concern by using exceptions that award extra bonuses to those that the management committee feels went above and beyond. Others have elected to use a multi-factor model, as discussed below.

Multi-factor approaches use any number of agreed-upon factors in setting individual partner and associate compensation. These factors can number as few as four or five to as many as 12 or more.

The finder/minder/grinder model

This approach rewards those who generate and maintain clients over those who simply work the files. It employs some set percentage formula for each category, such as 10 percent to the originator, 15 percent to the responsible or relationship attorney, and 75 percent to the attorneys who work on the client matter, after deducting a percentage of firm overhead from all gross receipts. The overhead percentage is usually determined based upon historical data, which is trued up at the end of the firm's fiscal year, and may or may not include any partners' base salaries.

This model usually has some element of disclosure and transparency. If the attorney has an issue about whether he or she should be the originator or responsible attorney on a client matter, the management committee is the final arbiter of all disputes. This usually means that each attorney is provided with firm-wide or at least department-wide data regarding productivity, receipts, and write-downs and write-offs so that each attorney can know how their compensation was determined.

The primary disadvantage of this model is that unless some net profits are set aside to reward non-billable contributions to the firm, then productivity, billings, and receipts override all. This can sometimes morph into the next compensation plan, the eat-what-you-kill model.

The eat-what-you-kill model

"Eat-what-you-kill" rewards the individual's work on her own client matters or work she brought into the firm. It is a siloed method of attorney compensation, rewarding or punishing each attorney based upon the receipts paid to the firm on that attorney's client files. If the firm's overhead is narrowly limited to fixed expenses and customary accounts payables incurred in the ordinary course of business, the EWYK model will exclude other staff and attorneys' non-receipt-based solo or team contributions to the law firm.

In short, this model undervalues the central question of "what is the glue that keeps this firm together?" If it is only the individual's receipts that matter—and even more critically, if each attorney is rewarded for only those client matters the attorney works on—then an attorney may be tempted to refer work to an attorney outside the firm instead of cross-marketing within the firm. If the attorney refers work that could be handled by the firm to another firm (that is, to an attorney who is likely to reciprocate by sending work back to that individual attorney), the firm suffers at the expense of the individual attorney's gain. A true EWYK approach can quickly erode firm loyalty and culture. Thus, many firms have moved to a multi-factor model for compensating attorneys—one that uses both billable and non-billable factors in deciding each attorney's final compensation.

The multi-factor model

Multi-factor approaches use any number of agreed-upon factors in setting individual partner and associate compensation. These factors can number as few as four or five (e.g., origination, billings, mentoring, marketing, etc.) to as many as 12 or more. Here are a few factors currently being used by firms, as noted by Joel A. Rose in his article on new trends in partner compensation:

- ☐ client origination;
- ☐ client retention;
- ☐ quality of work product/ timeliness;
- ☐ partner productivity;
- ☐ seniority;
- ☐ firm management and leadership;
- ☐ compliance with firm policies;
- ☐ personal relationships and teamwork;
- ☐ partner participation in firm activities/functions;
- ☐ lawyer development and delegation of work;
- ☐ professional and community activities.[11]

The advantage of the multi-factor compensation model is that the management committee and the firm as a whole can allocate different percentages to each factor and adjust those percentages over time to reflect the firm's values and goals. The primary criticism of this model is that what might appear at first blush to be a more objective compensation model than the old black box still involves many subjective judgments. It is, after all, still a matter of management's judgment as to how an attorney's job performance and behavior fall within the categories the firm uses. Still, a multi-factor compensation plan usually allows the attorneys to feel in the end that their compensation supports the law firm's culture, values, and mission.

This structure also permits the firm to create and promote a culture that encourages lawyers to buy in and stay with the firm long-term. In the end, if the lawyer feels connected to the firm, she is more likely to continue with the firm. This connection to the culture of the firm may be a much more important factor than whether individual attorneys feel that they have been paid exactly what they want.

The full transparency (and full transparency coupled with a 360-degree review) model

The full transparency model is coming into its own in the 21st Century with the next generation of managing partners. There are two varieties. Variety One is full disclosure of all factors used to determine total compensation as well as all final payments made to each attorney, both associates and partners. But only the management committee or senior partners are involved in setting the amounts of final compensation. The advantage of the full transparency model is that each attorney knows where he or she stands in comparison to their seniors, peers, and juniors and will have a sense of what financial rewards are possible if he or she is motivated to achieve those results. This model can be a motivator, as well as providing clarity with respect to the firm's valued competencies.

Variety Two, less used among law firms, has the added element that every attorney evaluates, discusses, and plays a role in determining each other's final compensation for the year (sometimes using a 360-degree review or similar evaluation tools). This evaluation is then used to determine each attorney's compensation based upon his or her job performance and ability to further the firm's agreed-upon objectives and goals.

The 360-degree[12] overlay focuses on online and interview-based reviews from all attorneys and staff who work with the attorney. While there remains some disagreement in the marketplace as to the effectiveness of 360-degree reviews, John Behr argues in his recent HBR article "Getting the Most Out of 360-Degree Reviews":

> [T]hese tools are only effective if the feedback is kept confidential, respondents are encouraged to be candid, and everyone is transparent about the purpose behind the 360.[13]

But the 360 needs to be customized to reflect the particular law firm's ethos, values, and brand. For law firms that rely on the more common business strategic plan using vision, mission and values, these should be integrated into the 360. There are many 360-degree review tools available online for management to use, but the key, as Behr points out, is that the 360-degree review "should never be delivered in a vacuum."[14] There needs to be appropriate context and support for the attorney to process and develop an action plan. This can be accomplished best by using the information to build a feedback loop between management and the attorney. Finally, for some firms and especially with key attorneys, the use of an outside consultant may be most beneficial for both the firm and the individual attorney.

Conclusion

In the end, attorney compensation plans reflect the values and culture of the firm. There is no right or wrong way to structure attorney compensation. It is a balancing act between a firm's bottom-line business goals and its cultural aspirations. For some, the balance might lean toward the importance of keeping the rainmakers happy. In other firms, building and retaining a connected culture might be viewed as more important. At the end of the day, a firm is usually best advised to consider what it wants for its attorneys. If it feels like the firm is not moving in the right direction, maybe a change to the compensation structure could provide a needed boost. But before making a change, a firm should conduct research by asking other firms with different structures what they like and dislike about their set-up.

Management committee members and those setting compensation should be slow to adopt another law firm's model without getting input—and, more importantly, buy-in—from most, if not all, of the attorneys in the firm. The firm's compensation model rewards and motivates specific and measurable attorney behavior and allows management to recognize through pay those who are contributing to help the law firm better support its staff and attorneys and better serve its clients.

A firm should also consider whether a change in the transparency of compensation might benefit the firm in reaching its goals. If retaining younger lawyers and forging a connected culture are important, then more transparency may prove useful. ▲

Notes

[1] Reid Hoffman, Ben Casnocha, Chris Yeh, "Tour of Duty—The New Employer-Employee Contract," Harvard Business Review (June 2013).

[2] For an overview of traditional compensation models, see Michael Moore, "Untying the Gordian Knot: Attorney Compensation," *Wisconsin Lawyer* (March 2012). For a discussion of the pros and cons of pay transparency on worker behavior, attitudes and performance, see Zoë B. Cullen and Ricardo Perez-Truglia, "The Motivating (and Demotivating) Effects of Learning Others' Salaries," *Harvard Business Review* (10/25/2018) and Todd Zenger, "The Case Against Pay Transparency," *Harvard Business Review* (9/18/2016).

[3] Tanza Loudenback, "More tech companies have stopped keeping employee salaries secret — and they're seeing results," *Business Insider* (5/3/2017). *https://www.businessinsider.com/why-companies-have-open-salaries-and-pay-transparency-2017-4*

[4] David Burkus, "Forcing Employees to Keep Their Salaries a Secret Could Hurt Performance," *Inc.* (6/22/2016). *https://www.inc.com/david-burkus/how-salary-transparency-impacts-employee-performance.html*

[5] David Burkus, *Under New Management: How Leading Organizations are Upending Business as Usual*, Houghton Mifflin Harcourt (2016).

[6] *Id.*

[7] Zoë B. Cullen and Ricardo Perez-Truglia, "The Motivating (and Demotivating) Effects of Learning Others' Salaries," *Harvard Business Review* (10/25/2018).

[8] *Id.*

[9] Karyn Twaronite, "The Surprising Power of Simply Asking Coworkers How They're Doing," *Harvard Business Review* (2/28/2019).

[10] *Id.* It is also worth noting that research is demonstrating that a sense of belonging is critical for diversity and inclusion to be successful in companies. See, Evan Carr, Andrew Reecem Gabriella Rosen Kellerman, and Alexi Robichaux, "The Value of Belonging at Work," *Harvard Business Review* (12/16/2019).

[11] Joel A. Rose, *Newer Trends In Determining The Most Appropriate Partner Compensation System For Your Firm And Standards To Assess Partner Performance* (1999-2017) (defining each of these factors in some detail) *at: http://www.joelarose.com/articles/newer_trends_partner_compensation.html*

[12] Jack Zenger and Joseph Folkman, "Getting 360 Degree Reviews Right," *Harvard Business Journal* (9/7/2012) ("[t]here is one 360 rater that is highly unreliable and rarely predictive at all… that person is you.… For leaders to get an accurate picture of their own effectiveness, they need feedback from their manager, peers, direct reports, and others in the organization.").

[13] John Behr, "Getting the Most Out of 360-Degree Reviews," *Harvard Business Review* (11/22/2019).

[14] *Id*

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Minneapolis's Great Experiment

An introduction to the Minneapolis 2040 Comprehensive Plan

By Steven P. Katkov and Jon Schoenwetter

There has long been a consensus among researchers that single-family zoning is bad for housing affordability, bad for the environment, and bad for racial justice.

— Richard Kahlenberg

Minneapolis is now engaged in the most ambitious urban planning experiment in American history—at once hailed as a promising step to combat rising housing expenses and decried as bulldozing the idyllic American neighborhood. Regardless of sentiment, on January 1, 2020, Minneapolis rezoned approximately 70 percent of its land area in one fell swoop.[1] For this, the massive Minneapolis 2040 Comprehensive Plan is responsible.[2] Though the plan has many facets, this article focuses on the zoning code revisions and offers an early assessment of the potential impact for affordability and the built environment.

Zoning history

Prior to the 20th century, landowners enjoyed virtually complete autonomy over their real property. Landowners could, of course, consent to restrictions by yielding to informal incentives or drafting private covenants.[3] But the only means of restricting offensive uses was common law tort remedies based on nuisance and trespass doctrines. Once sufficient to ensure orderly living, the failure of these doctrines to combat the ills of increasing urbanism and the industrial revolution led social reformers and elected officials to whittle away at freedom of ownership with restrictive legislation and rulings.

Initial movers included Washington, D.C., which enacted height restrictions in 1899, and Los Angeles, which created residential districts in 1908. New York City is often cited as the first to employ comprehensive zoning, with the enactment of, among other restrictions, "wedding-cake" setback requirements responsible for the iconic tiered look of the Chrysler and Empire State buildings.[4] In 1916, only eight American cities employed some form of zoning ordinance.[5]

The desire to zone quickly exploded and, 20 years later, achieved near ubiquity with some 1,254 cities employing it in one way or another, evincing a clear preference for single-use properties and the primacy of the single-family home.[6] The US Supreme Court weighed in on the discussion as early as 1909, holding in the case of *Welch v. Swase*[7] that building height restrictions were a constitutional exercise of the police power and laying the foundation for broad police power exercise over land use in 1915 in *Hadacheck v. Sebastian*.[8] With the landmark *Village of Euclid v. Ambler Realty Co.* decision in 1926, the Court unequivocally stamped land-use controls with a resounding seal of constitutional approval.[9]

Economic, racial, social, and political theories abound, each seeking to explain why land use restrictions developed the way they did. The authors submit that the most compelling explanation is the rise of modern transportation infrastructure. Prior to the last century, most people had little choice but to walk to work and, not surprisingly, favored seeing their immediate neighborhoods develop commercially. Accordingly, our cities were largely a patchwork of uses with homes and businesses in the same area.

Many of the justifications that underlie modern zoning districts arose naturally because of the limited mobility of the workforce. The immense inconvenience and expense of non-foot travel kept higher densities localized. Further, the most noxious of uses—industrial—naturally aggregated around the docks and railyards. Accordingly, distance both caused and insulated naturally occurring residential enclaves.

The early 20th century saw mass proliferation and economization of trolley systems, passenger buses, and, most important of all, the automobile. The urbanite was increasingly free to live in one area and work in another. Trucks similarly unchained industrial structures from the docks and railyards. Enticed by the lower cost of land and liberated by transit, *de facto* "residential" areas came under assault by the higher densities.[10]

As people began to live and work in different areas, the development incentive that existed in the live-work neighborhood began to erode. Now the homeowner was able to support downzoning without risking economic ruin. The prospect that an unsavory use could invade a residential neighborhood and depress home values became real. Accordingly, the homeowner had clear economic incentives to re-confine industrial, commercial, and high-density residential back to the transit corridors they had previously occupied. Consequently, zoning codes created zoning districts, dividing the city into areas with similar uses. They provided buffers and transitions between districts with dissimilar uses, such as industrial and residential.[11]

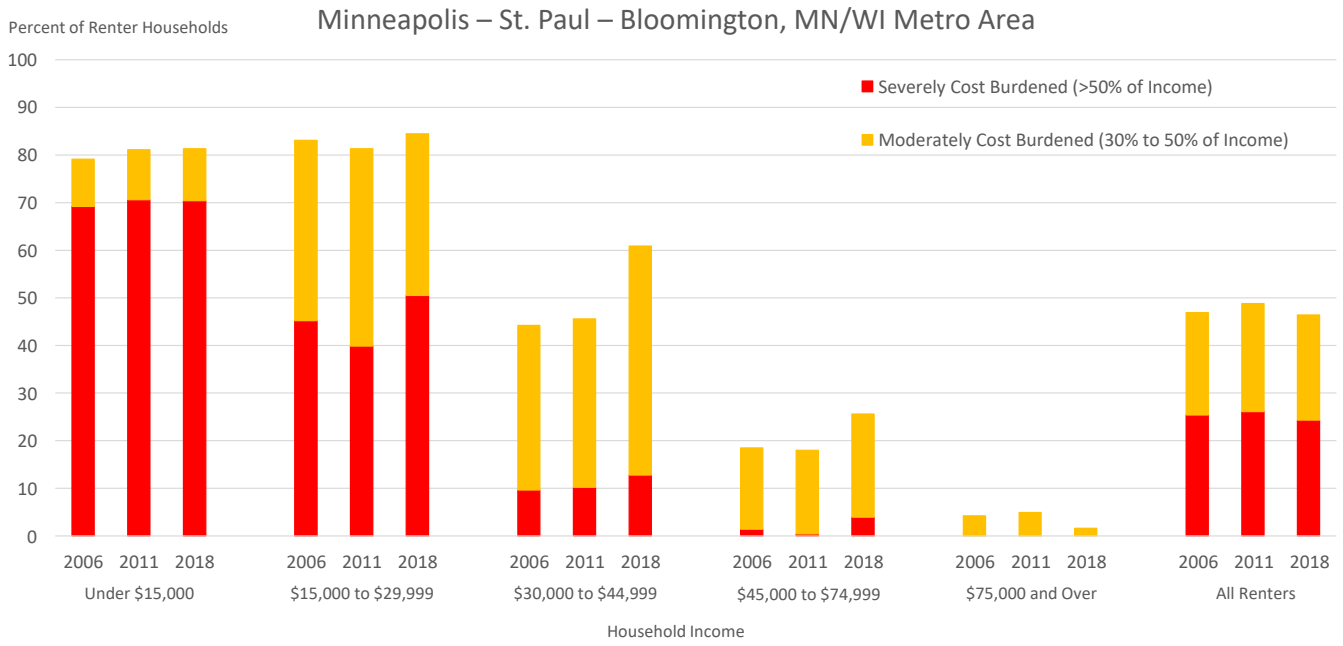
Affordable housing crisis

Our cities are the product of these zoning practices, and simple intuition indicates that they have had something to do with making our housing so expensive. The growing evidence suggests that (1) the lowest-income renters increasingly outnumber the supply of units they can afford, (2) low-rent stock in most metropolitan areas has declined substantially since 2011, and (3) housing affordability has dropped from 77.5 percent in 2012 to 56.6 percent in 2018.[12] This issue seemed to reach a breaking point in 2019, when a flood of new legislation and ideas around housing peppered the public discourse to an unprecedented degree.[13] Last year, two states enacted rent control measures to stem the tide of unaffordability among renters.[14]

While affordable housing means different thing to different people, the HUD definition of "housing with monthly costs that are no more than 30 percent of a household's income" is a decent place to start. To the average Minneapolitan, this breaks out to approximately $1,400 per month for housing-related expenses.[15] In December 2019, the median sales price of a residential property (condominium, townhouse, single-family, new or used, any size, any price) in Minneapolis was $280,000, up approximately $40,000 from two years earlier.[16] While more expensive, this home is still "affordable" for the average Minneapolitan.[17]

The rental market is somewhat different. The average monthly rent is over $1,500,[18] but this figure is slightly misleading, as the market is highly segmented in terms of product. For example, the Star Tribune reported the average monthly rent for a two-bedroom apartment to be $1,847, while the average one-bedroom unit could be had for $1,253.[19] Accordingly, the consumer has some control over whether the housing choice they make will be affordable. Regardless, the National Association of Home Builders reports that 45 percent of metro-area renters are "cost burdened," meaning that they spend more than 30 percent of their pre-tax household income on housing expenses.[20] The 30-percent-of-income-standard, while imperfect and no stranger to controversy, presents a real and significant problem for Minneapolis residents.[21]

Change in Cost-Burdened Renter Households[22]



Minneapolis 2040 is clearly not just about the "average" Minneapolitan. Indeed, the plan operates on a more expansive idea of affordability: to enable those with less skills and wealth to access the tremendous economic synergies of the Minneapolis area. The ability of Minneapolis 2040 to serve those residents who may make less than 30 percent of the area median income (AMI) has been called into question.[23] Currently, the 30th percentile AMI for a single-member household is $21,000; for a four-member household, $30,000.[24] Affordability for these households means housing-related expenses of less than $525 and $750 per month, respectively. Between 2011 and 2017, the Minneapolis-St. Paul Metropolitan Area lost 35.5 percent of its $800-and-under rental stock, and as such, it's clear that affordable housing is not occurring at rates commensurate with economic reality.[25]

The subject is so complex that Gov. Mark Dayton convened a nonpartisan task force in December 2017 to develop solutions to alleviate Minnesota's housing challenge. The Governor's Task Force on Housing identified six major themes suggestive of a healthy, affordable housing market, and its final report includes no fewer than 30 action steps aimed at increasing both housing choice and affordability across its 70 pages.[26] The report affirms that the state's building code and regulations need to be transformed to "*encourage innovation without sacrificing safety and quality standards.*"[27] An important driver in the cost of housing in Minneapolis is simply the cost of construction; for a variety of reasons, home construction costs are simply too high in Minnesota to make meaningful progress in this regard.[28]

Nuts and bolts

Aiming to help reverse this trend, Minneapolis has made a bold declaration through a usually mundane event. By statute, Minnesota cities are required to adopt and update a "comprehensive plan" every 10 years.[29] The most recent iteration is Minneapolis 2040, adopted by the City Council on October 25, 2019 and made effective January 1, 2020.

Minneapolis 2040 has 14 goals:

1. eliminate disparities;
2. more residents and jobs;
3. affordable and accessible housing;
4. living-wage jobs;
5. healthy, safe, and connected people;
6. high-quality physical environment;
7. history and culture;
8. creative, cultural, and natural amenities;
9. complete neighborhoods;
10. climate change resilience;
11. clean environment;
12. healthy, sustainable, and diverse economy;
12. proactive, accessible, and sustainable government; and
14. equitable civil participation system.

By far the most-discussed of these is goal 3, affordable and accessible housing—specifically, the allowance of triplexes on formerly single-family lots. At its core, Minneapolis 2040's revisions amount to a simple upzoning of residential property. Prior to Minneapolis 2040, the city's most restrictive zoning, R-1, permitted only one single-family detached structure per parcel. Now, this same zone will accommodate, as of right, three-family attached structures. While simple in concept, its implementation is complex.

On November 13, 2019, Mayor Jacob Frey approved zoning code revisions responsive to Minneapolis 2040.[30] The primary revisions are definitional in nature, with "Three-Family Dwelling" largely replacing prior references to single- and two-family items: Three-family dwellings are now permitted in R1-R6 zones.[31] Aside from this global modification, the revisions have also coopted variance changes to meet the new three-family dwellings.[32] Specifically, Minneapolis may now:

1. grant minimum width variance for three-family dwellings located on lots 40 feet or less in width;[33]
2. grant a variance for new enclosed storage requirements;[34] and
3. grant a variance for curb-cut requirements.[35]

The revised code also relaxes many existing restrictions in favor of greater density. Some of these changes, like adjusting the per-dwelling minimum lot size requirement, necessarily follow the permission for three-family dwellings.[36] Perhaps the most striking change is the abolition of off-site parking requirements. Under the revised code, single-, two-, and three-family dwellings need only provide 200 square feet of enclosed storage, which may or may not be used to house vehicles.[37] Also relaxed are the minimum width requirements, from 20 feet to 18 feet,[38] and, for many lots, the hard-cover requirement, from 60 to 65 percent.[39]

Also noteworthy is the new front yard setback mechanic.[40] While the revised code maintains the existing front yard setbacks, it provides for an adjustment pursuant to new Sections 546.160(b) and (c). This mechanic allows for *reduced* front yard setback where the average front yard setback of the majority of residential structures on the same block-face are less than the required distance, provided certain other conditions are met.[41] This starkly contrasts with the old code, where front yard setback *increased* where the immediately neighboring homes were set further back than required.

The revised code also provides for converting existing single-family homes into three-family dwellings.[42] Of note, fire escapes and stairs to walk-up units are permitted on the rear exterior of the building (or may be enclosed within). Mechanical boxes must be located on the side or rear of the building and street-facing materials must be comparable to the existing ones. Notably, developers will be permitted to convert already nonconforming single-family structures to three-family dwellings.[43]

As revolutionary as these changes are, much of the existing regulatory scheme with which developers and homeowners are familiar remain in place and, importantly, Minneapolis did not create one universal residential zone. Accordingly, the differing bulk, yard, and setback requirements still apply to all development. For example, the same three-family dwelling will have to abide by a 25-foot front yard setback on an R1 property and a 15-foot one on an R4 property. In short, develop-ability will vary based on the existing "R" classifications.[44] Specifically:

1. The design standards remain constant for single-, two-, and three-family dwellings.[45]
2. Height restrictions remain at 25 feet.[46]
3. Rear yard setbacks remain at 5 or 6 feet depending on the R zone.[47]
4. Side yard setbacks remain at 5 to 12 feet depending on lot size.[48]
5. Minimum gross floor area remains at 500 square feet for each dwelling unit.[49]
6. Minimum lot width remains at 50 to 40 feet depending on R zone.[50]
7. Maximum floor area remains at .5x or 2,500 feet.[51]

Finally, the revised code provides several clarifications regarding egress windows,[52] window area requirements,[53] and entranceways.[54] While the last of these communicates a preference for a shared front entrance, the revised code permits separate entrances, even where two of the three entrances are located on the side of the structure.[55]

"In time we can reasonably expect triplex units to be more affordable than comparably finished and located single-family homes."

Lack of building code revisions

As indicated previously, the new three-family dwelling presents significant changes for Minneapolis. But Minneapolis 2040 has not produced any meaningful liberalization in building restrictions. Developers will have to abide by the height restrictions and lot line setbacks with which they are familiar. Most importantly, three-family dwellings are not eligible for the height increase mechanism available to single- and two-family dwellings.[56] The only notable liberalization is that developers will no longer have to provide off-street parking, though they will have to provide a 10 x 20 foot storage facility instead. No specific revisions to the building code have materialized as of the date of this article, but should be forthcoming this year and beyond.

Long-term policy considerations

The evidence suggests that single-family zoning has contributed to the pattern of ever-increasing housing costs in many American cities. New housing stock has historically either been pushed to neighboring exurbs, increasing automobile emissions and traffic congestion; or it's been foisted upon poor, minority communities with the effect of gentrification and displacement. This result is by no means unique to Minneapolis but rather is a national phenomenon, where most metropolitan land area is devoted specifically and exclusively to the single-family home.[57]

Historically, government has enjoyed a number of options to address affordable housing. First, government controls building codes and land use restrictions. To the extent that authorities require more expensive building practices (e.g., Minnesota's failed residential sprinkler system requirement), housing will likely be more expensive. A similar outcome can be expected where authorities enact zoning ordinances favoring light density. Second, government provides housing subsidies directly to consumers. Such subsidies increase the consumer's purchasing power, making more of the existing housing stock affordable. Section 8 vouchers are a prominent example. Third, government participates directly in the housing market by constructing units and then renting them at sub-market rates. The Minneapolis Public Housing Authority is one such example. As an operator of nearly 6,000 public housing rental units—including apartment buildings, single-family homes, townhomes, and senior apartment complexes in Minneapolis—it attempts to address affordable housing directly. Finally, government can institute rent control policies that restrict the amounts that landlords can charge. California and Oregon, where rent increases are now capped, respectively, at 5 and 7 percent annually, are examples.

Each of these avenues to affordability comes with consequences. Removing restrictions may lead to greater profits rather than cheaper houses. Rent subsidies merely mask the underlying affordability issue for recipients. Public housing tends to aggregate poverty. Rent control discourages development and pushes housing elsewhere. What is clear amidst this sea of unintended consequences is that our society

needs to pull these levers differently if the affordable housing crisis is to be ameliorated. Seen in this light, Minneapolis 2040 is certainly a refreshing initiative.

Theoretically, Minneapolis 2040 paves the way for greater housing supply, which should reduce housing costs. Socially, it promises to reduce racial segregation and promote access to high-opportunity, low-crime neighborhoods. Environmentally, it provides consumers the option to select smaller living footprints and shorter commute times. While these anticipated benefits are largely speculative today, it is clear that forging ahead to more decades of omnipresent downzoning policies is no longer a viable option.[58]

Looking forward

As a whole, it is difficult to find a single revision to the Zoning Code that will make developing residential property more difficult or expensive. Indeed, the only item that adds to the developer burden is a new tree-density requirement.[59] Accordingly, it is easy to conclude that Minneapolis 2040 is more development-friendly than many of its critics have insisted. Yet we also have substantial justification for concluding that, over time, the liberalization of restrictive single-family zoning will create more affordable housing.

Setting aside limited developments in the last decade, a strong case can be made that we live under the most restrictive, down-zoned regimes in the nation's history. These restrictions contribute to costs that, according to the National Association of Home Builders, account for 25 percent of the sticker price on new single-family homes.[60] There is undebatable merit in zoning and building codes that promote quality of living, health, and safety. Today's big question is not whether our codes meet these goals, but whether they are detrimentally excessive. Minneapolis 2040 answers affirmatively. Indeed, if the plan stands for anything, it's that we can no longer ignore the value of supply-driven solutions as part of an effective regulatory system.

It is, however, unlikely that the triplexes contemplated by Minneapolis 2040 will be, in and of themselves, "affordable" housing units. Indeed, the authors believe it would be unrealistic to expect new triplexes in Minneapolis for less than $250,000 per unit in the existing marketplace. To the extent that this upzoning initiative does impact area affordability, it will take time.

In the near term, the authors expect that upzoning will have little tangible impact on affordability. Indeed, a recent study in Auckland, New Zealand revealed that upzoning actually increases the cost of housing as existing lots are repriced according to their new development value.[61] Following these results, Minneapolis' single-family lots with older, smaller homes will see noticeable price increases as developers compete for initial triplex pads.[62]

These triplexes will likely serve two demographics—first, young professionals looking to secure more space who are either unwilling to forego the ease-of-use that flows from professional property management or unprepared to purchase a single-family home; and second, existing homeowners who are looking to right-size their living footprint but are unwilling to accept high-density living. Neither of these groups is among the "less well-off" demographics that Minneapolis 2040 clearly aims to fight for.

As the market for triplexes begins to mature, there is ample reason to believe these initial price increases will be offset by the growing availability of housing stock. First, triplex residents become removed from the marketplace. In sufficient numbers, this will help readjust vacancy rates back to historic levels and give landlords more incentive to reduce rents. Second, it is expected that many new triplex residents will be moving from existing single-family homes. This will assist the existing homes in "filtering down" and, given sufficient numbers, becoming viable candidates for triplex redevelopment themselves.[63] Most promisingly, Minneapolis 2040 offers to bring down housing costs in affluent areas and allow more people to access the localized opportunities there. This objective is something that traditional programs, such as the Low Income Housing Tax Credit or Housing Choice Voucher System, have struggled to do. Indeed, a 2012 RAND study found that only 10 percent of housing created through the LIHTC program, and 7 percent under the choice voucher program, are located near low-poverty-rate schools.[64]

It is simply true that subject to structure, quality, and location, large houses on big lots cost more to buy or rent than smaller ones. Though it's necessarily still hypothetical, simple math suggests that the opportunity to replace a single unit with three dwelling spaces militates in favor of increasing the available housing stock. So in time we can reasonably expect triplex units to be more affordable than comparably fin-ished and located single-family homes. By permitting Minneapolitans to go smaller, Minneapolis 2040 offers a previously un-available way to reduce housing costs. While it's clearly not a panacea for our city's housing crisis, it is a step that, in conjunction with other measures, will aid in the cure.[65] ▲

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Notes

[1] Richard D. Kahlenberg, *How Minneapolis Ended Single-Family* Zoning (The Century Foundation, 10/24/2019) (identifying approximately 70% of Minneapolis' land area as reserved for single-family residential use), *https://tcf.org/content/report/minneapolis-ended-single-family-zoning/?agreed=1*

[2] Weighing in at roughly 1,250 pages replete with studies, Minneapolis 2040 may be found online here: *https://minneapolis2040.com/*.

[3] Notably, rudimentary zoning restrictions, often related to fire safety, can be traced to the 19th century. *See e.g.*, William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects* 13 (12/18/2001). *https://www.dartmouth.edu/~wfischel/Papers/02-03.pdf*

[4] Fischel, at 3.

[5] Elizabeth Winkler, *'Snob Zoning' is Racial Housing Segregation by Another Name*, Wash. Post (9/25/2017). *https://www.washingtonpost.com/news/wonk/wp/2017/09/25/snob-zoning-is-racial-housing-segregation-by-another-name/*

[6] *Id.* (with ordinances on the books in 1,254 cities).

[7] 214 U.S. 91 (1909).

[8] 239 U.S. 394 (1915) (holding that cities may restrict uses without committing a 5th Amendment taking).

[9] 272 U.S. 365 (1926).

[10] Fischel, at 15 (""[N]ew modes of transportation allowed people to separate where they lived from where they worked and… the development of the bus and truck undermined traditional means of protecting neighborhoods.").

[11] Indeed, a segregating effect was and is clearly the goal of zoning ordinances. *See, e.g.*, Gabriel Metcalf, *Sand Castles Before the Tide? Affordable Housing in Expensive Cities*, 32 J. of Econ. Perspectives 69, n. 1 (Winter, 2018) ("[F]or the country as a whole, the restrictive housing policies of the cities in expensive metro areas leads to the segregation of the wealthy into zoned enclave communities; a reduced ability of lower-income people to move to areas of higher opportunity; a diversion of enormous wealth into rent-seeking behavior by landowners; and a decrease in economic productivity for the country as a whole, because labor is not able to be allocated to the most productive economic clusters."). While segregating uses seems morally neutral, ordinance drafters rather quickly realized that zoning could be used for a more nefarious purpose: segregating people. For example, one of the first implementations of zoning in the county—Baltimore's 1910 ordinance—prohibited selling or renting property in majority-white neighborhoods to blacks, and vis versa. *Silver*, at 1. The prevalence of race-based zoning continued until the Supreme Court struck down a Louisville, Kentucky law similar to the Baltimore ordinance in 1917. *See Buchannan v. Warley*, 245 U.S. 60 (1917) (holding the ordinance violated the freedom to contract under the 14th Amendment). With affirmative race-based exclusionary zoning policies "out," in stepped the proxy of private deed covenants, later struck down by the U.S. Supreme Court. *Shelley v. Kraemer*, 334 U.S. 1 (1948). While it would be disingenuous to suggest that this narrative is the only explanation for the early-century explosion in zoning practice, it was undeniably an early and significant force.

[12] Source: Joint Center for Housing Studies of Harvard University, available at: *https://www.jchs.harvard.edu/data-and-charts/?ra=affordability.*

[13] *See, e.g.*, Richard Florida, *How Housing Supply Became the Most Controversial Issue in Urbanism* (Citylab, 5/23/2019), *https://www.citylab.com/design/2019/05/residential-zoning-code-density-storper-rodriguez-pose-data/590050/*); Richard D. Kahlenberg, *Minneapolis Saw That NIMBYism Has Victims* (The Atlantic, 10/24/2019), *https://www.theatlantic.com/ideas/archive/2019/10/how-minneapolis-defeated-nimbyism/600601/* ; Laura Kusisto & Peter Grant, *Affordable Housing Crisis Spreads Throughout World* (Wall St. J., Apr. 2, 2019), *https://www.wsj.com/articles/affordable-housing-crisis-spreads-throughout-world-11554210003*; Alcynna Lloyd, *NAHB: Most Homeowners now view Housing Market's Affordability Problem as a Crisis* (Housing Wire, 9/13/2019), *https://www.housingwire.com/articles/50149-nahb-most-homeowners-now-recognize-the-housing-markets-affordability-problem-as-a-crisis/* The issue has even inspired the creation of a White House Council to study it. *See* Exec. Order No. 13878, 84 C.F.R. 30853.

[14] Oregon and California are the first to employ state-wide rent control. Jenna Chandler, *Here's How California's Rent Control Law Works* (Curbed Los Angeles, 1/6/2020), *https://la.curbed.com/2019/9/24/20868937/california-rent-control-law-bill-governor;* Lauren Drake, *Rent Control is Now The Law In Oregon* (Oregon Publ. Broad., 2/28/2019), *https://www.opb.org/news/article/oregon-rent-control-law-signed/* New York, New Jersey, Maryland, and Washington D.C. all have some form of local level rent control. National Multifamily Housing Council, *Rent Control Laws by State* (NMHC, 9/20/2019).

[15] US Census Bureau, *QuickFacts: Minneapolis City, Minnesota* (U.S. Census Bureau, 7/1/2018) (reporting median household income as $55,270 in 2017 dollars). *https://www.census.gov/quickfacts/minneapoliscityminnesota*

[16] NorthstarMLS, *Infosparks Market* (10K Research, 1/13/2019).

[17] Submitting that $1,400 per month can sustain a $300,000 thirty-year, fixed-rate mortgage at 4 percent.

[18] RentCafe, *Minneapolis, MN Rental Market Trends* (Sept., 2019). *https://www.rentcafe.com/average-rent-market-trends/us/mn/minneapolis/*

[19] C.J. Sinner, *How Much is Rent in Twin Cities? This Guide Breaks it Down by Area, Unit Type* (StarTribune, 6/14/2019). *http://www.startribune.com/how-much-is-rent-in-twin-cities-this-guide-breaks-it-down-by-area-unit-type/414996293/*

[20] National Association of Home Builders, *Housing Fuels the Economy* (NAHB, 2019). *http://www.nahbhousingportal.org/states/minnesota/?tab=afford*

[21] Christopher Herbert, Alexander Hermann & Daniel McCue, *Measuring Housing Affordability: Assessing the 30-Percent of Income Standard* (Joint Ctr. For Housing Studies, Sept., 2018). *http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Herbert_Hermann_McCue_measuring_housing_affordability.pdf*

[22] Harvard Joint Center for Housing Studies tabulations of US Census Bureau, 2006–2017 American Community Survey 1-Year Estimates using the Missouri Data Center MABLE/geocorr14, available at: *https://www.jchs.harvard.edu/son-2019-cost-burdens-map.*

[23] Jack Cann, *Objections to Minneapolis Draft Comprehensive Plan* (1/22/2019). *https://www.documentcloud.org/documents/6024160-Objections-to-Minneapolis-Draft-Comprehensive-Plan.html*

[24] NeighborWorks Home Partners, *Area Median Income*, (NeighborWorks Home Partners, 2019).

[25] Joint Center for Housing Studies, *The Low-Rent Stock in Most Metros has Declined Substantially Since 2011* (Joint Ctr. For Housing Studies, 2019) (adjusting contract rents and household income to 2017 dollars).

[26] Minnesota Legislature, *Governor's Task Force on Housing* (Minn. Legis. Ref. Libr., 8/21/2018), *https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=2312*

[27] Governor's Task Force on Housing, *More Places to Call Home: Investing in Minnesota's Future* 25 (8/21/2018), *https://www.leg.state.mn.us/docs/2018/other/180809.pdf*

[28] Housing First Minnesota, *Solutions to the High Cost of Housing in Minnesota* (2019) (noting that 2018 legislation had increased the cost of producing a new single-family home in Minnesota by $17,000). *https://www.mnhousingtaskforce.com/sites/mnhousingtaskforce.com/files/media/25.%20Housing%20First%20reply%20to%20Call%20for%20Ideas.pdf*

[29] Minn Stat. §473.85171 (Metropolitan Land Planning Act).

[30] Minn. Ord. No. 2019-048 (11/16/2019), *https://lims.minneapolismn.gov/Download/*MetaData/15355/2019-048_Id_15355.pdf The Minneapolis Code of Ordinances can be accessed online here: *https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=MICOOR_TIT20ZOCO#TOPTITLE.*

[31] *Id*., at T. 546-1.

[32] We presume that the legal standards applicable to the granting of a variance under Minnesota law will apply to this section of the plan, permitting affected property owners to oppose any variance request under Minn. Stat. Section 462.357 and its case law. If true, the plan's effectiveness could be limited by disqualifying more challenging lots from consideration because the property owner cannot reasonably demonstrate that strict enforcement would cause the owner "practical difficulties." See *In re Stadsvold*, 754 N.W.2d 323 (Minn. 2008). The authors predict that any variance applications under Minneapolis 2040 will be met with vocal public opposition.

[33] *Id*., at 525.520(12).

[34] *Id*., at 525.520(30).

[35] *Id*., at 525.520(31).

[36] *Id*., at T. 546-3 "Lot Dimensions and Building Bulk Requirements" (providing that single, two-, and three-family dwellings must have a minimum lot area of 6,000 feet); T. 546-5 "R1A Lot Dimensions and Building Bulk Requirements" (providing a minimum lot area of 5,000 feet); T. 546-7 "R2 Lot Dimensions and Building Bulk Requirements" (same); T. 546-9 "R2B Lot Dimensions and Building Bulk Requirements" (same).

[37] *Id*., at 530.300.

[38] *Id*., at 535.90.

[39] *Id*., at 546.150(b) (if the lot does not have second street frontage or access to a public alleyway, and is less than 6,000 square feet, hard cover is permitted on 65% of the lot).

[40] *Id*., at 546.160(c).

[41] *Id*., at 546.160(c)(1)-(2) (no fewer than four residential structures on same block face; setback not less than the two immediate side neighboring residential structures).

[42] *Id*., at 535.90(e)

[43] *Id*., at 535.90(f) (provided that the nonconformance is not increased).

[44] *Id*., at 546.200 et. seq.

[45] *Id*., at 530.280.

[46] *Id*., at 546.110 (33 feet at highest point).

[47] *Id*., at T. 546-2 "R1 Yard Requirements" (6 feet); T. 546-4 "R1A Yard Requirements" (same); T. 546-6 "R2 Yard Requirements" (same); T. 546-8 "R2B Yard Requirements" (same).

[48] *Id*. (5 feet for lots less than 42 feet; 12 for lots in excess of 100 feet).

[49] *Id*., at 535.90 (350 feet for studio units).

[50] *Id*., at T. 546-3 "R1 Lot Dimensions and Building Bulk Requirements" (50 feet); T. 546-5 "R1A Lot Dimensions and Building Bulk Requirements" (40 feet); Table 546-6 "R2 Yard Requirements" (same); T. 546-8 "R2B Yard Requirements" (same).

[51] *Id*.

[52] *Id*., at T. 535-1 (providing that egress windows must be at least 3 feet apart and not more than 3 egress wells may project closer than 5 feet to an interior side lot line).

[53] *Id*., at 535.90(c).

[54] *Id*., at 535.90(b)(1).

[55] *Id*., at 535.90(b)

[56] *Id*., at 546.240(f) (proving that "the maximum height of *single- and two-family dwellings* may be increased...") (emphasis added).

[57] Emily Badger and Quoctrung Bui, *Cities Start to Question an American Ideal: a House With a Yard on Every Lot* (N.Y. Times, 6/18/2019) ("It is illegal on 75 percent of the residential land in many American cities to build anything other than a detached single-family home."). *https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html*

[58] Consider Los Angeles, which, despite increasing population, has lost 60% of its population capacity to downzoning between 1970 and 2010. Gregory D. Morrow, *The Homeowner Revolution: Democracy, Land Use and the Los Angeles Slow-Growth Movement, 1965-1992*, ii (2013). *https://escholarship.org/uc/item/6k64g20f*

[59] Minn. Ord. No. 530.295 (requiring one tree for every 3,000 feet of lot area).

[60] National Association of Home Builders, Housing Fuels the Economy (NAHB, 2019). *http://www.nahbhousingportal.org/*

[61] Ryan Greenway-McGrevy, Gail Pacheco & Kade Sorenson, *Land Use Regulation, the Redevelopment Premium and House Prices*, 2 (Univ. of Auckland: Economics Working Paper Series, Sept. 2018). *https://www.aut.ac.nz/__data/assets/pdf_file/0003/163542/AUT_wp_2018_02_updated.pdf*

[62] *Id.*, at 12.

[63] Stuart S. Rosenthal, *Are Private Markets and Filtering a Viable Source of Low-Income Housing? Estimates from a "Repeat Income" Model*, 104 Am. Econ. R. 104, 687, 704 (2014); John C. Weicher, Frederick J. Eggers & Fouad Moumen, *The Long-Term Dynamics of Affordable Rental Housing* 3 (Hudson Inst., 9/15/2017) ("Filtering added 4.6 million units to the affordable rental inventory and gentrification removed 1.7 million, for a net contribution of 2.9 million units to the affordable rental housing stock [between 1985 and 2013]."). *https://s3.amazonaws.com/media.hudson.org/files/publications/AffordableRentHousing2017.pdf*

[64] Hickey, at 4.

[65] For those new to the discussion of duplex and triplex construction on single-family lots, the idea is neither novel nor recent. As early as the 1980s, the town of Chester, New Hampshire battled this very issue with an enterprising developer, Raymond Remillard. Chester had a zoning ordinance, in effect since 1985, that provided for a single-family home on a two-acre lot, a duplex on a three-acre lot and excluded multi-family housing from all five zoning districts. Remillard owned 23 acres and tried for 11 years to obtain a permit to construct a multi-unit housing complex primarily for low- to moderate-income families. He ultimately succeeded in his quest when the New Hampshire Supreme Court struck down Chester's exclusionary zoning ordinance as unconstitutionally restrictive, evincing a clear prejudice "for people who can afford a single-family home on a two-acre lot or a duplex on a three-acre lot." See *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991).

BLE holds hearing on admission of foreign-trained lawyers

By Emily Eschweiler

On February 5, 2020, the Minnesota Board of Law Examiners conducted a public hearing to discuss the issue of admitting lawyers with foreign legal education. In advance of this meeting, the board received and reviewed 15 written comments submitted by individuals in response to the board's request for input on this issue.[1]

John Koneck, the chair of the Rules and Professional Conduct Committee, and Doug Peterson, the board president, commenced the meeting by thanking the parties who had submitted comments and confirming that the board is genuinely interested in this issue and mindful both that the world is increasingly connected and that applicants from other countries have the potential to increase the diversity of the bar. Over the course of the two-hour conversation that followed, the board heard from individuals who had asked to present, as well as other attendees. Many of these individuals described their reasons for selecting Minnesota law schools for their LL.M. programs and their desire to be admitted in Minnesota. Presenters also noted the ways that a diverse and robust legal profession will benefit clients throughout Minnesota and positively impact Minnesota's position in the global market. The comments from presenters reinforced the reasons the board is committed to studying this complex issue and the interest the board has in exploring a pathway for well-qualified foreign educated applicants to pursue admission.

By way of background, in 2010, the board filed with the Supreme Court a comprehensive report studying the issue of non-ABA legal education, including foreign education.[2] The Court requested the report in response to a petition filed in 2009 by four Minnesota lawyers who sought a pathway for admission without an ABA degree. The board noted in the report that the issue of foreign education is complex. The complexities of evaluating foreign education include:

1. Differences in the basis for the legal education, including common law, civil law, religious law, customary law, or a mixture of legal systems.
2. Undergraduate versus graduate studies for law and the curriculum of the foreign law school.
3. Differences in whether an examination is required to practice in the foreign jurisdiction and whether an applicant is required to be licensed to practice.

Notably, there is significant variance in how other U.S. jurisdictions approach the issue.[3]

In August 2011, following submission of the board's comprehensive report, the Court amended Rule 4A(3) to include a provision for graduates of non-ABA-accredited U.S. law schools to sit for the Minnesota bar examination if they have practiced for five of the last seven years in another U.S. jurisdiction. The Court did not expand the rule to permit foreign educated graduates to sit for the bar examination at that time. The board advised the Court that it would continue to review the issue. Over the past eight years, the board has received a handful of inquiries from foreign-educated lawyers interested in licensure in Minnesota. The board has also met with foreign-educated lawyers interested in having the board review this issue further and make additional recommendations to the Court.

At the public hearing, some speakers advocated for an LL.M. degree from an ABA-approved law school in the U.S. in order to sit for the bar exam. A number of states impose this additional requirement on foreign-educated lawyers. The committee asked presenters for additional input on how such a rule could be structured. At present, only JD degree programs, not LL.M. degree programs, are accredited by the ABA.[4]

There is no uniformity among ABA-approved law schools concerning what combination of courses is required to achieve an LL.M. degree and many LL.M. programs are focused on a specific subject matter, such as compliance, federal taxation, or criminal law. There is currently no nationally recognized standard for an LL.M. or other educational program that would offer training on the basics of U.S. law or the U.S. legal system. There is also no international accreditation agency or any other recognized standard that is comparable.

A number of compelling circumstances work together to present the board with another opportunity to study this issue: access to justice concerns; the changing global marketplace for legal services; an ever-increasing diversity in the legal profession as more doors are open and our world becomes more mobile; and the continued interest of the legal community in this issue.

Specifically, the board is considering the following:

- whether licensure in another U.S. jurisdiction should be required (as is required by 10 U.S. jurisdictions);
- whether to require licensure in the foreign country in which the lawyer obtained their law degree (as is required by 16 U.S. jurisdictions);
- whether an educational equivalency determination should be made (as is required by 18 U.S. jurisdictions), and if so, how to accomplish that; and
- what impact, if any, an LL.M. should have on the determination, since there is no body that accredits LL.M. degrees (five U.S. jurisdictions consider completion of an LL.M program sufficient to permit applicants to sit for the examination without meeting additional requirements).

As next steps, the committee will bring the discussion back to the full board for further action. Individuals interested in this issue may follow the board's activities on the Board of Law Examiners' website (*www.ble.state.mn.us*). Individuals interested in providing additional input on this issue are welcome to submit written comments to the Board of Law Examiners, Attn: Douglas Peterson, Board Chair, 180 E. 5th Street, Suite 950, MN 55101 or emailed to *ble@mbcle.state.mn.us*. ▲

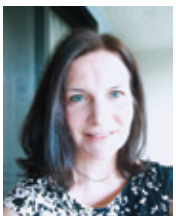
Notes

[1] *https://www.ble.mn.gov/minnesota-board-of-law-examiners-seeks-comments-related-to-foreign-legal-education/*

[2] *https://www.ble.mn.gov/wp-content/uploads/2019/11/Report-BLE-Report-and-Recommendation-Legal-Education-Standard-for-Admission-to-the-Minnesota-Bar-1.pdf*

[3] Additional information on requirements in other jurisdictions may be found in the National Conference of Bar Examiners' Comprehensive Guide to Bar Admission Requirements – 2019 at *http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf*

[4] Standard 313 of the ABA Standards and Rules of Procedure for Approval of Law Schools 2019-2020 states that the program cannot interfere with the ability of the law school to "operate in compliance with the Standards and to carry out its program of legal education." Interpretation 313-1 states, "Acquiescence in a degree program other than the J.D. degree is not an approval of the program itself and, therefore, a school may not announce that the program is approved by the Council." *https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter3.pdf*



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CRIMINAL LAW

JUDICIAL LAW

Tribal authority: Tribal officer has authority to detain and expel from reservation a non-Indian suspected of violating Minnesota law on reservation. Appellant drove to a hospital on the Red Lake reservation to pick up his brother. Red Lake officer Bendel was present and saw appellant arrive. Officer Bendel noted a number of indicia of intoxication and administered a PBT, which revealed a BAC of 0.121, and additional field sobriety tests, which appellant failed. Officer Bendel then placed appellant in handcuffs, Mirandized him, and placed him in the back of the squad car. Officer Bendel drove appellant to the reservation boundary, where appellant was transferred to Beltrami County Deputy Roberts. Deputy Roberts also observed indicia of intoxication upon taking custody of appellant, drove him to the jail, and read the implied consent advisory. Appellant consented to a breath test, which reported a BAC of 0.11. Appellant argued he was unlawfully arrested by Officer Bendel, because Officer Bendel was not a "peace officer" for purposes of the DWI statute. The district court denied appellant's suppression motion and, after a stipulated facts trial, found appellant guilty of DWI. The Minnesota Court of Appeals affirmed, finding Officer Bendel's actions lawful.

The Supreme Court also affirms. The court points to federally recognized Indian tribes' power to exclude persons deemed undesirable from tribal lands, which includes the power to restrain and eject those who disturb the public order on the reservation. Also, under this authority, "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Duro v. Reina*, 495 U.S. 676, 697 (1990). Officer Bendel detained, investigated, and ejected Thompson pursuant to this recognized tribal authority. Thus, appellant's detention was lawful. ***State v. Thompson***, 937 N.W.2d 418 (Minn. 1/15/2020).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

Labor arbitration; benefits partial remand on plant shutdown. A denial of a motion by a labor union to require arbitration following the company's announcement of a closing manufacturing plant was allowed, in part, by the 8th Circuit. The lower court's denial of a motion to compel arbitration was upheld with respect to early retirement benefits, which are exclusively subject to statutory claims under the Employees & Retirement Income Security Act (ERISA), but arbitration was allowed on the issue of the manner in which plant benefits would be affected by the plant closure. Therefore, the case was partially remanded to permit arbitration on the effects of the shutdown. The decision, written by Justice James Loken of Minnesota, permitted the case to proceed to arbitration with respect to the effects of the plant shutdown, but claims for retirement benefits must be pursued independently under ERISA. ***International Union, et al. v. Trane U.S., Inc.***, 936 F.3d 1031 (8th Cir. 1/10/2020).

ERISA; disability benefits denied. An employee was denied contravention of disability benefits after exhausting medical illness benefits. The 8th Circuit Court of Appeals upheld the termination of benefits, following the end of mental illness benefits, because of a lack of disabling physical condition. ***Miller v. Hartford Life & Accident Ins. Co.***, 944 F.3d 1006 (8th Cir. 12/16/2019).

■ **USERRA; termination upheld.** A retired U.S. Army serviceman lost his termination appeal under the federal Uniform Services Employment and Reemployment Act (USERRA), 38 U.S.C. §4301, *et seq.* The 8th Circuit affirmed a lower court ruling that the claimant's mandatory status was not a "motivating factor" in the decision by his private sector employer to fire him. ***McConnell v. Anixter, Inc.***, 944 F.3d 985 (8th Cir. 12/13/2019).

■ **Wage loss; preemption claim rejected**. The Minnesota Supreme Court upheld the Minneapolis minimum wage law, which incrementally raises the level to $15 over a period of time. Affirming two lower court rulings from Hennepin County District Court and the Minnesota Court of Appeals, the Supreme Court unanimously rejected a claim that the measure, which is similar to the one going into effect in St. Paul, is preempted by the Minnesota mini-Fair Labor Standards Act (FLSA), Minn. Stat. §177.23. ***Graco, Inc. v. City of Minneapoli***s, 925N.W.2d 262 (Minn. Ct. 1/22/2020).

■ **Teacher license; revocation upheld for unreasonable discipline of students.** The Minnesota Professional Educator Licensing & Standards Board (formerly known as the Board of Teaching) properly revoked a teacher's license on grounds that the teacher improperly and unreasonably disciplined students while working as a teacher at an elementary school. The court of appeals upheld a decision by an administrative law judge, rejecting two claims of procedural errors in preventing the teacher from introducing testimony from an investigator and allowing the hearing to exceed the scope of the notice. ***In re teaching license of Evans***, 2020 WL 132172 (Minn. Ct. App. 1/13/2020) (unpublished).

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FAMILY LAW

JUDICIAL LAW

■ **Minor child name change.** The Minnesota Supreme Court held that in matters involving a name change application for a minor child by an unmarried mother, notice to a biological father does not need to be completed. Merely having a known biological father does not trigger the notice requirement under the name change statute. To require proper notice, there must be a legally recognized father. The Supreme Court viewed comparable statutes, and directly addressed the court of appeals' reasoning in deciding that the "holding-out" presumption of the Minnesota Parentage Act cannot apply *at the time of birth*. Moreover, the Supreme Court reasoned that the Legislature could not intend to give biological fathers more rights at the time of a future name change of a child than they enjoyed at the time of the birth of that child, absent the biological father taking some additional step to adjudicate their legal status as father. ***In the Matter of the Application of J.M.M. O/B/O Minors for a Change of Name***, ___ N.W.2d ___ (Minn. 2020).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Personal jurisdiction; *certiorari;* Minnesota Supreme Court.** The United States Supreme Court granted *certiorari* and will review two decisions (one from the Minnesota Supreme Court) finding Ford subject to specific personal jurisdiction. The two cases were consolidated.

The Minnesota case arose out of an accident in Minnesota involving a car that was not purchased in Minnesota, and Ford contends that it should not be subject to personal jurisdiction because the plaintiff's claims do not "arise out of or relate to" its activities in Minnesota. ***Bandemer v. Ford Motor Co.***, 931 N.W.2d 744 (Minn. 2019), *cert granted*, ___ S. Ct. ___ (2020); ***Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.***, 443 P.3d 407 (Mont. 2019), *cert granted*, ___ S. Ct. ___ (2020).

■ **Improper removal; forum defendant rule.** While it acknowledged that the weight of authority from other courts holds otherwise, the 8th Circuit relied on its prior decisions in holding that a violation of the forum-defendant rule is a jurisdictional defect and not a "mere procedural irregularity" subject to waiver. ***Holbein v. Baxter Chrysler Jeep, Inc.***, __ F.3d ___ (8th Cir. 2020).

■ **28 U.S.C. §1920; costs not taxable may be awarded as attorney's fees.** While it reversed a district court's award of postage and delivery expenses and certain expert expenses as taxable costs under 28 U.S.C. §1920, the 8th Circuit noted that certain nontaxable costs can be properly treated as a component of attorney's fees under fee-shifting statutes. ***Johnson v. Charps Welding & Fabricating, Inc.***, ___ F.3d ___ (8th Cir. 2020).

■ **Fed. R. Civ. P. 12(c); consideration of documents outside the pleadings.** Judge Brasel determined that an email exchange not attached to or incorporated in the complaint could be considered in support of a motion for judgment on the pleadings without converting that motion to a motion for summary judgment, citing decisions considering exhibits attached to the answer "under certain circumstances." ***Cortec Corp. v. 572415 B.C. Ltd. d/b/a Innoplast Machinery***, 2020 WL 206380 (D. Minn. 1/14/2020).

■ **Impact of motion to dismiss on timing of responsive pleading; dispute over redactions.** Magistrate Judge Menendez held that defendants' filing of a motion to dismiss tolled their deadline to file a responsive pleading, including counterclaims, under Fed. R. Civ. P. 12(a)(4).

In the same order, Magistrate Judge Menendez also criticized defendants' redacting of portions of otherwise relevant

text messages, and ordered them to produce the text messages in their entirety or, in the alternative, to produce any text message containing a search term as well as 10 text messages on either side of each responsive text message. ***Management Registry, Inc. v. A.W. Cos.***, 2020 WL 468846 (D. Minn. 1/29/2020).

■ **Request for expedited discovery denied following denial of motion for preliminary injunction.** Having denied plaintiff's request for a preliminary injunction in a purported trade secrets case, Judge Brasel also denied its request for expedited discovery, finding that it would not serve the purposes for which expedited discovery is usually granted. ***Cambria Co. v. Schumann***, 2020 WL 373599 (D. Minn. 1/23/2020).

■ **CAFA; amount in controversy.** Where plaintiffs commenced an action in the District of Minnesota alleging jurisdiction under CAFA, Judge Tostrud dismissed that complaint for failing to plausibly allege the required amount in controversy, plaintiffs amended their complaint in an attempt to address this issue, and defendant moved to dismiss the amended complaint, Judge Tostrud found that plaintiffs' CAFA theory required counting the claims of purported class members who lacked standing or required speculation "not tethered to any plausible factual basis." Plaintiffs' amended complaint was dismissed without further leave to replead. ***Penrod v. K&N Eng'g, Inc.***, 2020 WL 264115 (D. Minn. 1/17/2020).

■ **Forum selection clause; *forum non conveniens*; Fed. R. Civ. P. 14.** While acknowledging the lack of judicial efficiency, Chief Judge Tunheim granted a third-party defendant's motion to dismiss on the basis of *forum non conveniens* in accordance with a forum selection clause that permitted litigation only in Ramsey County District Court, finding that the forum selection clause had "priority" over third-party claims brought pursuant to Fed. R. Civ. P. 14. ***United Fire & Cas. Co. v. Weber, Inc.***, 2020 WL 335360 (D. Minn. 1/21/2020).

■ **Fed. R. Civ. P. 62(c); stay of injunction pending appeal denied.** Rejecting plaintiffs' argument that the settlement agreement underlying the motion was not an injunction subject to stay under Fed. R. Civ. P. 62(c), Judge Frank found that the orders that followed the settlement agreement were "plainly injunctive in nature," but denied defendants' motion for stay pending appeal, finding that three of the four relevant factors favored the plaintiffs and that the fourth factor was neutral. ***Jensen ex rel. Jensen v. Minn. Dept. of Human Rights***, 2020 WL 550209 (D. Minn. 2/4/2020).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Inadmissibility and public charge grounds: An update.** On 8/14/2019, the Department of Homeland Security (DHS) published its final rule amending regulations addressing inadmissibility, on public charge grounds, of foreign nationals seeking admission or adjustment of status. The rule was scheduled to go into effect on 10/15/2019. **84 *Fed. Reg.*, 41,292-508** (8/14/2019). *https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-17142.pdf*

As noted in the November issue of Bench & Bar, litigation ensued across the nation that involved various states (i.e., New York, Washington, Virginia, Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Rhode Island, California, Maine, Oregon, Commonwealth of Pennsylvania, and the District of Columbia), organizations, and individual plaintiffs. On 10/11/2019, the U.S. District Court in the Southern District of New York issued a nationwide order enjoining and restraining the government from "enforcing, applying or treating as effective, or allowing persons under their control to enforce, apply, or treat as effective, the Rule" until such time as the order is terminated and the rule goes into effect.

On 1/27/2020, the Supreme Court issued a stay of the 10/11/2019 nationwide injunction, thereby allowing the final rule to go into effect pending disposition of the appeal before the Court of Appeals for the 2nd Circuit Court. The sole exception was an injunction issued in the state of Illinois, which was allowed to remain in place. ***Department of Homeland Security, et al. v. New York, et al.,*** 589 U.S. ____ (2020). *https://www.supremecourt.gov/opinions/19pdf/19a785_j4ek.pdf*

On 1/30/2020, USCIS announced that the final public charge rule will go into effect, with the exception of the state of Illinois, for those relevant applications or petitions postmarked or electronically filed on or after 2/24/2020. *https://www.uscis.gov/news/news-releases/uscis-announces-public-charge-rule-implementation-following-supreme-court-stay-nationwide-injunctions*

■ **Reinstatement statute precludes attack on validity of removal order.** On 12/27/2019, the 8th Circuit Court of Appeals denied the petition for review of the Department of Homeland Security's reinstated prior order of removal, finding that it lacked jurisdiction to consider the petitioner's arguments over the validity of his underlying removal order. "Section 1231(a)(5) creates a streamlined process for reinstating prior removal orders, and it authorizes the Attorney General to reinstate a prior removal order after finding that an individual has illegally reentered the United States following removal or voluntary departure pursuant to a removal order." ***Lara-Nieto v. Barr***, No. 18-2232, *slip op.* (8th Cir. 12/27/2019). *https://ecf.ca8.uscourts.gov/opndir/19/12/182232P.pdf*

■ **Petitioner failed to raise a valid constitutional claim or question of law in relation to BIA's cancellation denial.** On 12/27/2019, the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not err when finding the petitioner had failed to satisfy his burden to demonstrate that his children would suffer an "exceptional and extremely unusual hardship" should he be removed to Mexico and they accompany him. Ultimately, the petitioner failed to raise a valid constitutional claim or question of law, thus denying the court jurisdiction to review the BIA's denial of his cancellation of removal application. ***Apolinar v. Barr***, No. 18-2722, *slip op.* (8th Cir. 12/27/2019). *https://ecf.ca8.uscourts.gov/opndir/19/12/182722P.pdf*

■ **No showing of past persecution on a protected ground.** On 12/11/2019, the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not abuse its discretion when it denied the Guatemalan petitioners' request for humanitarian asylum, given that they failed to prove past persecution on a protected ground. ***Mejia-Lopez v. Barr***, No. 18-3651, *slip op.* (8th Cir. 12/11/2019). *https://ecf.ca8.uscourts.gov/opndir/19/12/183651P.pdf*

ADMINISTRATIVE ACTION

■ **USCIS notice of H-1B registration process implementation.** On 1/9/2020, the Department of Homeland Security published registration requirements for petitioners seeking to file H-1B petitions on behalf of cap-subject foreign nationals for

fiscal year 2021. Key points taken from the notice are: 1) The initial H-1B petition registration period will begin 3/1/2020; 2) petitioners, including those eligible for the advanced degree exemption, will first be required to register with USCIS before being able to properly file an H-1B cap-subject petition; 3) USCIS intends to close the initial registration period on 3/20/2020 and will announce the actual end date on its website; 4) following the end of the initial registration period, USCIS will undertake the initial selection process, with those being selected then eligible to file an H-1B cap-subject petition during the associated filing period. **85 *Fed. Reg.* 1176-77** (1/9/2020). *https://www.govinfo.gov/content/pkg/FR-2020-01-09/html/2020-00182.htm*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Punitive damages and deceptive trade practices pleading standards. Judge Tunheim recently adopted the magistrate's report and recommendation denying defendants' motion to dismiss and motion to strike punitive damages claim. Management Registry, Inc. (MRI) alleged that A.W. Companies, Inc. and three individuals stole MRI's customers, clients, employees, and databases following failed negotiations to acquire MRI's staffing services companies. MRI sued defendants for, *inter alia*, breach of contract, fraud, deceptive trade practices, and tortious interference. Defendants moved to dismiss the Second Amended Complaint and to strike the punitive damages claim. Defendants argued that MRI's attempt to add a punitive damages claim did not comply with Minnesota's statutory procedure for adding punitive damages. Minnesota Statute §549.191 requires a plaintiff, subsequent to filing the civil action, to move a court for permission to amend the pleadings to add a punitive damages claim. The magistrate found that Minn. Stat. §549.191 was incompatible with the Federal Rules of Civil Procedure and applied Rule 15's plausibility standards when reviewing the allegations. Because the magistrate adopted a reasonable interpretation of Minn. Stat. §549.191, no clear error occurred. The court further reviewed defendants' challenge to MRI's deceptive trades practices act claim. Defendants objected that claims under the Minnesota Deceptive Trade Practices Act (Minn. Stat. §325D.44) fall under the heightened pleading standards of Fed. R. Civ. P. 9(b), but the magistrate reviewed this claim under the pleading standards contained in Rule 8, rather than Rule 9(b). The court sustained the objection to proper pleading standard and reviewed the claim under Rule 9(b) standards. MRI adequately pleaded its deceptive trade practices claim, including alleging future harm. The findings of the report and recommendation were accordingly adopted. ***Mgmt. Registry, Inc. v. A.W. Cos.***, No. 17-5009, 2020 U.S. Dist. Lexis 15513 (D. Minn. 1/30/2020).

Trade secrets: Denied injunction against former employee. Judge Brasel recently denied plaintiff Cambria Company LLC's motion for preliminary injunction and request for expedited discovery. Cambria sought an injunction to bar its former employee, Adam Schumann, from working at his new employer, Dal-Tile Tennessee, LLC, a subsidiary of Mohawk Industries, Inc. Mr. Schumann worked for Cambria for 10 years, including in his final position as assistant plant superintendent. In October 2019, Mohawk hired Schumann to be its director of countertop operations. His first day was 12/23/2019—after his non-compete expired. Cambria sought assurances that Mr. Schumann would not disclose Cambria's confidential information. Mohawk's assurances were deemed inadequate. Cambria filed the lawsuit alleging Mr. Schumann would inevitably disclose confidential information and trade secrets he learned while employed at Cambria in violation of his confidentiality agreement and in violation of state and national trade secrets laws. The court considered Cambria's likelihood of success on its trade secrets claims. To succeed on a trade secret claim, a plaintiff must prove the existence of trade secrets and (inevitable) disclosure of said trade secrets. For the present motion, the court accepted that Cambria had trade secrets but found that Cambria had failed to identify them with sufficient specificity. Cambria's description of its trade secrets shifted between the briefing and oral argument, making Cambria's trade secrets a "shifting target." The court then considered the inevitable-disclosure doctrine. Minnesota courts and the 8th Circuit have neither accepted nor rejected the doctrine, though decisions in the District of Minnesota have applied it. To succeed at the preliminary injunction stage, Cambria must prove "a high degree of probability of inevitable disclosure." Cambria did not meet this burden. Accordingly, the preliminary injunction was denied. The request for expedited discovery to build a record before the preliminary injunction hearing was denied, as the parties built a robust record without such discovery. ***Cambria Co., LLC v. Schumann***, No. 19-cv-3145, 2020 U.S. Dist. Lexis 11373 (D. Minn. 1/23/2020).

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REAL PROPERTY LAW

JUDICIAL LAW

Homeowners' association claims untimely under statutes of limitation. After discovering problems with the HVAC systems in units throughout one building in 2014 and in the units in a second building in 2015, and providing notice and a demand for repair in 2015, the homeowners' association sued the developer, the general contractor, and a mechanical subcontractor in 2015, asserting claims for negligence, breach of implied warran-

ties, breach of contract, and breach of statutory warranties. A certificate of occupancy was issued in November 2003 for the first building and in October 2004 for the second building. Deeds for the earliest units were delivered, and occupancy began, before 2005, but some units were not sold or occupied until later.

The defendants moved for summary judgment on all claims, arguing they were untimely. The district court granted the motion, and the court of appeals affirmed in part and reversed in part. The Supreme Court decided that each unit in a condominium building is not entitled to its own warranty date under Minn. Stat. §§327A.01-.08; rather, the entire building was subject to a single warranty date, held to be the date when the first unit owner occupied a unit or took title to a unit. Thus, because the first deeds for units in both buildings were granted before 2005, the statutory claims asserted in 2015 were untimely for all the units. Further, the Supreme Court held that the Minn. Stat. §541.051, subd. 1(a) statute of repose based on substantial completion of construction (with the certificate of occupancy serving as "powerful evidence" of the same) begins running for a building or project when it may be turned over to the person who hired the entities doing the construction for the purpose for which it was intended. Thus, the two buildings were separate improvements, with separate dates of substantial completion, and the common law claims for both buildings were untimely. ***Village Lofts at St. Anthony Falls Ass'n v. Housing Partners III-Lofts, LLC***, No. A18-0256, 2020 WL 220074 (Minn. 1/15/20) (*https://mn.gov/law-library-stat/archive/supct/2020/OPA180256-011520.pdf*).

■ **Variance denial affirmed.** Property owner Calm Waters sought a variance to subdivide one plot into four parcels of differing sizes—two that would be less than 20 acres, and two that would not abut a public road. The township's zoning ordinance prohibited lots of less than 20 acres and required lots to abut public roads. The town board denied the variance and the landowner sued, asserting that the township lacked authority to zone its land because it was shoreland, with regulation preempted by Minn. Stat. §§103F.201–.227, and that the denial was arbitrary and capricious. The district granted the township summary judgment. The Minnesota Court of Appeals held that townships have the authority to zone land that is also subject to the county's shoreland management controls and a township's deference to the county's shoreland management controls does not preempt it from also imposing more restrictive regulations on shorelands.

Further, the court of appeals decided that the record did not include evidence that the owner faced practical difficulties in complying with the lot size and frontage requirements, so the township's decision to deny the variance was reasonable. The court also held that the district court properly decided that the comprehensive plan was presumptively valid, despite the fact that the only copy of the comprehensive plan was marked as a draft from the early 1980s, and the two local newspapers from the time did not publish public notice of adoption of the final plan. Finally, the court of appeals decided that the district court did not abuse its discretion in denying a motion to compel discovery. ***Calm Waters, LLC v. Town of Kroschel***, No. A19-0614, 2019 WL 6837002 (Minn. App. 12/16/19) (unpublished) (*https://mn.gov/law-library-stat/archive/ctapun/2019/OPa190614-121619.pdf*).

■ **Only the petitioner in property tax valuation appeal can provide mandatory disclosures.** Petitioner Avis leases space at the Minneapolis-Saint Paul International Airport, which is owned and operated by the Metropolitan Airports Commission (MAC). Lessees at the airport are subject to property tax as if they were the owners of the property. *See* Minn. Stat. §272.01, subd. 2(a). Avis filed a petition challenging Hennepin County's valuation of the property it leased. Since it was income-producing property, Avis was required to provide specific mandatory disclosures under Minn. Stat. §278.05, subd. 6. Avis provided Hennepin County with certain rent calculations and information. The tax court held that Avis's disclosures were insufficient, as they omitted information related to concession fees and minimum annual guarantees, and dismissed the petition. As part of annual informal disclosures from MAC, Hennepin County actually had this additional information in its possession. The Minnesota Supreme Court, in a 4/3 decision with a strong dissent, affirmed the dismissal. Citing its recent *Wal-Mart Real Estate Bus. Tr. V. County of Anoka*, 931 N.W.2d 382 (Minn. 2019) decision, the Court held that the concession fees and minimum annual guarantees were income attributable to the property, and that disclosure was thus mandatory. Further, in a case of first impression, the Supreme Court held that Minn. Stat. §278.05, subd. 6 required that the petitioner itself must provide all mandatory disclosures, and that production by a third party does not comply with the statute. ***Avis Budget Car Rental LLC v. County of Hennepin***, No. A19-0886 ___ N.W.2d ____ (Minn. 1/15/2020).

■ **Court affirms summary judgment due to failure to comply with property tax payment requirements of Minn. Stat. §541.02 against a claimant seeking title to 52% of a separately assessed parcel.** Plaintiff Brian Domeier claimed title to portions of two separately assessed tax parcels (described as the west and east parcels) owned by defendant St. Paul Park Refining Co., LLC. Minn. Stat. §541.02 includes a requirement that under certain circumstances a party claiming title through adverse possession must have paid property taxes on the property at issue for a period of at least five years. It was undisputed that the plaintiff had not paid any property taxes on the disputed property. The court noted that case law has "generated some confusion" as to whether this requirement applies when a claimant seeks to adversely possess only a portion of a separately assessed parcel. It cited past cases which had held this requirement applies when a claimant seeks "all or substantially all of an assessed tract or parcel." In this case, the plaintiff sought title to 52% of the area of west parcel, and 5.32% of the east parcel. The defendant argued that plaintiff's statement in his prayer for relief that he owns "some or all" of the disputed parcels is an admission that is fatal to his claim. Plaintiff detailed the specific areas in the parcels which were at issue in his deposition and on survey. The court held that under notice pleading, and because pleadings are to be construed liberally, the language in plaintiff's pleading was not an admission that he sought title to "all or substantially all" of the parcels. The court affirmed summary judgment on the claim to the west parcel, finding that 52% was sufficient to trigger the property tax payment requirement of Minn. Stat. §541.02. It reversed the district court as to the east parcel, finding that 5.32% was insufficient. ***St. Paul Park Refining Co. LLC v. Domeier***, No. A19-0573, ___N.W.2d ____ (Minn. Ct. App. 02/03/2020).

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TAX LAW

JUDICIAL LAW

Finder's fees paid by institutional investors on behalf of acquisition targets may not qualify as ordinary and necessary business expenses under Section 162. A key take-away from a recent memorandum opinion: Investors should structure acquisition finder's fee and service transaction agreements carefully to ensure that the ordinary and necessary business expense deductions under Section 162 are preserved. A mere transfer of the liability from the acquirer to the target and subsequent payment by the target of the fee was not enough to sustain the deduction in this case. As a practical measure, institutional and other investors interested in acquisitions may sign agreements in advance of target identification and transaction completion, as in *Plano Holdings, LLC v. Commissioner*. The Ontario Teacher's Pension Plan (OTPP) signed a finder's fee agreement with the company that suggested Plano to OTTP as an acquisition candidate, even though no service or benefit was conferred on Plano. Upon the acquisition of Plano, OTTP transferred the liability to Plano, which paid the finder's fee and took the deduction. The IRS disallowed the deduction and assessed a penalty, which Plano contested. In its decision, the tax court noted, "A taxpayer generally may not deduct the payment of another person's expenses." In this case, OTTP admitted the company receiving the finder's fee performed no service for Plano. Because Plano received no benefit, the fee was not an ordinary and necessary business expense for Plano and thus not deductible. The tax court also rejected the argument that whether the expense was deductible turned on the presence or absence of a legal obligation. If an acquirer intends the target to pay expenses that spring from liabilities incurred by the acquirer, the likelihood they may be deductible improves if the target receives a benefit from the services and becomes part of the agreements as the transaction evolves. ***Plano Holding LLC v. Comm'r***, T.C. Memo. 2019-140, No. 9169-17.

Property valuation tax court cases timely filed in the Small Claims Division can transfer to Regular Division under certain circumstances. Petitioners timely filed petitions in the tax court's Small Claims Division alleging that the estimated market value of the property in their individual assessments was greater than the actual market values. The tax court had jurisdiction in these matters pursuant to Minnesota Statutes 271.01 subdivision 5 (2018). Post-filing, petitioners determined that the assessments were higher than the $300,000 jurisdictional limit for the Small Claims Division and requested the petitions be transferred to the Regular Division. Generally, once a property tax case is commenced in the Small Claims Division, the Small Claims Division has exclusive jurisdiction over the case if it meets the jurisdictional requirements of the division. In petitioner's timely filed petitions, each had assessments over $500,000.

The tax court stated that transfers of cases from the Small Claims Division to the Regular Division are not barred under MN Section 271.21, subdivision 3 if the tax court in general had subject matter jurisdiction over the case at the time it was filed, but the Small Claims Division lacked subject matter jurisdiction due to the size of the assessment. ***738 TDH LLC v. County of Ramsey***, 2019 WL 7593130 (Minn. Tax Small Cl. Div. 12/23/19), ***712 HLS LLC v. County of Ramsey***, 2019 WL 7593146 (Minn. Tax Small Cl. Div. 12/23/19).

***Pro se* petitioner fails to respond to motion; court grants motion to dismiss.** On 4/30/2019, Shoa Motamedi filed a petition in the tax court alleging that Chisago County's estimated market value of the subject property exceeded its actual market value with respect to property located at 38624 14th Avenue, in North Branch. The Explanation of Proof of Service filed with the court admitted service of the petition on each of the county assessor, treasurer, auditor, and county attorney by Mr. Motamedi, via email. The admissions of service were completed by Mr. Motamedi. On 10/24/2019, the county moved to dismiss the petition for insufficiency of service. The county stated that Mr. Motamedi failed to properly serve the petition when he emailed it to the county officials. Mr. Motamedi also did not file an affidavit of personal service demonstrating he personally served the petition on those county officials.

Minn. Stat. §278.01 (2018) authorizes the filing of a petition to determine the validity of an assessment in district court or tax court, "by serving one copy of a petition... upon the county auditor, one copy on the county attorney, one copy on the county treasurer, and three copies on the county assessor." The method of service, however, is not specified in the statute. Minnesota Rule of Civil Procedure 4.03(a) defines effectuating personal service on individuals "by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode." "Service of process in a manner not authorized by the rule is ineffective service." Proof of service must be filed with the court along with the petition. Minn. Stat. §278.01, subd. 1(c) (2018).

"Minnesota law states that when service of process is challenged, the plaintiff must submit evidence of effective service." *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 271 (Minn. 2016). Mr. Motamedi bore the burden of submitting evidence of effective service. Because Mr. Motamedi did not respond to the motion, did not provide an affidavit indicating personal service, and did not appear for the telephonic hearing, the court granted the county's motion to dismiss. ***Shoa Motamedi v. Chisago Co.***, 2020 WL 369812 (Minn. TC 1/15/20).

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SALSBURY


WELTERS

Mark D. Salsbury joined Fredrikson & Byron as a shareholder in the business & tax planning, private equity, and mergers & acquisitions groups. Amanda L. Welters has rejoined the firm. She is a corporate lawyer whose practice focuses on assisting public and private clients in mergers and acquisitions, corporate governance, and other strategic transactions.


ANDERSON

Gov. Walz appointed Karie M. Anderson as district court judge in Minnesota's 3rd Judicial District. Anderson will be replacing Hon. John T. Cajacob and will be chambered in Faribault in Rice County. Anderson is a shareholder at Patton, Hoversten & Berg, PA practicing in the areas of family law, criminal defense, real estate, bankruptcy and civil litigation.


BIREN


LUTZ

Gov. Walz appointed Patrick Biren and David Lutz as district court judges in Minnesota's 1st Judicial District. Biren's appointment fills a vacancy that occurred upon the retirement of Hon. Lawrence F. Clark and will be chambered at Red Wing in Goodhue County. Biren is the managing attorney and a senior partner at the law firm of Stich Angell. Lutz's appointment fills a vacancy that occurred upon the retirement of Hon. Karen A. Asphaug and will be chambered at Hastings in Dakota County. Lutz is currently a partner at Bowman and Brooke LLP.

Margaret L. Neuville has been elected a shareholder of Gregerson, Rosow, Johnson & Nilan, LTD.

Michael Warren has joined the Minneapolis office of Taft as attorney practicing in the area of commercial finance.


BROWN

Gov. Walz appointed David Brown as district court judge in Minnesota's 2nd Judicial District. Brown's appointment fills a vacancy that occurred upon the appointment of the Hon. Jeffrey M. Bryan to the Minnesota Court of Appeals and will be chambered at St. Paul in Ramsey County. Brown is currently the chief deputy Hennepin County attorney.


LEES

Lees Family Law, Ltd. announced Timothy D. Lees has been named a Fellow of the American Academy of Matrimonial Lawyers (AAML). Comprising the top matrimonial attorneys throughout the nation, AAML members are recognized as preeminent family law practitioners with the highest levels of knowledge, skill, and integrity.


FOERTSCH


BRUNO

Stephen Foertsch has been named partner at Bruno Law, PLLC. Foertsch joined the firm as an associate in 2017, after working for three years as a criminal defense attorney for another firm. Also, firm founder Fred Bruno achieved recertification as a criminal trial specialist by the National Board of Trial Advocacy.


HICKS


ROHACH

Jack W. Hicks and Alexis N. Rohach have joined Baker Vicchiollo Law as an associate attorneys in the family law practice.


GISLASON

Barbara J. Gislason was quoted in *Time Magazine* in an article published on February 3, 2020 entitled *The New Custody Battle: When Couples Divorce, Changing Laws May Decide Who Gets to Keep the Family Pet*.


KIM

Youn-Jin Kim, a shareholder at Fredrikson & Byron, was selected to be a member of the 2020 class of Fellows of the Leadership Council on Legal Diversity (LCLD) to identify, train, and advance the next generation of leaders in the legal profession.


SHARMA


MALDONADO

Stinson LLP attorneys Aalok Sharma and Lariss Maldonado have been selected for the LCLD Pathfinders program, designed for diverse, high-potential, early-career attorneys. Maldonado was also selected by the Hispanic National Bar Association as a 2020 Top Lawyer Under 40 for her professional accomplishments and dedication to diversity and inclusion.

IN MEMORIAM

Mary Brigid McDonough, of Saint Paul, died of cancer on January 21, 2020. Brigid was a longtime attorney at Briggs and Morgan, where her focus was low-income housing development. Her belief in serving underserved populations led her to provide pro bono citizenship services to immigrant and refugee families.

Kermit F. Hoversten, 91, of Austin, died on January 21, 2020. He practiced law for nearly 60 years and was a founding partner of Hoversten, Johnson, Beckmann & Hovey, LLP. He graduated from the University of Minnesota Law School in 1952.

Arden J. (Buddy) Fritz of St. Paul died on January 29, 2020 after a courageous battle with cancer. He was passionate about his career in the Twin Cities as a prosecutor and public defender, with his final role as chief legal counsel at the Minnesota Department of Health.

SUCHOMEL

Cassandra Suchomel has joined Atticus Family Law, SC. Suchomel has practiced family law since graduating from Mitchell Hamline School of Law in 2015.

Henson Efron announced that Lisa Spencer is assuming the role of firm president.

SPENCER

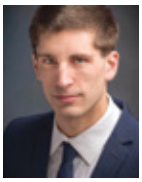
STRAFACCIA

Nicholas Strafaccia has joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. His practice focuses on construction law.

HARBOTT

Gov. Walz appointed Corey Harbott as district court judge in Minnesota's 9th Judicial District. The appointment fills a vacancy that occurred upon the retirement of Hon. Paul E. Rasmussen. He will be chambered at Warren in Marshall County. Harbott has worked as an assistant public defender for over 18 years.

Allen J. Peterson has joined the Ed Shaw Law Office of the Brainerd Lakes Area and will be focusing on criminal and family law.



PETERSON

ROBINSON

Gerald C. Robinson was recently made a partner at Halunen Law. Robinson joined the firm in 2017 and has nearly 30 years of experience in complex litigation, with an intense focus on False Claims Act (FCA) cases since 2005.

Aaron P. Minster has joined Moss & Barnett as an attorney with the firm's litigation team.

MINSTER

Serena O'Neil has joined Spencer Fane LLP as an associate in the tax, trusts & estates practice group.

Classified Ads

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ATTORNEY WANTED

ASPEN WASTE SYSTEMS is an independent, privately-owned, growing company with offices in Minneapolis, St. Louis and Des Moines. Aspen provides waste and recycling collection services for commercial and residential customers. The HR manager/attorney position is a member of the senior management team and serves all divisions of the company from the headquarter office in Minneapolis. The position is responsible for planning, directing and coordinating all human resource activities across the company, including recruitment, retention, performance management, training, compensation, benefits, and compliance with applicable laws and regulations. The position will also be responsible for other legal affairs of the company as needed. Candidates must have a bachelor's degree and a law degree and must have legal experience in the area of employment law and/or at least three to five years of general human resource management experience. To learn more about this position or to submit a resume, please send an email: afang@aspenwaste.com.

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ASSISTANT GENERAL COUNSEL. Sterling Management, LLC, the Advisor to Sterling Multifamily Trust and Sterling Office and Industrial Trust, both North Dakota real estate investment trusts (REITs), seeks an Assistant General Counsel to support the General Counsel and the entire Sterling team in all aspects of the REITs' operations with an emphasis in the areas of commercial leasing, real estate acquisitions, loan transactions and corporate governance. Juris Doctor degree with academic distinction required. Must be licensed (or eligible to become licensed) to practice law in North Dakota. Licensure in Minnesota as well is preferred. A minimum of three years of relevant work experience in a law firm or in-house setting with an emphasis in business and real estate transactions preferred. All applications will be kept strictly confidential. For a detailed job description please email: wcarlson@sretrust.com. To apply please email a cover letter and resume to the above email address, or send via mail to: Sterling Management, LLC, Attn: General Counsel, 1711 Gold Drive South, Suite 100, Fargo, ND 58103. No telephone calls please.

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ASSOCIATE ATTORNEY. Fisher Bren & Sheridan, LLP is currently looking for a hardworking and dedicated attorney to join our Fargo office. Fisher Bren & Sheridan is a 11-attorney practice that focuses on assisting clients in the fields of construction law, insurance coverage and litigation, general liability and civil litigation, catastrophic loss, environmental and pollution law, and commercial & business litigation, real estate, professional litigation, and data center litigation. Our ideal candidate will have a great personality, a passion for litigation and trial work, possess excellent legal research and analytical skills, writing, and critical thinking ability; and have excellent verbal and written communication skills. Required Experience: zero to four year(s). Benefits: Medical, 401K and more; Paid time off/holiday pay; Professional yet casual work environment; Access to free work out facility; Offer comprehensive benefits package and competitive salary. Job Type: Full-time. Send resume to: Fisher Bren & Sheridan, LLP, Attn: Katie Rudnick, 3137 32nd Avenue South, Suite 212, Fargo, ND 58103.

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ASSOCIATE POSITION – Family Law. Moss & Barnett, A Professional Association, seeks an attorney with zero to two years' experience in family law. Preferred candidates will have superior academic qualifications, strong research and writing skills and a distinguished work record. Salary commensurate with experience and qualifications. Position eligible for participation in associate bonus program. Interested candidates should email cover letter, resume, law school transcript and writing sample to Carin Del Fiacco, HR Manager: carin.delfiacco@lawmoss.com. Moss & Barnett is an affirmative action/EEO employer. No agencies please.

ASSOCIATE ATTORNEY interested in fast track to partnership/ownership in small Alexandria firm representing injured people including personal injury and workers' compensation. Send resume and writing sample to McCashin Law Firm: dmmlaw@centurylink.net

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CORPORATE/TRANSACTIONAL Attorney — Finley Law Firm, PC is seeking an attorney with three plus years of experience to work in its corporate and transactional department. More senior level applicants are also encouraged to apply. The ideal candidate would possess outstanding academic credentials, work experience, and a strong work ethic. Please send a cover letter and resume to: Recruiting Team, 699 Walnut Street, Suite 1700, Des Moines, IA 50309 or by email to recruiting@finleylaw.com. All inquiries will be held in confidence.

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