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VOLUME LXXVII NUMBER IV
APRIL 2020
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PLUS

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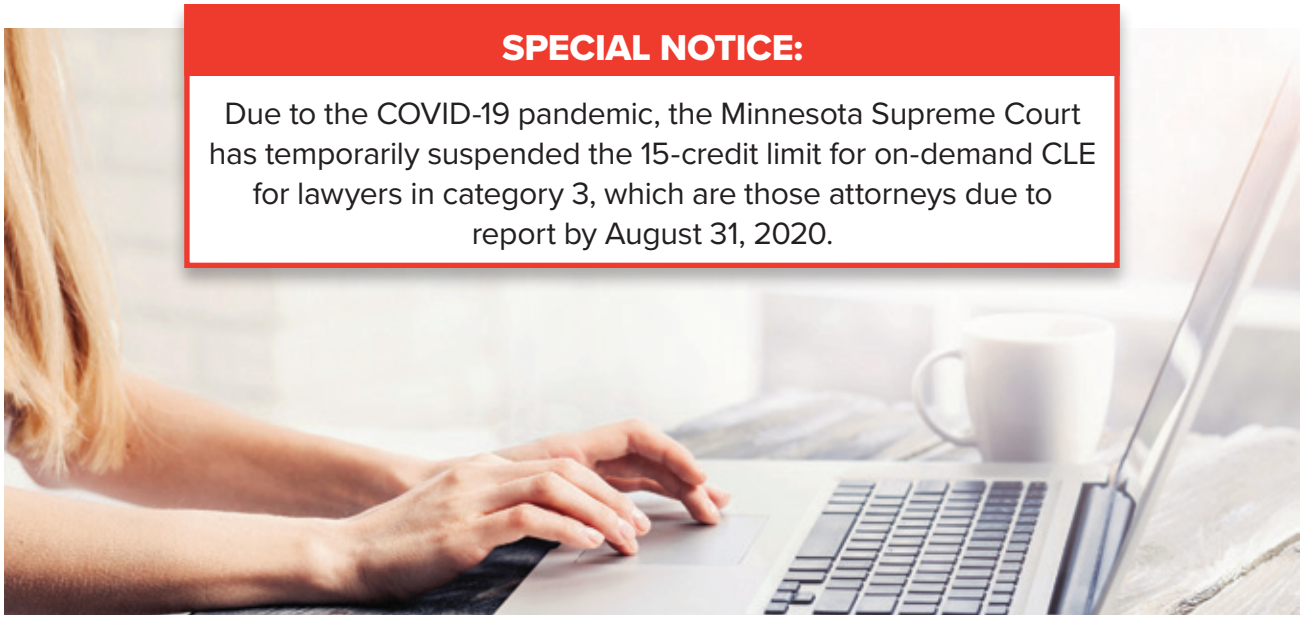

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COLUMNS

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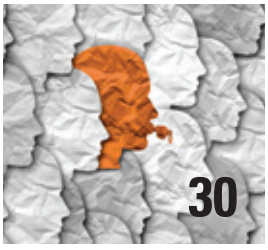
RESPONDING TO COVID-19

As this issue of Bench & Bar went to press, the courts and the legal profession were adjusting to the radically refigured state of affairs caused by the coronavirus outbreak in the United States. The MSBA staff remains on the job, working to provide members with timely information and resources to help them in carrying on their practices to the greatest extent possible. Visit our page of COVID-19 resources for legal professionals at mnbar.org/covid-19-resources. You'll find it regularly updated with the latest state and federal court orders, coronavirus-related information and advice related to different practice areas, technology tips for remote work, and wellness resources.

We're also presenting the most valuable news and insights about coronavirus and the profession in our weekly Legal News Digest. If you aren't currently a subscriber to LND and would like to receive it, just send an email to COVIDinfo@mnbars.org with the subject line "Subscribe LND" and we'll take care of the rest.

ON THE COVER

NEW LAWYERS SPOTLIGHT



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It's Safe to Seek Help to Get Well

There's no doubt about it, ours is a complicated profession—a collage, and sometimes a cacophony, of characteristics. Difficult to enter; challenging to succeed at; often noble; occasionally disparaged; demanding as well as fulfilling; dedicated to doing good and sometimes doing well. We bear the burden, and enjoy the privilege, of guarding and making real our nation's promise of "life, liberty and the pursuit of happiness." It is a calling as well as a career.

Along the way, our work can take a toll. With duties and privileges come demands; clients and colleagues expect us to be in control (or at least look like we are) and ready to take control in order to solve problems or seize opportunities. But there are perils, and those perils can put our own happiness and health at risk. Our journey can turn into a complex and toxic mobius strip—rooted in ambition, competition and zealous representation (at the core of our nature, and drivers of our success)—but too often morphing into workaholism and sometimes alcoholism or other substance use, or causing persistent (not episodic) stress and exhaustion—leading to numbing anxiety and, too often, suicidal despair. Sometimes it's just too much to bear; and sometimes we can't simply rally and "snap out of it." Alarmingly, this is part of the life of younger lawyers just as much as, or even more than, those of us who are more senior.

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

All of which is rough enough, and then, to make matters even worse, we add "stigma" to it all. Self-stigmatization as well as the stigmatizing, the "otherizing," of others—arising out of the perceived or presumed "weakness" implicit in needing or asking for help; made worse by the belief that seeking help won't be confidential, let alone effective, and that it will lead to negative professional consequences. It's one of our "taboos;" a hidden (and sometimes not so hidden) bias and moment of discrimination. Why do we do it? Perhaps it's our penchant toward perfectionism; or perhaps it reflects our need to say to ourselves: "Well, at least I'm not as flawed as he or she is." Wherever it comes from, it doesn't reflect us at our best.

It's also a bit of a relic. Please don't tell me that you don't remember the recent "Don't Ask; Don't Tell" dodge—not only a form of stigmatization, but a formalization of the stigma, a buying-into the stigma. Or the shameful shaming of Senator Eagleton arising out of his history of mental health care, when he was a vice-presidential candidate (for whom our 8th Circuit courthouse in St. Louis is now named). Long ago; but maybe not. Even in our legal analysis, we have fostered certain stigmas, with an allegation of a "loathsome disease" deemed defamatory per se (like leprosy or, yes, mental illness; but not diabetes and, at least after a 1997 New York ruling, not cancer; really). Such stigmatizing hurts us all. It causes valuable colleagues to hide inward, and to not seek help; it corrodes the core of our own existence. Silence in the face of such stigmatizing enables and perpetuates the stigma. Silence, in this way, truly is consent.

The good news, though (and yes; I know: "What took you so long?"), is that it is in our hands and hearts to meet these challenges. Borrowing from Cassius, the fault lies "not in our stars but in ourselves." The troubling threads woven into the fabric of our profession are neither necessary nor inevitable. We can solve this. Solving problems, after all, is one of the things that we lawyers do best.

So, what are we going to do? Well, first of all, we can tell ourselves and others to stop stigmatizing, although that only goes so far. We also have to make it clear that it really is "safe to seek help to get well;" and then we have to make it real. Maybe we don't need another "summit" or conference (especially in the midst of our current coronavirus-related circumstances); and maybe that would be "preaching to the choir" anyway. Instead, we're creating a 24-hour resource—an any-time and no-matter-where on-demand video with pledges and promises that, yes, it is safe to seek help to get well. These promises will come from leaders at every stage of lawyers' lives. From the Deans, Admissions Officers, career advisors and faculty of our law schools; to the Board of Law Examiners and the Lawyers Professional Responsibility Board. From law firms and other legal employers and recruiters (who will view these issues as more than risk management moments) to clients (who depend upon advice from lawyers who are healthy and strong, not impaired). That may well lead to a new "business case" for wellness—with clients demanding that the firms they work with be expressly and demonstrably dedicated to the wellness of their lawyers (much like the "business case" for diversity and inclusion). Our promises will also come from justices and judges, and professional liability and healthcare insurers; and from bar associations and CLE leaders. These and other members of our profession—both institutional and individual—are ready to say it out loud and to mean it when they say: "It's Safe to Seek Help to Get Well."

I know; I know; this may all be a bit Don Quixote-ish—especially in the face of one of our profession's dominant personality traits: skepticism. If we say "it's safe to seek help to get well," it might well prompt some of our colleagues to say: "Ya, right; best of luck with that." I get that; such is life. But this is important; the health of our colleagues and our profession depends upon it. We can and should will our way through our and others' skepticism. Our core is good enough to succeed at that, and our duty is clear. So say it out loud, to yourself and to others: "It's safe to seek help to get well." Mean it; count on it; make it so. ▲

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When may a lawyer ethically threaten criminal prosecution?

Many lawyers and members of the public look askance at lawyers who threaten criminal prosecution as part of negotiations in civil litigation. Every year we receive several complaints against lawyers who have done this, based on the complainant's belief that to do so is always unethical. Is this correct? You may be surprised to learn that, although such conduct implicates several ethics rules, it is not ethically prohibited and may be ethically permissible under certain circumstances. Let's review.

Background

Prior to 1983, most ethics rules expressly prohibited using or threatening criminal prosecution solely to gain an advantage in a civil matter. This began to change in the mid-1980s when the ABA changed its model rules to remove this express prohibition. In 1992, the ABA issued a formal opinion, based upon the revised model rules, on the circumstances under which it was ethically permissible to threaten (and relatedly refrain from pursuing) criminal prosecution to leverage a client's position in a civil matter.[1] According to that opinion, threats of criminal prosecution against an opposing party may be made in order to obtain relief in a civil matter so long as (1) the criminal matter is related to the client's underlying civil claim, (2) the lawyer has a well-founded belief that both the civil claim and criminal charges are warranted under the law and facts, and (3) the lawyer does not try to exercise or suggest improper influence over the criminal process.

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The Director has long relied on the ABA position regarding the permissibility of threats of prosecution in related civil litigation and has published articles advising the bar to this effect. *See* Patrick R. Burns, *Limits on Threats of Criminal Prosecution*, Minnesota Lawyer, October 10, 2011; Kenneth L. Jorgensen, *When Lawyers Threaten Criminal Prosecution in a Civil Case*, Minnesota Lawyer, April 24, 1998. There is more to the story, however, that is worth discussion.

Other jurisdictions

Some states carried forward the original express prohibition. For example, Rule 8.4(g) of the Illinois Rules of Professional Conduct provides that "It is professional misconduct for a lawyer to present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter." Texas Rule of Professional Conduct 4.04(b)(1) also prohibits a lawyer from presenting, participating in presenting, or threatening to present "criminal or disciplinary charges solely to gain an advantage in a civil matter." This may matter to you because, under the ethics rules choice of law provisions, the ethics rules to be applied to a matter will be the rules of the jurisdiction where a tribunal sits, if the conduct relates to a matter pending before a tribunal; where the conduct occurred; or where the predominant effects of the conduct occurred.[2] Due to the multi-jurisdictional nature of many practices, you should know the ethics rules to the extent your conduct has significant contact with other jurisdictions. And if you are considering a threat regarding criminal prosecution, you should be reviewing the applicable ethics guidance from that jurisdiction.

Criminal law

The primary rationale behind omitting the pre-1983 prohibition language was that other rules covered this conduct. For example, as noted in the ABA Opinion, "If a lawyer's conduct is extortionate or compounds a crime under the criminal law of a given jurisdiction, that conduct also violates Rule 8.4(b)."[3] Minnesota does not have an extortion statute, but does have a very broad coercion statute.[4] Criminal coercion occurs when "whoever orally or in writing makes any of the following threats and thereby causes another against the other's will to do any act or forbear doing a lawful act," including "a threat to make or cause to be made a criminal charge, whether true or false."[5] Criminal law is well beyond the purview of the Director's Office. However, provided a lawyer follows the guidance in the 1992 ABA opinion, the Director has not imposed discipline. Nor am I aware of an occasion where a lawyer was charged under the coercion statute after following the ABA guidance. But the criminal law on its face is very broad.

Recently, the Minnesota Court of Appeals struck down as unconstitutional a subdivision of the criminal coercion statute, specifically Minn. Stat. §604.27, subd. 1(4), in *State v. Jorgenson*, 934 N.W.2d 362 (Minn. Ct. App. 2019), review granted December 17, 2019. That subdivision criminalized "a threat to expose a secret or deformity... or otherwise to expose any person to disgrace or ridicule." The court of appeals determined the statute was overbroad as it proscribes and criminalized a substantial amount of protected speech. Subdivision 1(5) of Minn. Stat. §609.27 may suffer from the same constitutional problems, as it similarly proscribes a substantial amount of protected speech, including claims of right and, in some instances, other statutorily mandated speech. For example, someone collecting on a worthless check must provide a notice of dishonor that includes notification

of criminal penalties under Minn. Stat. §604.113, subdiv. 3. However, the criminal statute as presently written makes it unlawful to "threaten to make or cause to make a criminal charge, whether true or false," and you should take that into consideration when making decisions regarding your own conduct.

The ethics rules

ABA Opinion 92-363 addresses additional rules practitioners should keep in mind to guide their conduct. Rule 4.4(a), MRPC, prohibits a lawyer from using means that have "no substantial purpose other than to embarrass, delay, or burden" an opposing party. Accordingly, "A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4." Rule 4.1, MRPC, imposes a duty of truthfulness in statements to others. So, "A lawyer who threatens criminal prosecution, without an actual intent to so proceed, violations Rule 4.1." Rule 3.1, MRPC, prohibits the assertion of non-meritorious claims or contentions. Thus, "A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1."

Conclusion

Tread carefully when making any threat to an opposing party, particularly relating to criminal prosecution. Lawyers frequently represent clients in matters where there are both civil and criminal remedies available, and to perform your job competently, those overlapping remedies often need to be addressed. If you choose to use potential criminal prosecution as a negotiating tactic, make sure you are operating in a jurisdiction where this is permitted, and that (1) the civil and criminal claims are related, (2) you have a well-founded belief that both the civil claim and the criminal charges are warranted by the law and facts, and (3) you do not attempt to exert or suggest improper influence over the criminal process. Otherwise you almost certainly are running afoul of the ethics rules. Also, make sure your negotiation demands are reasonable. If you are demanding more than your claim is worth to forgo criminal prosecution, chances increase that you may violate a coercion or extortion statute.

We often field requests from lawyers on our ethics hotline on the topic of ethically threatening criminal prosecution in a client's civil matter. We also see several complaints on this topic annually. Most lawyers err on the side of caution when approaching this topic, but many lawyers do not. Zealous representation does not mean you can use as leverage every bad (or criminal) thing you know about the opposing party, even though your client may want you to. As always, if you have questions regarding your ethical obligations, please call us at 651-296-3952, or visit our website at *lprb.mncourts.gov* to submit an online request. ▲

Notes

[1] ABA Formal Opinion 92-363 (July 6, 1992).

[2] Rule 8.5(b), Minnesota Rules of Professional Conduct (MRPC).

[3] Rule 8.4(b), MRPC, "It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

[4] Minn. Stat. §609.27.

[5] Minn. Stat. §609.27, subd. 1(5).

Cybersecurity in pandemic times

A week ago I wrote on the importance of business continuity in planning for the coronavirus ("Business continuity and coronavirus planning," B&B Online 3/12). In partnership with Mike Olson, CEO of 360 Security Services, I proposed a four-tier approach to aid organizations in implementing a remote work program led by a dedicated team of key personnel responsible for communication, monitoring, and the coordination of procedures. Under that system, many within Minnesota would be at tier 2 or 3 as I write this—meaning an almost complete reliance on remote work given the spread of the virus and the government-ordered shutdowns of public gathering spaces. As we continue to manage this novel threat, maintaining organizational security while accommodating high volumes of remote work is imperative.

In this crisis, reprioritization is occurring on a number of far-reaching levels. Communities are faced with the prospect of being quarantined for extended periods in order to stay healthy and protect vulnerable populations from becoming ill. Schools, venues, and events are closing or canceling for the same reasons. Families canceled spring break trips and vacations. Organizations are being encouraged to focus on remote work capabilities and business continuity. Throughout this upheaval, one thing is clear: Technology is the thread holding all of us together—allowing many of us to continue to work, to communicate, to live as normally as possible, and to find answers when uncertainty seems to be lurking around every corner. The reality of instant communication has made the response to this pandemic unlike any other in history.

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

The very tools that are upholding business operations during this pandemic also open up a wider range of vulnerabilities and potential cyberattacks. The fact is, hackers are being quarantined, too—and now have all the time in the world to take advantage of organizations with weakened security postures.

But even in a pandemic it remains true that the price of all this technology-bred convenience is weakened security. The very tools that are upholding business operations during this pandemic also open up a wider range of vulnerabilities and potential cyberattacks. The fact is, hackers are being quarantined, too—and now have all the time in the world to take advantage of organizations with weakened security postures.

Unfortunately, the health sector may be especially at risk. "The U.S. Health and Human Services Department suffered a cyberattack on its computer system Sunday night during the nation's response to the coronavirus pandemic," Bloomberg News reported on March 16. "HHS officials assume that it was a hostile foreign actor." Given the current climate it's possible that hacktivist attacks, especially those fueled by political or nationalist motives, will prove a particularly dangerous threat during this time. No sooner was the pandemic declared than the scammers, fraudsters, and hackers opened for business, recognizing new attack vectors and preying on the heightened feelings and fears of many of us. Phishing scams exploiting fear of this pandemic are on the rise, many purporting to contain information regarding the COVID-19 virus.

Some of the best hackers operate within the circles of organized crime and/or nation state bad actors. Much like a corporation with an effective enterprise security team, they evaluate all the potential avenues of attack. If they have conducted the proper planning and intelligence work, they have already targeted certain organizations for their vulnerable networks and lax security. Mike Olson stresses the need for crisis communication plans that let employees know who should be communicating to them from within and stay apprised of developing cyberthreats. "Employees should be avoiding personal email crossover onto work-issued computers and devices," he notes. "Your designated team should be monitoring emerging threats on a regular basis and providing concise awareness to your employees. Not all employees will be regularly tuned in to new cyber threats as they work to balance their work-from-home responsibilities while caring for their own families, children out of school, or other personal concerns as a result of this pandemic."

As many organizations race to put together viable remote work plans, it is crucial that cultures of security continue to thrive remotely just as they would in the physical office space. A holistic security approach takes into account all areas of potential vulnerability,

including those at off-site locations as employees begin to remotely access critical business systems and networks. Security training for employees should be conducted by security and IT departments immediately. Instructing on best practices is imperative for supporting the efficiency and safety of remote work. These best practices include the use of VPNs, avoidance of open wifi networks, email encryption, securing endpoints, and phishing/social engineering attack awareness. Relevant remote work policies and procedures should be reviewed (and updated if necessary) and provided to every employee.

As you are continually communicating these best practices to your employees, it is critical to acknowledge the value of intelligence or information gathering. This includes information gathered from any remote employees who observe suspicious activity in relation to their work (such as phishing schemes, social-engineering attempts, or unusual phone calls seeking information). It also includes ensuring you are effectively logging or capturing activity in your network and retaining this information should an attacker exploit your employees or network.

Cyber and traditional criminal activity will rise as a result of this crisis. As during other recent crises, such as the 9/11 attacks or the housing collapse of 2008, fraudsters and hackers will seek ways to exploit vulnerabilities and monetize their crimes. Organizations and law enforcement will not be able to investigate these crimes until the immediate crisis and triaging associated with the pandemic subside. It is then that we will be left to clean up and investigate potential attacks that occurred. You will need a good collection of data to use in deciding to investigate, mitigate, respond to, and recover from any attacks that may have slipped past your defenses.

As we work through these challenging times, the role of digital communication and the conveniences enabled by the Internet of Things cannot be diminished. Our digital landscape has allowed for a degree of preparedness and information-sharing that did not exist in past pandemics. In many ways, it is the only thing preserving our capacity to carry out a semblance of "business as usual." But we must heed the heightened threat climate, too. Cybersecurity must be prioritized as much as the technologies making business operations possible. Though we may feel safer as we leave our physical offices, we face a greater number of threats in the cyber world. Now is the time to double down on your efforts to bolster your security posture and conduct the regular security assessments needed to optimize your organization's ability to respond to the cyberthreats we now encounter. In a society struggling to protect itself from a novel virus while maintaining some degree of normalcy, we truly are hanging by a Web. ▲

‘I believe turnover in positions of power is good for representative government’

An interview with Minnesota Court of Appeals Chief Judge Edward Cleary on the eve of his retirement

By Jon Schmidt

Minnesota Court of Appeals Chief Judge Ed Cleary has served as a judge for nearly 18 years—nine and a half years as a Second Judicial District judge (appointed by Governor Ventura) and close to eight and a half years as an appellate judge (including six and a half as chief judge, appointed by Govs. Dayton and Walz). Before joining the bench, he worked in private practice while also acting as a public defender, and then was appointed Director of the Office of Lawyers Professional Responsibility by the Minnesota Supreme Court. He received his undergraduate and law degrees from the University of Minnesota.

As he nears retirement after serving as a judge for nearly two decades, Chief Judge Cleary and I recently spent time reflecting on his esteemed career—including his U.S. Supreme Court argument—and discussed his future endeavors.

JON SCHMIDT: You have served as a judge for almost 18 years (many years as a trial judge and more recently as a Court of Appeals judge). What have you found to be the most rewarding aspect of serving as a judge?

CHIEF JUDGE EDWARD CLEARY: It may sound trite, but the most rewarding aspect of serving as a judge is making a difference in people’s lives. Trial judges have the opportunity to see that difference up close, with civil litigants and criminal defendants in particular. In addition, you are aware that you are not allowed any “bad” days where you act arrogantly or dismissively, as your courtroom may be the only opportunity that jurors, parties, and witnesses have to view the justice system. Appellate judges, on the other hand, make an even bigger difference in the community. Opinions often have an impact on many people, not just the parties before the court. Appellate judges need to be aware that they too need to treat appellate counsel with respect and patience. The qualities of an effective and respected jurist are the same in any courtroom.

SCHMIDT: You are still young, yet stepping down before you turn 70. Why are you retiring early? What do you plan to do during your retirement?

CHIEF JUDGE CLEARY: I find it interesting that lawyers and judges find 67 young to retire. That said, I chose to retire at 67 for a number of reasons.

First, I believe the Court of Appeals is operating at a high level. I can't take credit for that. It is due to the judges, the law clerks, the staff attorneys and the judicial assistants. But it is important to me that the next chief judge inherit an outstanding operation.

Second, I enjoy being an appellate judge as I take my leave. That may seem counterintuitive, but I have seen too many men and women in the law leave exhausted, unhappy, and even burnt out. I am one of the fortunate ones in that I have enjoyed every phase of my legal career, including serving as chief judge.

Third, I believe turnover in positions of power is good for representative government and good for the judicial branch. In the final analysis, we are all replaceable. And I would like to leave while people are saying, "Cleary is leaving already?" as opposed to "When the hell is Cleary going to leave?" (Hopefully, no one is saying that already.)

As to my retirement, I am not completely sure of my plans. My wife is retiring after 33 years as a probation officer, so she has a similar challenge.

I will never be far from the law. I may well come back as a senior judge on the Court of Appeals or I may serve the law in some other capacity. In any case, retirement will include traveling with my wife and friends and acquiring a rescue dog.

SCHMIDT: You argued at the United States Supreme Court (*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)). Tell me about that experience. Where do you keep your quill?

CHIEF JUDGE CLEARY: The two years from June 1990 (when I was assigned the case of *R.A.V.* as a public defender) to June 1992 (when the United States Supreme Court issued the opinion) were tumultuous to say the least. When the dust settled, perhaps the most satisfying result was that a case that we (attorney Michael Cromett worked with me on the case) had lost 7-0 in the Minnesota Supreme Court, we won 9-0 in the United States Supreme Court. I still enjoy the symmetry of that result.

Preparing for oral argument, after the briefing had been completed, was an experience in itself, as I participated in a moot court argument before five accomplished law professors at Georgetown with 150 students in attendance. The stress from that two-hour experience was a prelude to what was to come.

The media coverage was beyond intense. Representatives from the major networks, cable stations, and radio stations all interviewed us, and the New York Times, Washington Post and USA Today all sent reporters to St. Paul.

On the day of the oral argument, the courtroom was packed, and the families of the justices were there, along with members of Congress. I felt fully prepared and, feeling that way, I felt a calmness that I have seldom experienced in highly stressful situations. As the oral argument continued, all of the justices asked questions, except Justice Thomas, who was new to the Court then. That surprised me, given the backdrop of a cross-burning and the hate-filled message it conveyed.

Seven months later, I was in Delphi, Greece when the opinion finally came down. That was an exciting moment, as was appearing on the Today show via satellite the next day from Athens to discuss the outcome.

As to the quill, I currently have that at home in a frame with the briefs. In 2017, I donated almost all of my *R.A.V.* material to my alma mater, the University of Minnesota Law School. I taught there for 12 years as an adjunct professor as well, so my ties to the school continue and I am quite pleased to have the material held there. Now that I am retiring, I plan on donating the balance of the *R.A.V.* collection to the law school, including the quill.

SCHMIDT: Other than being a judge, what is a job that you wish you had?

CHIEF JUDGE CLEARY: It is perhaps more of a calling than a job, but like many in the legal profession, my interest, other than in practicing law or serving as a judge, would be to make a living as an author of books, fiction or nonfiction.

R.A.V. opened the door for me to be a published author and that is a story in itself. After the Supreme Court accepted review of the case, I saved everything: notes, phone messages, correspondence, etc. Then I went to a bookstore (remember those?) and bought a book on how to properly submit a nonfiction book proposal. I put together a packet and sent the proposal to pre-selected editors at the six biggest publishing houses. Sometimes it helps to be naïve. One Saturday morning in the spring of 1992, I received a phone call from an editor at Random House (the biggest publishing house in the world at the time) named Joe Fox. Joe was a bit of a legend, having edited many books, including *In Cold Blood* and *Gideon's Trumpet*. Joe apologized for not getting back to me earlier(!) and told me he was interested in my book proposal and that he would recommend acquisition to the Acquisition Committee. A week later he called me and said he had good news and bad news. The good news was that Random House was interested in publishing the book. The bad news was that the United States Supreme Court had to agree with me.

The day after the opinion came down in late June 1992, I agreed on the terms of a book contract with Joe Fox from my hotel in Delphi, as Joe read the article on the opinion from the front page of the *New York Times*. It took me 10 months to prepare the manuscript, which I did primarily at night and on weekends since I was practicing law during the day. Random House released the hardcover, *Beyond the Burning Cross*, in 1994; the paperback in 1995; and as an e-book in 2011. Joe and I talked about additional books, but then Joe died at his desk in 1995 and I lost my champion. I took that as a sign that my career at 42 remained in the legal world, not in the publishing world.

When I went to Joe's funeral in New York City, and the reception for his authors following that event, I found myself standing in a room with Anthony Lewis, John Irving, Phillip Roth, E.L. Doctorow, and other authors of that stature. A memorable coda to my "other" career.

SCHMIDT: As chief judge for the Court of Appeals, you have sat on numerous Special Term panels. Can you describe the Special Term of the court, the issues you address, and the process? What can attorneys do to better position their case to be helpful to the panel?

CHIEF JUDGE CLEARY: Every Tuesday morning at 10:00 a.m., as chief judge, I chair a revolving panel of three judges to hear Special Term matters. All three of us will have received a bench memorandum and a proposed order on each matter on the calendar on the previous day, prepared by a member of our central staff attorneys or, occasionally, by one of our law clerks. The number of cases on the calendar varies from three to 12, with six or seven cases constituting the usual workload.

Special Term involves the "gatekeeping" function of our court. Here, we decide if an appeal will go forward or a writ will be issued or denied. We meet in our main conference room with judges on one side of the conference table and members of central staff on the other. Each matter is presented by the staff attorney, who makes a recommendation to the judges and answers their questions. The seven central staff attorneys all have their own area of expertise and they are experienced, professional, and a great help to our judges and to our law clerks.

The decision is made to either agree to the proposed order, amend the order, or, rarely, issue an opinion, which is often published.

As to what appellate counsel can do to improve their submissions, counsel should keep in mind that since the Special Term panel does not have the benefit of full briefing and oral arguments, it is helpful if relevant materials from the record are identified or submitted in an addendum. As to petitions for discretionary review, counsel should explain why effective relief would be unavailable on appeal from a final judgment.

SCHMIDT: There has been an external push about increasing the number of opinions that the Court of Appeals publishes. How is it decided which opinions are published and not published? Do you feel that the number of published opinions should increase?

CHIEF JUDGE CLEARY: This has been an ongoing issue for some time and there appears to be some fundamental misunderstandings about how the Court of Appeals operates.

First, the judges on our court are not opposed to the publication of opinions and, in fact, enjoy releasing published opinions. We teach our incoming law clerks to review files and prepare bench memorandums with a recommendation to consider publication when the area of law is unsettled or where there is no binding precedent. We reject the idea that we are at all times an error-correcting court and we are quite aware that we, on occasion, are a policymaking court as well. The judges on our court encourage appellate counsel to argue for publication in their briefs or at oral argument. Finally, the judges make a decision to publish or not publish and the other judges are allowed to weigh in as the proposed opinion is circulated.

Second, we are aware that the Minnesota State Bar Association is supporting a legislative proposal to repeal Minn. Stat. §480A.08, subd. 3(c) which sets limitations on what opinions may be published. While we take no official position on that proposal, we would likely set up a committee to evaluate new guidelines for publication if the statute is repealed, and we would likely provide MSBA representatives with an opportunity to comment on any proposed rules.

Our Court does *not* take issue with those who would like more published opinions. We take issue with those who believe that we are intentionally avoiding the publication of opinions for some unknown reason. Many opinions are fact-based (unemployment cases come to mind), or are not properly briefed on the issue that may warrant publication, or involve binding precedent or well-settled areas of law. There are a number of hurdles to dramatically increasing the number of published opinions. That said, the judges on our court are quite aware of the desire of certain members of the bar to have the number of opinions we publish increased, and the court will continue to evaluate opinions closely with an eye toward publication, short of setting an artificial annual "goal" publication rate.

It is prudent to keep in mind, however, that if the bar is arguing that the statute violates separation of powers concerns, it does so in recognition of judicial independence.

Schmidt: You have spoken many times on the topic of wellbeing for lawyers. Why do you think mental health still has such a stigma in the legal field? What do you think judges and practitioners can do to take care of themselves and each other?

CHIEF JUDGE CLEARY: My father was an attorney and I remember quite clearly an incident that occurred when I was 12 years old. His closest friend, also an attorney, took his own life and left five children under 15. My father was deeply saddened that he had been unable to help his friend. As the years went by, I heard of other such stories. One such story involved a lawyer I knew with four young daughters who took his youngest daughter to kindergarten for her first day of school and took his life that night. I was not aware he had been struggling with his mental health and he apparently believed he had done all he could by making sure his youngest child had begun school. I am sure many lawyers and judges know of such stories.

When I became director of the Office of Lawyers Professional Responsibility in 1997, I was reminded of how inadequately the legal profession dealt with mental health issues. Several suicides occurred in relation to discipline. We had an incident where an attorney called the office while holding a loaded handgun, threatening suicide, and we stalled him long enough for the police to arrive and talk him down.

All of this has heightened my concern over how members of the legal profession deal with mental health and wellbeing. It cannot be swept under the rug. We place great emphasis on hard-charging success—but at what cost for those who, through no fault of their own, can't handle the pressure or are genetically predisposed to clinical depression and other illnesses?

It seems to me we have an obligation to look after one another, if only because we share a dedication to the legal profession. Untreated mental illness is a tragedy waiting to occur. And we are better than that.

Here, in Minnesota, while I was director, we began to address the problem by expanding LCL into a lawyer assistance program that seeks to help not only lawyers and judges who have chemical issues, but those who deal with mental health issues as well, with an emphasis

on helping family members of these lawyers and judges too. Helping family members cope with the ill family member is critical to long-term success.

It will take time to lessen the stigma of mental health. In the meantime, judges and practitioners should have heightened awareness of the need to find balance in their own lives and to reach out where they see others in the profession in need. Better to act than to risk the devastating loss and regret my father felt all those years ago.

SCHMIDT: What is a moment in your legal career that altered the trajectory of your life or career?

CHIEF JUDGE CLEARY: Undoubtedly, my involvement in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) altered the trajectory of both my life and career.

My participation on the Franken-Coleman Senate canvassing board, in addition to being a very memorable experience, had an impact on my career in the sense that my visibility rose substantially as a result of that involvement. I heard from many people from around the State who had followed the hearings assiduously online. Over a decade later, those hearings still come up in conversation with members of the public.

However, the lead-up to *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), decided by the United States Supreme Court 10 years later, also had a sizeable impact on me.

Shortly after the Minnesota Supreme Court appointed me director of the Office of Lawyers Professional Responsibility in 1997, I was asked to give an advisory opinion as to whether I would enforce the announce clause of then-Canon 5 of the Code of Judicial Conduct, which prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues. After conducting my own research and discussing the matter with several lawyers in the office, I informed the attorney that I found the announce clause problematic and likely unconstitutional, and told him that as a result, as director, I would not enforce it. He gave the letter to the Star Tribune, which reported that I found the announce clause unconstitutional.

Consequently, a number of justices serving on the Minnesota Supreme Court at the time were unhappy with me. And I was unhappy with them for not taking steps to delete the clause and substitute language accepted by the majority of states at the time. For the second time in a decade, I found myself at odds with justices of the Minnesota Supreme Court over a First Amendment issue. Since I was appointed by the Court, there was a possibility that the Court would ask me to step down as director. There was also the possibility that I would step down of my own volition. Neither occurred. I served as director of the Office of Lawyers Professional Responsibility from 1997-2002 and I am glad I did, as I enjoyed working with the members of that office and my relationships with the justices improved.

In 2002, the United States Supreme Court struck down the announce clause in *Republican Party of Minnesota v. White* as a violation of the First Amendment.

SCHMIDT: When they write the history of the Court of Appeals, what do you want people to say about the years you were chief? The Cleary Court, if you will.

CHIEF JUDGE CLEARY: Retired Chief Judge Edward Toussaint and I are the only chief judges in the history of the court, thus far, to have completed at least 2 three-year terms. I point that out because I believe it takes several terms before a court perhaps reflects the direction a chief judge has taken.

During my six and a half years as chief judge, I would like it to be said that our court, even with the high turnover of judges, remained professional, collegial, and hard-working at all times and that we operated successfully by consensus. We have always attempted to keep close communication with the members of the bar to facilitate discussion and to avoid misunderstandings.

As to the tenor of the opinions we have issued over these years, I believe it has been outstanding. Keep in mind that the judges come from very different backgrounds and have different writing styles and that we don't sit *en banc*, primarily because of volume pressures. As a result, an opinion issued by a three-judge panel doesn't always reflect every judge's opinion on our court, but the vast majority of our opinions are approved in circulation unanimously or by a substantial majority of the court.

As chief judge, at Special Term and elsewhere, I have believed that, when statutory authorization is available, and a proper request for relief is submitted, our court should be heard. This has resulted in opinions and orders that perhaps other chief judges would not have issued. But I believe we should keep the gate open as much as possible and that our court should not hesitate to use its authority when the case presented calls for it.

Looking forward to issues facing the Court of Appeals in the years ahead, the good news is that the 19-member court will not need to be expanded anytime in the near future, given the stable numbers of filed appeals. The issue of new rules surrounding publication of opinions will need to be addressed if the Legislature repeals Minn. Stat. §480A.08, subd. 3(c).

The court will continue to work with the Minnesota Supreme Court and other members of the Judicial Branch in addressing issues regarding cybersecurity and other technological advances, keeping in mind budgetary concerns.

All in all, the new chief judge will inherit one of the nation's finest intermediate courts of appeal, including 18 other hard-working judges and an outstanding central staff and support staff, as well as gifted law clerks. The citizens of our state should be very proud of our Court of Appeals. I know I am. ▲

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Insights on the law and on navigating your early years as a lawyer from members of the MSBA New Lawyers Section

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Being a lawyer is hard. Don't make it harder.

10 tips & truths for navigating life as a new lawyer

By Patty Beck

Becoming a lawyer is one of the most rewarding yet challenging things I have ever done. I learned early on that one of the toughest parts about being a new lawyer is discovering how many things I did not know coming into this profession despite spending years preparing for it.

The day I was sworn in as a new lawyer was one of the happiest of my life. After three years devoted to rigorous studying, extracurricular activities, and volunteering in various legal roles, I was finally a *lawyer*. I started working as an associate at a large law firm, where I was assigned fascinating cases and learned from talented lawyers. I was so excited by even the most mundane tasks that I offered to work weekends.

Then after a few months it hit me—being a lawyer is tough. I always knew it would be difficult given the complex laws, demanding deadlines, and billable hours. But experiencing these challenges firsthand differed considerably from my expectations, and I was surprised at how unprepared I felt despite my best efforts during law school.

I had no idea how mentally exhausted I would be, or the impact it would have on my memory and organizational skills. I did not anticipate how challenging it can be to gather facts from clients and witnesses, or to decipher complex documents. Most of all, I did not appreciate how stressful it is not to know what you are doing, and to stumble and make mistakes as a result.

I was surprised at the stress associated with navigating my career path. I did not realize the extent to which my interests and priorities would change over time, that my dream job as a litigator would not be a good fit for me, or that I would eventually start over in a new practice area.

Since graduating from law school, I have been fortunate enough to have practiced law at an exceptional firm, discovered my true passions and skillset, and transitioned to a non-practicing role where I can use my law degree to help lawyers navigate their own professional struggles.

Here are 10 things I wish I had known as a new lawyer, along with tips to help minimize stumbles and surprises along the way. Some of these lessons I learned the hard way, while others I learned by handling ethics and malpractice claims for lawyers of all experience levels.

1 You will make mistakes

Lawyers tend to be perfectionists, and we are very hard on ourselves when we make mistakes. If you graduated from law school, chances are you're accustomed to excelling academically and succeeding in most endeavors. The challenge is that when you start practicing, nearly every task you are assigned is something you have never done before and will be expected to complete flawlessly (sometimes with little or no guidance from the assigning attorney or client). Although there is a learning curve at any job, lawyers often set high standards and demand perfection even when doing something for the first time. Under these circumstances, the odds are you will make mistakes and have to re-do certain projects, which can be stressful for those unaccustomed to making errors.

I struggled with this as a new lawyer despite doing well in law school. I believed getting good grades would automatically translate to success in practicing law. It didn't, and that was hard to process. I often felt like I had no idea what I was doing, and that there was something wrong with me for not instinctively knowing how to perfectly draft a deficiency letter, evaluate whether a proposed protective order seemed reasonable, or prepare a budget for a client.

Fortunately, my work product and confidence level improved significantly as I sought feedback, devoted extra time to improving my writing skills, and observed senior lawyers in action—conducting client calls, interviewing witnesses, and developing case strategies. Although I wish my experience were unique, I have met many lawyers who shared my struggles and my experience of how difficult it can be to ask for help—which is even more stressful when you feel like the only one who can't keep up. (Spoiler alert: *Many* lawyers feel like they do not know what they are doing.)

▶ **TIP:** *Get as much information as possible about the project from the assigning attorney to understand your starting point, how many hours you should spend, and where your assignment fits within the "big picture" of the client's needs. If possible, find examples of what the end product should look like before drafting documents like motions, discovery requests, and contracts. And be sure to have someone you can ask "dumb questions," because it is better to admit you are confused and ask for help than to isolate and struggle alone.*

Most importantly, try not to be too hard on yourself when you make mistakes. They are inevitable, even for experienced lawyers. There will be many times throughout your career when you do not know how to tackle a project, especially during your first few years. As in any job, it takes time to figure out how to do things. With time, experience, and guidance from other lawyers, you will figure it out.

2 You will be exhausted when you first start practicing

Lawyers are no strangers to long hours. Many of us spent eight to ten hours per day during law school studying and attending class. The difference is that in law school, those hours are broken up throughout the day by class schedules, extracurricular activities, and work. As a lawyer, you will spend those same hours (or more) at your desk reading, analyzing, and writing. Oftentimes you will work additional hours at home during the mornings or evenings (and let's not forget weekends). I can still recall discussing with my peers our shock at how exhausting the practice of law was, even though we were all familiar with long hours from law school.

▶ **TIP:** *Take frequent short breaks throughout the day. Rather than working four hours and taking an hour-long break, work for one hour and take a quick five-minute break (a lap around the office is great for this and increases daily steps!). Short frequent breaks help us combat the brain fatigue that occurs when we spend many consecutive hours working. Short breaks are also nice because they tend not to interrupt your momentum on a project.*

3 Sometimes your memory will fail you

An additional side effect of exhaustion is that it will sometimes cause your memory to fail you. Depending on your caseload, you will be working long hours and juggling several fact patterns, dates, and legal principles at any given time. If you do not give your brain adequate time to rest and recharge, you will forget something at some point in time. I have spoken with many lawyers who would have bet anything they remembered certain facts and deadlines correctly but were mistaken.

▶ **TIP:** *Develop a system to keep track of important facts, dates, and characters, and use it during discussions with colleagues and clients. Some people prefer charts while others work better with text-heavy summaries, lists, chronologies, or other diagrams. Find what works best for you, which may involve trying out multiple methods before one clicks.*

4 Even the most organized lawyers can overlook important dates

By now you may be sensing a theme, which is that mistakes happen—to everyone. Even the most organized and experienced lawyers can overlook deadlines or write down the wrong date. Some lawyers rely on a flawed memory rather than documents to compute a statute of limitations. Others may hear one date and write down another. Lawyers sometimes even misread or misunderstand various rules of procedure regarding applicable deadlines.

▶ **TIP:** *Have an organized calendar system and check it regularly. When imputing critical dates, always double-check your facts and the rules to make sure your calculation is correct. If another lawyer has calculated a date for you, do your own independent evaluation to make sure the date is correct. Make sure you frequently check in on all files, as this will help you catch mistakes before deadlines are missed.*

5 Clients can be unreliable

As if avoiding lawyer mistakes were not enough to worry about, new lawyers must also recognize that clients can make mistakes. Some clients may misremember key facts or important dates. Others may believe they provided you with all relevant documents while overlooking additional emails. Sometimes clients will even describe documents as relating to one issue when they in fact relate to another. Miscommunication happens often, regardless of whether your client is an individual filing for divorce or a massive corporation embroiled in a business dispute.

▶ **TIP:** *Frequent communication with colleagues and clients regarding investigation is critical. It is important to be clear on what information you are seeking so the client is not the one deciding whether something is "relevant" for production. Following up a phone call with instructions in writing will help ensure that everyone is on the same page. Verify as many facts as possible with documents to avoid relying on someone's memory for important information.*

6 Billing time is hard because so much time is non-billable

Although we all know that lawyers tend to work long hours, it is hard to appreciate how challenging it is to bill time until you do it. I recall discussing billable hours with an associate while I was still a law student, and I was surprised to hear how much difficulty she experienced in billing time given how many total hours she worked. She explained how easy it is to "lose time" throughout the day to non-billable activities such as attending firm meetings, lunches, involvement in various bar associations, and simply chatting with colleagues. For a lawyer to bill 40 hours per week, typically they must devote significantly more time to their job than that. This can be a shock to new lawyers who have never had to log each hour of their day (often in six-minute increments).

▶ **TIP:** *Start the year by mapping out how many hours you must bill each week to meet the firm's billable hour target while factoring in at least two vacation weeks, holidays, and time devoted to CLE and other non-billable activity. Be sure to adjust this plan each month depending on whether you are ahead or behind on your hours. Next, identify ways to be as efficient as possible with your non-billable time by saying "no" to certain activities and, where appropriate, using support staff to assist with travel arrangements, registering for events, etc. If you are not on track to meet billable hour expectations, have an honest conversation with your supervisor to find out why and how you can improve to avoid any consequences of not billing enough.*

7 You may be awkward at times

Of all things that shocked me as a new lawyer, I should have seen this one coming a mile away given how awkward I am on any given day. Alas, I learned the hard way that business development skills are generally learned over time. I still cringe remembering my first time networking with a corporate client and how direct I was about trying to develop that business relationship (I believe I am still waiting for a notification on LinkedIn saying my request to connect was accepted). Although I wish I could say I'm alone in this regard, I have learned from being a client just how challenging it can be for even experienced lawyers to navigate and develop relationships with existing and potential clients.

▶ **TIP:** *Do not take a one-size-fits-all approach to client interactions. Although some clients may prefer a more formal and direct approach to doing business, others may appreciate a subtle approach of going for coffee or lunch to get to know one another (with a sprinkling of experience throughout). A lot goes into developing a professional relationship, and the nuances can get lost in the mix for lawyers who do not understand what different clients appreciate. If you do have an awkward experience, figure out where you went wrong so that you can do better next time. And don't dwell on it.*

8 Your interests may change over time

Some new lawyers find a job in a practice area they are interested in and assume they will continue in that field throughout their career. I started my career litigating employment law matters and thought I would forever be an "employment lawyer." Over time I realized that although the subject matter was interesting, I was not passionate about it—and I found the adversarial nature of the litigation system exhausting. This realization, among many others, caused me to develop anxiety when it became apparent the career path I had spent several years pursuing was not a good fit for me. I felt like there was something wrong with me. It turns out there was nothing wrong with me, and that many lawyers have this experience for several reasons.

▶ **TIP:** *Do not be afraid to make a change at any point during your career. Many lawyers have told me that they know they do not love what they do but are hesitant to make a change due to timing (proximity to partnership), fear of career setbacks, and the dread of starting over. I have also met several lawyers who made a change and expressed extreme happiness at the freedom to do something they are passionate about. This profession is a marathon, with several short sprints along the way. Even after making partner, you are likely still closer to the starting line than the finish line of your career. If you know you are unhappy by mile three, don't wait until mile twelve to make a change—life is too short for that!*

9 Your priorities may change

New lawyers who join law firms often set out on a path to partnership (or equivalent position). It's the natural progression in many firms. I started my career with this exact goal in mind. But after a few years, I realized the less time I spent with my now-husband, family, and friends, the less I enjoyed my work. It surprised me how much my priorities changed, given how dedicated I was to becoming a successful attorney. I considered my career in the long term and realized these challenges were likely to continue, since it did not appear I would suddenly have nights and weekends free after making partner.

My changing perspective added to the anxiety I was experiencing at the time, so I consulted a professional counselor about what to do. After several months of reflection on what I wanted out of my career and personal life, I decided to transition to a non-practicing role as a claim attorney for Minnesota Lawyers Mutual Insurance Company. This transition was terrifying in many ways, but it allowed me to manage my anxiety and achieve the type of balance I needed, all while still using my law degree every day.

I know many lawyers who shared similar experiences changing their career paths after meeting a significant other, starting a family, or even after achieving a career goal and realizing it was not what they wanted after all. A common theme is that it is nerve-wracking to make any change, but the reward often outweighs the risk.

▶ **TIP:** *Continually evaluate what you are looking for in your career and in your personal life. Network often, and ask experienced lawyers what they like and dislike about their position, company/firm, and practice area. Be deliberate in finding out whether and how you can achieve your career goals without sacrificing personal goals—or at least identify the sacrifices that may need to be made.*

Also, be cautious in making any major life purchases in your first few years of practice. Many lawyers have shared stories of enjoying their work for the first year or two, purchasing an expensive house or car, and feeling stressed when they want to make a job change but cannot do so and maintain their lifestyle. I am still thankful I did not purchase the extravagant house I was eyeing during my second year of practice, as it would be very difficult to afford now—and would have adversely affected my ability to make a much-needed career change.

YOU MUST TAKE TIME AWAY FROM WORK FOR YOURSELF.

10 You must take care of yourself

One constant among attorneys is that this profession requires long hours and dedication regardless of your position or experience level. Many lawyers tell stories of working months or years without taking a real vacation (one that involves no billing or checking email), which can lead to burnout. Some lawyers hold off on taking time away until they feel they are on top of billable hours (which can take months to achieve), while others worry about being perceived as uncommitted to their work if they take time off. Whatever the reason, many lawyers seem to struggle with work-life balance—though, ironically, it's one of the most critical aspects of being a successful lawyer. Lawyers who are exhausted, stressed, and failing to take care of themselves are more likely to struggle with meeting basic performance expectations than lawyers who take appropriate time off to rest and recharge.

▶ **TIP:** *You must take time away from work for yourself. Schedule vacations, make plans for weekends, and spend evenings with friends, family, and yourself. Move the email app on your phone to the second screen so you control when you switch from "personal time" to "work time." Find activities you enjoy and put them on your calendar so they become a priority.*

Finally, be open with your supervisor if you are struggling. Lawyer well-being is critical to the growth of our profession, and now more than ever, law firms and companies are striving to provide resources and support to their lawyers and staff to allow us to thrive in this profession. ▲

New lawyers need a mentor and a sponsor.

And they aren't the same thing.

By Molly B. Hough

I often find myself in conversations with new lawyers who either: a) do not have a mentor and do not make finding a mentor a priority, or b) who already have a mentor and don't make earning a sponsor a priority. These relationships can easily take a back seat in your career when you are trying to establish yourself. It is crucial to understand the value each relationship offers, because both are essential as you progress in your career, and they serve different purposes.

What are the differences between a mentor and a sponsor?

Mentors will traditionally serve as guides throughout your career. They will steer you through workplace challenges, encourage you, and help you think strategically about short- and long-term career goals. Finding a mentor is a crucial first step when starting a career. This can often be overlooked because there is much more to focus on when you first become a lawyer, such as developing a network and learning the hard skills (writing, courtroom experience, detail work, etc.). But taking the time to cultivate a mentor relationship will offer you a guide when you truly need one, especially in the first year as a lawyer. In your first few years, you will encounter many obstacles within the workplace that law school simply did not train you to navigate. Engaging in repetitive conversations with a mentor can help you not only work through such challenges, but to think beyond the work that is in front of you to establish yourself as a great lawyer.

A sponsor, on the other hand, serves as an advocate when you are not in the room. They speak publicly about you and tell others that you are capable of the task or project that needs to be distributed. These are likely senior-level people who have power or influence in the areas you wish to pursue. At their core, they believe in you and your ability, work ethic, and talent. Sponsors will help advance your career by helping you retain key assignments, meet clients, and earn leadership opportunities.

When a sponsor vouches for you, they are putting their own reputation at risk. Eileen Scully, founder and CEO of The Rising Tides, a consulting and advisory firm, explains the difference between a mentor and a sponsor this way: "You can ask someone to be your mentor. You cannot ask someone to be your sponsor—they decide that on their own."[1]

How to find mentors and earn sponsors

There is more than one way to find a mentor. This can occur formally through a structured program, or it can occur organically. If you are in a workplace setting where there is a formal mentorship program, then you must be intentional in who you choose. This could be someone you work closely with who understands the ways in which you need to improve (or what challenges you might be experiencing), and can jump right into helping. Another avenue to choosing a mentor is selecting someone who is not in your direct practice area but has experience in the firm or organization.

This is my preferred avenue to choosing a mentor. It allows you to speak openly and freely to your mentor about any workplace challenges; your mentor can then help you resolve such challenges through an objective lens, and encourage you when needed. Finding formal mentors outside your organization can be just as beneficial. There are many programs like this set up through the different bar organizations, so it is important to find ways to engage with the bar organizations, whether through volunteering or serving in a leadership position. Both of

these formal ways to find a mentor can help you alleviate some of the stress and cultivate the patience required for a more organic relationship to form.

If you are not in a workplace where there is a formal program, then finding a mentor will take patience, consistency, and intentionality. Many new lawyers want the mentor relationship to flourish without putting in the work. Organic relationships will occur, but not because of a lack of effort. Mentors are generally busy people and a mentee is not always their top priority. It's important for new lawyers to take the lead by initiating an invite, following up, and scheduling periodic meetings. Do not be discouraged if a meeting is canceled; this is not personal. Rather, be consistent and patient, and over time this relationship will grow organically and require less and less work. Push yourself to find mentors and sponsors who look and act differently than you. Some of my most beneficial relationships have been with people who look and think differently than I do, and have allowed me to be challenged and grow in ways that have benefited me personally as well as professionally.

Identifying sponsors in your workplace takes strategic and authentic relationship building. To identify a sponsor in your organization, ask yourself the following questions:[2]

1. Who makes pay, promotion or project assignment decisions that affect you?
2. Which senior-level leaders could benefit from your career advancement?
3. Which senior-level leader has a network or platform most equipped to help you advance in your career?

Take time to write down a list of people who satisfy these requirements; make strides as often as you can to showcase your abilities to these key people. To be clear, this is not done through grandstanding or false promises, but through excellent work product, asking good questions regarding their careers, conducting due diligence, demonstrating loyalty, and showcasing your value through your actions. This is how you earn a sponsor and advance your career in concrete ways.

How to effectively work with both

Working with a mentor and a sponsor requires a two-way street. New lawyers often cheapen these relationships by only thinking about what they can receive from it and how they can grow. If you want to be in the room or at the table, then you absolutely need to bring something to it. What unique value are you bringing to this space? Why should someone at a senior level be investing their time, energy, reputation, and resources in you and your career growth? Will you ensure they receive a return on their time and investment in you?[3]

This leads to a very important exercise: Are you able to articulate your value? Take the time to understand how you can communicate your abilities, and then prove this value through consistent work product, conducting due diligence, and demonstrating loyalty and intentionality. In both mentor and sponsor relationships, it is very important to set expectations. Communicate early and clearly to each other what you are wanting out of the relationship. This will help eliminate frustrations between the two of you and allow you to operate in a consistent manner that is fulfilling to you both.

Be patient but intentional

None of this will occur immediately—but to advance your career development, you must start making intentional decisions now. Do you want a sponsor who will insert your name into the conversation and be your advocate when you are not in the room? Do you want a mentor to help navigate the ups and downs of your career, to think strategically about your goals, and to guide you in workplace challenges? Then be consistent, because they are also making a decision on whether they want to invest in you. Diligently appear in front of them communicating your value, showcasing your excellent work product and work ethic. Remind them of the types of opportunities you want.

Repetition is key. But it does not always come easy and can be frustrating in the day to day. When trying to build authentic relationships that will last and prove beneficial to both people, patience is critical. When you can have this mindset of patience and understanding, the day-to-day work of being intentional will set you up for success. Finally, always be grateful and never forget to say thank you.

Both relationships are crucial to your career. Treat them as priorities, add value to each relationship, and you will have both short-term and long-term career growth in ways that were not available to you before. Individually you are capable, but with mentors and sponsors you can have concrete benefits to super-charge your career. ▲

Notes

[1] Grensing-Pophal, Lin, "Mentor Versus Sponsor: The Differences and How to Find and Work With Them." *Ivy Exec.* Accessed 12/21/2019. *https://www.ivyexec.com/career-advice/2019/mentor-versus-sponsor-differences-and-how-to-find/*

[2] Baumgarten, Maryann, "The Key Role of Sponsorship", *SLAC.* Accessed 12/21/2019. *https://inclusion.slac.stanford.edu/sites/inclusion.slac.stanford.edu/files/The_Key_Role_of_a_Sponsorship_for_ Diverse_Talent.pdf*

[3] Supra note 1.

Following the Unexpected Call

How I made the move from private practice to government in my early years of practice.

By Hillary A. Taylor

I'm no different from any of my "friends in law." I started law school in 2013 hoping to be a good lawyer doing good things. Until a little while ago, I planned on being at my firm for the foreseeable future. I loved the people I worked with. I enjoyed being exposed to the variety of litigation and pro bono matters.

I didn't expect my plan to change. And I definitely didn't imagine I'd be transitioning in my career as soon as 2019, when I made the move from private practice to public service.

Like many people in law school, I had a plan for my career after graduation. My plan always involved working in a law firm and traveling down a path where I shared in the development of the firm and advocated for my own clients. And I found exactly what I was looking for. I clerked for a regional mid-sized firm that was the best fit for me, which provided more responsibility and valuable experiences for junior associates. I returned to that firm after graduation and began practicing with good mentors who cared about my development.

Last year, I was reminded of the familiar quote, "Life is what happens to us while we are making other plans" (often errantly attributed to John Lennon, but actually made by writer and cartoonist Allen Saunders). Despite my career plan, after the 2018 election I felt compelled to apply to work for Minnesota Attorney General Keith Ellison at the Attorney General's Office, and in 2019 I was hired as an assistant attorney general in the Solicitor General's Division. As I hemmed and hawed with close friends over whether this was a good time for me to take the first step of applying, whether I even possessed what the office needed at my career stage, a friend bluntly asked, "If not now, then when?"

There were a number of things that drew me to this office and position. I enjoy representing my home state, taking on issues that matter to Minnesotans. I was excited to take on appeals, constitutional challenges, and otherwise defend the state in ways that make it more efficient and effective. Also, I was ready to take on the challenge of more responsibility and autonomy. There's an expectation in government practice that I'll own my cases, meaning my job is to move my cases along, strategize, draft briefs, examine witnesses, and advocate orally in a variety of settings. While the work in private practice was challenging and fulfilling in its own way, I'm proud to say I'm doing impactful work and serving in a way that's true to my core values.

I discovered over the past year that our legal careers, even at junior stages, don't need to be perfect, linear paths. They can be fluid. They can reflect our values and needs at that time.

I've learned a lot through my job transition from private practice to government work, some of which may be of interest to those considering a step aside from their initial plans, whether it's a jump similar to mine or just a midstream job change. Here are some takeaways I had, which is a fluid list that is constantly updating:

Know the "why." The questions I was asked the most during my transition were the *why* questions. Why you want to make the change from private to government? Why now? Why this specific position or office? These questions uncover your path, motivation, and purpose. As attorneys, we can be reactive in what we do without taking the time to think of why we're acting in a certain way. Asking why isn't only tied to transitions, however. Asking why we stay lockstep with a life plan can be just as important as asking why we might decide to step in a different direction.

Starting a transition has its pros and cons. A natural follow to the "why" is thinking about what would be fulfilling to you in your career. What are the costs and benefits of transitioning from one sector to another? Candidly, there were clear pros and cons for me when I considered leaving a place in private practice I cared about to move to an exciting state government position that had an element of the unknown. In addition to thinking this through on my own, it really helped to talk to trusted advisors who shared their experiences and knowledge about this process.

Research to find your fit. Government offices have their own culture in addition to the type of work they do. Much like figuring out if a law firm is right for you, take time to ask questions of people internal and external to the office to see if that's a place you can really grow as an attorney and feel comfortable with your colleagues. I found mentors, friends, and my broader legal network helpful in this area. I was able to figure out the type of work I'd be doing, the diverse team I'd be working with, and the values of my coworkers before I even stepped foot in the door.

Be humble and patient at the new gig (and with yourself). With any transition, you find yourself learning a lot about the position and the workplace right off the bat. Add to that the switch from private practice to government, and you've got a scenario where there's a lot of new or uncharted territory. And that's okay. Be kind to yourself as you learn and stretch yourself. Humility and grace will allow you to soak up the opportunities (big or small) thrown at you in government, even if it involves a lot of questions and research every step of the way. Saying "yes, I'll take that on" has led to a lot of invaluable experience that may not have happened elsewhere.

Cherish your network. It's hard to maintain it all during a transition, especially if you have a change in your location or resources. But your friends and network are still there during and after a transition. Continue your connections and share your excitement about what your new path brings. ▲

Inflexible Leave Policy Litigation

Stretching the limits of the ADA

By Colin Hunter Hargreaves

Inflexible leave policy litigation is nothing new. In fact, this niche area has been on many people's radar for a while now, especially that of the Equal Employment Opportunity Commission (EEOC). Throughout the past decade, EEOC has repeatedly made litigating these policies a priority.[1] Yet despite the EEOC's emphasis on reducing inflexible leave policies, and in the wake of numerous class action cases, these leave policies still appear regularly. Inflexible leave policy litigation remains an area of law infrequently discussed by scholars and experts. This article provides a brief overview of recent developments.

Part I will present some examples of inflexible leave policies and provide additional context regarding facially neutral, but potentially unlawful, inflexible leave policies. Part II will discuss the legal framework and recent developments in case law on this novel and rapidly developing area. Part III distills key takeaways.

Part I: Context

Inflexible leave policies[2] are facially neutral and seemingly non-discriminatory policies that employers implement to control the amount of time their employees are out of work. This appears to make sense, since any employer would want to limit employees' time away from work and ensure that they return as soon as possible. But there are inherent issues with such policies, since they may unintentionally discriminate against employees with disabilities who need an accommodation.

Indeed, the EEOC has taken the position that any such inflexible leave policy violates the Americans with Disabilities Act (ADA) because the policies do not allow for an "individualized assessment" of an employee's disabilities.[3] Nor do they allow the federally mandated interactive process to occur; in fact, such policies chill any attempt to engage in it. Any policy that seemingly prohibits an employer from taking into account the highly individualized and unique nature of each individual's disability may open up organizations to liability.

In practice, though, it is not as simple as that. Facially neutral inflexible leave policies take many forms. One common example: An employer implements a policy requiring termination of any employee who is unable to return to work after exhausting their leave under the organization's policies, the Family and Medical Leave Act, a previous ADA leave, short-term disability, workers' compensation leave, or something similar. A second example occurs when an employee returns to work but is prohibited from taking an additional brief medical leave shortly after returning due to side effects of a medication, recurrence of symptoms, complications from a procedure, etc. A third example happens when an employer implements a policy requiring an employee to be "100 percent

healthy" before returning to work. By way of illustration, the following hypothetical pulls all three of these scenarios into one unfortunate policy.

> ***Acme, Co. Disability, Medical, and Leave of Absence Policy***
> EMPLOYER will provide all EMPLOYEES up to, but not in excess, of 100 days of disability, medical, and/or for any other such leave of absence that are related to any qualifying illness in accordance with federal disability leave statutes. If after 100 days, EMPLOYEE is unable to return to work at full (100%) health, without any restrictions, EMPLOYER will terminate EMPLOYEE'S employment and allow EMPLOYEE to re-apply for a vacant position upon stabilization of their condition.

Acme's policy, like the examples cited above, is fatally inflexible for a variety of reasons. First, the policy does not take into account the unique nature of each employee's disability through an "individualized assessment." Second, it does not allow an employee to request an accommodation (such as another brief medical leave or other work modifications). Third, the policy effectively terminates an employee with a disability who may be able to return to work with an accommodation or return in a different, but similar, role. Fourth, the policy requires an employee to reapply for a vacant position, instead of being placed in that position.[4] To understand why facially neutral non-discriminatory policies may violate the ADA, it is best to understand the underlying law.

Part II: Legal primer

The ADA and its various state equivalents prohibit discrimination based upon an individual's disabilities.[5] Included in this prohibition is the obligation for an employer to engage in an "interactive process" to provide reasonable accommodations to assist with an employee's known disabilities.[6] A reasonable accommodation means, *inter alia*, making the employer's facilities readily accessible for an individual with disabilities, providing a restructuring of the job, modifying the employee's work schedule, reassigning the employee to a vacant position, or providing other equipment or devices that will aid the employee's return to work.[7]

Under the ADA, discrimination includes "using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities..."[8] This definition includes "utilizing standards, criteria, or other methods of administration that have the effect of discrimination on the basis of disability."[9] This is where many inflexible leave policy claims derive from and get their teeth. The EEOC summed it up perfectly when it stated (in reference to inflexible policies):

> The ADA requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation. Although employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, they may have to grant leave beyond this amount as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship.[10]

Note that an employer is relieved of its obligation if the requested accommodation poses an "undue hardship" on the employer's business.[11] An accommodation is an "undue burden" if the employer incurs a "significant difficulty [in providing the accommodation] or expense."[12] Some factors to consider in determining whether a given accommodation is an "undue hardship": the cost of the accommodation, the financial resources of the employer compared to the cost of the accommodation, the size of the business, the number of employees employed by the employer, the impact of the accommodation on the employer's facilities, etc.[13]

For years now, the EEOC has taken the absolute position that any inflexible leave policy violates the ADA. The EEOC even listed inflexible leave policies as one of the issues of concern in its recent Strategic Enforcement Policy.[14] This in turn led the EEOC to file various lawsuits alleging, in part, that the inflexible leave policies violated the ADA because the employer did not engage in an interactive process.[15]

EEOC cases

Throughout the 2000s and 2010s, the EEOC has litigated dozens of cases related to inflexible leave policies. The EEOC's pursuit has led to numerous lucrative settlements, ranging from five figures all the way up to $20 million.[16] The potential for class action lawsuits or high settlements should concern employers. Three cases are particularly illustrative of the jurisprudence:

First, in *EEOC v. Sears Roebuck and Co.*,[17] an employee injured on the job took workers' compensation leave for an extended period. The employee tried to return to work but was unsuccessful after Sears failed to provide any accommodations or avenues for his return and then terminated him at the end of his leave in accordance with Sears' workers' compensation exhaustion policy. While this case started as a charge from a single employee, it evolved into a class action after pre-trial discovery revealed that hundreds of other employees were similarly terminated under the policy. The case eventually resolved for $6.2 million, with the added requirements that Sears must "provide written reports to the EEOC detailing its workers' compensation practices' compliance with the ADA, train its employees regarding the ADA, and post a notice of the decree at all Sears locations."[18]

In *EEOC v. Verizon Comms.*,[19] the EEOC contended that Verizon maintained attendance policies that penalized employees who had reached a specific threshold of "chargeable absences." After a certain amount of "chargeable absences," an employee faced increasingly severe disciplinary steps that resulted in punishment and ultimately termination.

The EEOC filed a lawsuit against Verizon after receiving 40 individual charges. The parties ultimately settled for a staggering $20 million, and the settlement further prohibited any additional discrimination, mandated revision of the company's attendance policies, and required Verizon to: provide training on the ADA; report all complaints of disability discrimination relating to its attendance plans to the EEOC; post notices about the settlement; and appoint an internal monitor to ensure future compliance. Interestingly, the EEOC director of the Philadelphia District Office, Spencer H. Lewis. Jr., said, "This settlement demonstrates the need for employers to have attendance policies which take into account the need for paid or unpaid leave as a reasonable accommodation for employees with disabilities."[20]

Finally, in the recent *EEOC v. Nevada Restaurant Servs.*,[21] the EEOC brought suit against the company for maintaining a well-established companywide requirement that employees with disabilities (or those with medical conditions) be "100 percent" healed before they were allowed to return to work. In addition, the EEOC found that the company further forced employees to resign due to their disabilities or their association with individuals with disabilities. The EEOC argued that such policies "do not allow for engagement in an interactive process or providing a reasonable accommodation for disabled employees." The lawsuit settled for $3.5 million, along with added requirements that the company retain an ADA consultant to review the company's policies, implement ADA training, develop a centralized tracking system for employee requests for disability accommodations, and submit regular reports to the EEOC to verify compliance.[22]

These examples showcase just how significant these claims can be. Not only are these cases reaching lucrative multimillion-dollar settlements; there are numerous additional costs associated with the settlements, including employing compliance monitors, paying counsel for drafting new policies, diverting staff resources to reporting information to the EEOC, and opening the company to significant future liability.

Hwang v. Kansas State University

Yet despite the EEOC's unflinching position that all inflexible policies are unlawful, not all courts agree with them. Most notably, the 10th Circuit's decision in *Hwang v. Kansas State University*[23] provided some clarification on this rapidly growing area of litigation.

In *Hwang*, now-Justice Gorsuch wrote for the plurality, holding that a leave of absence extending longer than six months was not a reasonable accommodation under the Rehabilitation Act.[24] Gorsuch reasoned that since Hwang was unable to return to work, she was unable to perform the essential functions of her job.[25] Furthermore, the opinion reasoned that since an accommodation's main purpose is to get the employee back to work, such extended leave was not reasonable.[26] Though many thought this was dispositive, Gorsuch provided a carve-out, stating "This isn't to suggest inflexible leave policies are categorically immune to attack."[27] This contention seems to be supported in other subsequent decisions as well.[28] Thus, this opinion appears to have been decided on narrow grounds since

Hwang wasn't able to perform her job—at all, even with the help of any reasonable accommodations—and her return was up in the air even after her most recent request for an additional medical leave.[29]

Thus, this decision appears to be factually specific with a narrow scope, which makes sense considering the EEOC's continued efforts following the *Hwang* decision. Nevertheless, other circuits have touched on similar issues (inflexible leaves and/or unusual accommodations) and have generally supported *Hwang* with similarly narrow holdings.

Part III: Takeaways

While there remain some ambiguities regarding current jurisprudence and the legality of inflexible leave policies (at least until more circuits weigh in), there are nevertheless some key takeaways for employers and scholars to glean from past and present litigation.

■ First, any type of leave policy that is restrictive or inflexible and sets a maximum duration for any type of leave (even if it exceeds the required amount of leave under the law) is inherently suspect under current precedent. If there are any doubts, have an employment lawyer review your policies.

■ Second, look at each situation individually and determine a given employee's needs. This is important because a one-size-fits-all application of facially neutral policies may not adequately envision a person's limitations or disabilities.

■ Third, enter into the interactive process to determine what accommodations, if any, an employee needs to return to work. For example, the EEOC stated, "If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its 'no-fault' leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her/[their] position, or (2) granting additional leave would cause an undue hardship."[30]

■ Fourth, it is always a good practice to document all attempts and communications to engage in the interactive process.

■ Fifth, stay updated. As more circuits encounter this issue, it could develop rapidly — especially if the Supreme Court eventually weighs in. ▲

Notes

[1] Equal Employment Opportunity Commission, *U.S. Equal Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017-2021* (Sept. 2017), *https://www.eeoc.gov/eeoc/plan/sep-2017.cfm*

[2] Also called "maximum leave policies" or "no fault" policies.

[3] Equal Employment Opportunity Commission, *Employer-Provided Leave and the Americans with Disabilities Act* (5/9/2016), *https://www.eeoc.gov/eeoc/publications/ada-leave.cfm#_edn8*

[4] See Equal Employment Opportunity Commission, *EEOC's Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (10/17/2002), *www.eeoc.gov/policy/docs/accommodation.html*

[5] 42 U.S.C. §12112(a).

[6] 42 U.S.C. §12112(b)(5).

[7] 29 U.S.C. §12111(9)(A)-(B).

[8] 42 U.S.C. §12112(b)(6).

[9] 42 U.S.C. §12112(b)(3).

[10] *See supra* Note 4.

[11] 42 U.S.C. §12112(b)(5)(A).

[12] 29 C.F.R. §1630.2(p)(1).

[13] 29 C.F.R. §1630.2(p)(2)(i)-(v).

[14] *See supra* Note 2.

[15] *See infra* Note 16-25.

[16] *See, e.g.*, *EEOC v. Denny's, Inc.*, No. WDQ-06-02527 (D. Md. 9/26/2006) ($1.3 million settlement after defendant refused to let employee return to work with an accommodation and maintained policy that automatically denied employees additional medical leave); *EEOC v. Supervalu, Inc.*, No. 09 CV 5637 (N.D. Ill. 9/4/2009) ($3.2 million settlement after defendant automatically terminated employees after set amount of medical leave); *EEOC v. JP Morgan Chase & Co.*, No. 2:09-cv-00864 (S.D. Ohio 9/29/2009) ($2.2 million settlement after defendant did not accommodate employees released to return to work and terminated after six months without accommodating); *EEOC v. Princeton Healthcare Sys.*, No. 10-4126 (D.N.J. 8/11/2010) ($1.35 million settlement for maintain fixed leave policy that failed to consider leave as a reasonable accommodation); *EEOC v. United Parcel Service, Inc.*, No. 09-cv-5291 (N.D. Ill. 9/10/2010) ($2 million settlement after defendant maintained inflexible leave policy which terminated employees after 12 months of leave without engaging in interactive process); *EEOC v. Interstate Distributer Co.*, No. 12-cv-02591-RBJ (D. Colo. 9/28/2012) ($4.85 million settlement after defendant maintained policies that automatically terminated employees after 12 weeks of leave, as well as requiring employees to return without any restrictions); *EEOC v. Doumak, Inc.*, No. 14-cv-7492 (N.D. Ill. 9/26/2014) (settlement of $85,000 after defendant capped any leave without providing any reasonable accommodation); *EEOC v. Groendyke Transport, Inc.*, No. 3:19-cv-02830-RV-EMT (N.D. Fla. 7/29/2019) (lawsuit alleges that defendant terminated employees after exhausting FMLA leave when employees were almost ready to return to work, but needed a little more time)

[17] *EEOC v. Sears Roebuck & Co.*, No. 04 C 7282 (N.D. Ill. Nov. 2004).

[18] Equal Employment Opportunity Commission, *Sears, Roebuck to Pay $6.2 Million For Disability Bias* (9/29/2009), *https://www.eeoc.gov/eeoc/newsroom/release/9-29-09.cfm*

[19] *EEOC v. Verizon Comms.*, No. 1-11-cv-01832-JKB (D. Md. 7/5/2011).

[20] Equal Employment Opportunity Commission, *Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit* (7/6/2011), *https://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm*

[21] *EEOC v. Nevada Restaurant Servs.*, No. 2:18-cv--00954-JCM-CWH (D. Nev. 5/28/2018).

[22] Equal Employment Opportunity Commission, *Nevada Restaurant Services to Pay $3.5 Million to Settle EEOC Disability Discrimination Lawsuit* (6/6/2018), *https://www.eeoc.gov/eeoc/newsroom/release/6-6-18c.cfm*

[23] 753 F.3d 1159 (10th Cir. 2014).

[24] 29 U.S.C. §701, *et seq.* Like the Americans with Disabilities Act, the Rehabilitation Act also prohibits discrimination with respect to entities that receive federal funds. Since the two are functionally identical, they are analyzed in the same manner as ADA claims.

[25] *Supra* note 25 at 1161-62 (10th Cir. 2014).

[26] *Id.* at 1162.

[27] *Id.* at 1162.

[28] *Echevarria v. AstraZeneca Pharmaceutical LP*, 856 F.3d 119, 131 (1st Cir. 2017) (stating, in dicta, that there is a reasonableness element to accommodations and it is a case-specific inquiry); *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 679 (7th Cir. 1998) (stating, in dicta, that blanket "no transfer" policies "would remain subject to challenge both for any disparate impact it might impose on disabled employees, and for any unreasonable inflexibility in the face of a demand for reasonable adjustments to accommodate a disabled candidate for transfer).

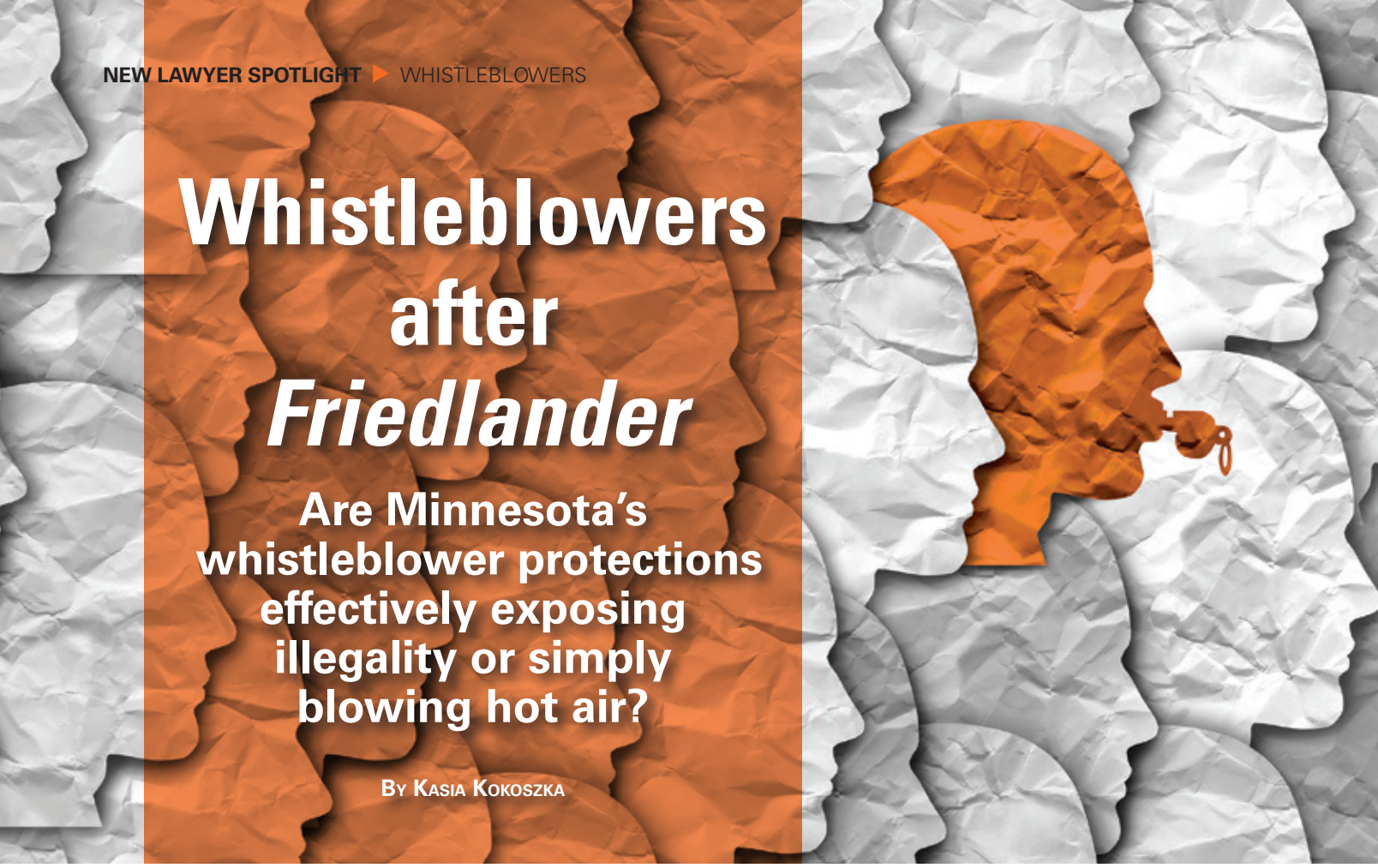
[29] This narrow holding was seemingly supported in *Severson v. Heartland Woodcraft, Inc.*, after the court held that long-term leave of absences are not reasonable accommodations. *See generally Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017) (stating, "But a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the '[i]nability to work for a multi-month period removes a person from the class of protected by the ADA.'").

[30] EEOC, No. 915.002, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), *available at* 2002 WL 31994335, at *15.

Whistleblowers after *Friedlander*

Are Minnesota's whistleblower protections effectively exposing illegality or simply blowing hot air?

By Kasia Kokoszka



The Minnesota Whistleblower Act (MWA), Minn. Stat. §181.931, *et seq.*, protects employees from retaliation for making a good faith report of unlawful conduct to their employer. Before it was amended in 2013, the MWA did not define "report" or "good faith." Given the statute's lack of clarity on these threshold issues, Minnesota courts developed judicial requirements interpreting what constituted a good faith report under the MWA.

Courts looked to the content of the report and the whistleblower's purpose to determine if the report was made in good faith, focusing on whether the report was made with the purpose of exposing an illegality.[1] In effect, this requirement undermined the purpose of the MWA because it required employees to act with the purpose of blowing the whistle, which paradoxically meant that individuals who simply discovered and reported unlawful conduct as part of their job duties were generally not protected.[2]

Some courts continued to apply these interpretations even after the 2013 amendments created new legal standards by defining "report" and "good faith."[3] The Minnesota Supreme Court clarified in *Friedlander v. Edwards Lifesciences* that Minnesota courts should look *only* to the statutory definitions and the content of the report to determine if the whistleblower made the report in good faith.[4] This decision held that the 2013 amendments superseded the judicially imposed rules and courts should no longer evaluate the motive of the whistleblower in determining whether a report was made in good faith.[5]

Friedlander seemed to significantly lower the bar for whistleblower claims, but it was unclear whether the new legal standards actually improved plaintiffs' chances of prevailing in the preliminary stages of litigation. Now a quantitative and qualitative analysis of opinions and orders since *Friedlander* has revealed very limited support for the proposition that the decision produced an uptick in MWA claims or that the new legal standards enable more claims to move past summary judgment.[6]

Publicly available opinions and orders demonstrate that the vast majority of whistleblower claims still fail after *Friedlander*, because courts find there is no discernible report, insufficient evidence of causation, or the plaintiff is unable to meet the burden of persuasion under the *McDonnell-Douglas* burden-shifting framework. So despite the apparently plaintiff-friendly change in legal standards, most employers can still likely avoid liability or elevated settlement payouts if the report does not implicate unlawful conduct or there exist legitimate and non-retaliatory reasons for the adverse employment action.

Overview of the MWA's legal standards

The MWA defines a report as "a verbal, written or electronic communication by an employee about an actual, suspected or planned violation of a statute, regulation, or common law, whether committed by an employer or a third party."[7] Despite this broad definition of what may constitute a protected report, courts in Minnesota closely scrutinize the presentation and the content of the complaint to determine if it is protected under the MWA. Even though there is no formality requirement, the content of the report needs to contain a distinguishable allegation of a legal violation to fall within the purview of the MWA. Expressing concerns about workplace processes and policies, even if it may indirectly imply wrongdoing, does not constitute protected conduct.[8] Similarly, general discussions at a staff meeting that do not implicate a violation of the law do not meet the standard of protected conduct.[9]

These interpretations suggest that employers realistically do not need to be concerned about the possibility of employees taking ordinary workplace conversations and retroactively framing them as whistleblowing activities. The MWA also requires that the employee in question must have made the report to either the employer, a governmental body, or a law enforcement official.[10] Unless a report is directed to one of the entities outlined in the statutory scheme, public whistleblowing is not protected conduct.[11] Employees airing their grievances with coworkers or in a public forum are not engaging in protected conduct under the current legal standards.

To maintain its protected status, a report must also indicate "a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law."[12] The 2013 amendments added common law claims, including contract and tort claims, as a potential category of violations. But courts remain concerned with construing the MWA too broadly and "have recognized that a mere report of behavior that is problematic or even reprehensible, but not a violation of the law, is not protected conduct under the Whistleblower Act."[13]

In 2009, the Minnesota Supreme Court established in *Kratzer* that the employee is not required to identify the exact law that is violated in the report, but the content of the report must at least implicate the law in question.[14] To maintain their protected status, the content of the report must implicate an actual law that exists, even if the employee is ultimately mistaken about the underlying facts.[15] Judicial opinions after *Friedlander* continue to uphold *Kratzer* and hold that while reports containing mistakes of fact may be protected, complaints that misinterpret the law or do not implicate any violation of the law are not protected.[16]

In practice, courts have a fair amount of discretion in their fact-finding powers to discern whether a report implicates a violation of the law, particularly if the report involves an alleged violation of an employer's internal policy. Unless it also independently implicates a violation of the law, courts will find this type of report is unprotected.[17] Similarly, reports in which the factual allegations taken at face value do not violate the law in question are not protected.[18]

However, a recent decision expanded the scope of common law violations by indicating that the category includes breach of collective bargaining agreements. Specifically, the Minnesota Court of Appeals held that filing a grievance is protected conduct implicating a common law violation, because it reports a violation of a collective bargaining agreement.[19] The legal standard for what constitutes a violation of the law is fairly broad and implicitly recognizes that many potential whistleblowers can recognize unlawful conduct even if they may not be able to identify the exact law in question.

Under the current legal standard, courts require the legal violation to be reasonably apparent from the content of the report, likely in an effort to prevent disgruntled former employees from construing whistleblower claims out of ordinary workplace complaints. Therefore, despite the broad language of the statute, the effect of the current standard may not differ significantly from the previous approach—because complaints about personal work issues, without a violation of any law, do not constitute statutorily protected conduct.[20] Statutorily protected reports under the MWA are not determined based solely on the subjective perception of the whistleblower and need to be reasonably identifiable as a report of unlawful conduct. Even under the current legal standards, courts would be unlikely to find that "nearly invisible and/or indistinguishable reports" merit the protections of the MWA.[21]

Recent changes to the MWA did not affect causation

The 2013 amendments and *Friedlander* created a more objective standard for determining what constitutes protected conduct, but these changes to the law did not affect the most significant challenge most MWA claims face. The MWA adopts a general causation standard as a necessary element to establish a *prima facie* case.[22] Minnesota is unique as a jurisdiction, compared to other states that also have whistleblower statues, because of the breadth of protections the MWA offers and the fairly generous causation standard.[23] While this standard does not appear to present an onerous burden, it leaves to judicial discretion how much other factors (such as job performance issues or the employer's business judgment) should color a court's analysis of retaliatory motive.

Based on a survey of publicly available orders and opinions since *Friedlander*, plaintiffs lost every MWA claim in which the court indicated that causation was one of the key deciding issues.[24] Specifically, causation was at issue in 10 out of 27 decisions surveyed, and plaintiffs lost in 100 percent of these cases since the *Friedlander* decision.[25] In interpreting the causation standard of the MWA, Minnesota courts particularly focus on temporal proximity, employee performance issues, and misconduct.

Plaintiffs are very likely to lose if the principal evidence of causation is temporal proximity, unless the proximity is so close that it supports a retaliatory motive.[26] Precedent is clear that gaps of several months on their own are not probative of temporal proximity or retaliatory motive.[27] However, it is difficult to imagine when the temporal proximity would be sufficient to establish a retaliatory motive considering that courts in Minnesota have indicated that not even a lag of two days between the protected conduct and adverse employment action would support this inference.[28]

Courts also grant considerable deference to evidence of non-retaliatory reasons, such as poor performance, insubordination, and violation of any company policy.[29] This is not particularly surprising when you consider that at-will employment is the general rule in American employment law, but it creates significant advantages for employers in MWA cases. There are no perfect employees, and under close scrutiny, nearly everyone would likely have some attendance or performance issues, especially over longer terms of their employment. Employers who bear some retaliatory motive but can point to employee deficiencies as the legitimate reasons for the adverse employment action are very likely to prevail in MWA cases because of the weight courts give these explanations when evaluating causation.

Trends in summary judgment

Following the Minnesota Supreme Court's decision in *Friedlander*, there was some concern among employment law practitioners in Minnesota that the new legal standard would make it significantly easier for plaintiffs to bring whistleblower claims and prevail at summary judgment. The more plaintiff-friendly standards also seemed likely to lead to an increase in MWA claims filed in Minnesota courts.

Since *Friedlander* was decided approximately two years ago, Minnesota federal and state courts have issued a total of 27 court opinions and orders involving MWA claims. From the enactment of the 2013 Amendments on May 23, 2013 to the *Friedlander* decision in 2017, 69 opinions and orders were emitted.

Comparing the time periods and number of decisions shows there was no significant increase. Additionally, out of the 27 court opinions and orders surveyed, the court denied or reversed summary judgment in only four cases, a 14.8 percent success rate for plaintiffs at the summary judgment stage.[30] It appears that following *Friedlander* there has been no noticeable increase in MWA claims and no increased likelihood of success at summary judgment.

Final reflections

Whistleblower protections are premised on the idea that whistleblowing should be legally protected because of the benefits it provides to society by preventing unlawful conduct. The MWA is unique compared to other state's whistleblower statutes because of the broad causation standard in the statutory language, but a review of the case law does not indicate that the revised statutory language and *Friedlander* effectively amplified whistleblower protections. *Friedlander*'s clarification of the proper judicial standard does not appear to have changed the ultimate outcome in the majority of cases.

This result leads to the question of how the statutory scheme may be changed to provide greater protections or additional clarity for courts. To begin, the Legislature can consider clarifying the causation standard. For example, the statutory language could implement strong protections against retaliatory animus on the part of employers by replacing "because" with language that clarifies that any connection between protected conduct and an adverse employment action can be grounds for liability. Alternatively, if the current interpretation of the MWA under *Friedlander* is too expansive, the Legislature may also incorporate the language of the former judicial doctrines that evaluated whether the employee is acting with the purpose of exposing an illegality.

Fortunately, there is also no indication that Minnesota courts are replicating the situation that occurred after the 2013 amendments, when they continued to apply the previously established judicial standards despite substantive changes to the law. While the changes to the law appear to lower the barriers to an actionable MWA claim, recent court opinions and orders interpreting the MWA indicate that even under the new standards, employees do not appear have higher chances of success at summary judgment. ▲

Notes

[1] *See Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000), *abrogated by, Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162 (Minn. 2017).

[2] *See Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 227 (Minn. 2010).

[3] *See Becker v. Jostens, Inc.*, 210 F. Supp. 3d 1110, 1127 (D. Minn. 2016); *Childs v. Fairview Health Services*, A16-0849, 2016 WL 6923709, at *2 (Minn. Ct. App. 11/28/2016); *Ewald v. Royal Norwegian Embassy*, 2 F. Supp. 3d 1101, 1123 (D. Minn. 2014).

[4] *Friedlander*, 900 N.W.2d at 166.

[5] *Id.*

[6] Out of 27 orders and opinions involving an MWA claim since *Friedlander*, only four reversed a prior grant of summary judgment or denied summary judgment. *See Wingate v. Metro. Airports Comm'n*, A19-0226, 2019 WL 3890451, at *1 (Minn. Ct. App. 8/19/2019); *Moore v. City of New Brighton*, 932 N.W.2d 317, 330 (Minn. Ct. App. 2019), *review denied* (Oct. 15, 2019); *Benner v. St. Paul Pub. Sch., I.S.D. #625*, 380 F. Supp. 3d 869, 904-05 (D. Minn. 2019); *Scarborough v. Federated Mut. Ins. Co.*, 894 F.3d 1277, 1278 (8th Cir. 2018).

[7] Minn. Stat. §181.931 subd. 6.

[8] *Olinger v. Renville Cty. Hosp. & Clinics*, 18-CV-00472 (ECT/TNL), 2019 WL 5901379, at *7 (D. Minn. 11/12/2019) (inquiring about a hiring process and whether the employer would hire the most qualified candidate did not constitute protected conduct).

[9] *Eilen v. Minneapolis Pub. Sch.*, 17-CV-04388 (ECT/DTS), 2019 WL 1557535, at *8 (D. Minn. 4/10/2019) ("That meeting, by [plaintiff's] own account, related to concerns with […] management and treatment of staff. [Plaintiff] points to no evidence that the discussions at that meeting even remotely touched on actual, suspected, or planned violations of the law.")

[10] *See* Minn. Stat. §181.932, subd. 1(1).

[11] *Ugrich v. Itasca Cty, Minnesota*, CV 16-1008 (DWF/LIB), 2017 WL 4480092, at *5 (D. Minn. 10/6/2017) (holding letter to local newspaper did not constitute protected conduct).

[12] *See* Minn. Stat. §181.932, subd. 1(1).

[13] *Kratzer v. Welsh Companies, LLC*, 771 N.W.2d 14, 22 (Minn. 2009).

[14] *Id.* at 19.

[15] *Id.*

[16] *Steffens v. State*, A19-0604, 2019 WL 5884570, at *2 (Minn. Ct. App. 11/12/2019); *Olinger v. Renville Cty. Hosp. & Clinics*, 18-CV-00472 (ECT/TNL), 2019 WL 5901379, at *7 (D. Minn. 11/12/2019).

[17] *Olinger*, 2019 WL 5901379, at *7; *Anderson v. Hearing Lab Tech., LLC*, 17-CV-5527 (PJS/FLN), 2018 WL 2670615, at *1 (D. Minn. 4/3/2018).

[18] *Steffens*, 2019 WL 5884570, at *3.

[19] *Moore v. City of New Brighton*, 932 N.W.2d 317, 324 (Minn. Ct. App. 2019), *review denied* (10/15/2019).

[20] *Harnan v. Univ. of St. Thomas*, 776 F. Supp. 2d 938, 948 (D. Minn. 2011).

[21] *Becker*, 210 F. Supp. 3d at 1128.

[22] *See* Minn. Stat. §181.932, subd. 1.

[23] Nancy M. Modesitt, *Why Whistleblowers Lose: An Empirical and Qualitative Analysis of State Court Cases*, 62 U. Kan. L. Rev. 165, 170 (2013); Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. Rich. L. Rev. 1193, 1195-96 (2016).

[24] *Lissick v. Andersen Corp.*, CV 18-2857 (DWF/KMM), 2019 WL 6324871 (D. Minn. 11/26/2019); *A Xiong v. Minneapolis Pub. Sch.*, A18-2027, 2019 WL 4409715 (Minn. Ct. App. 9/16/2019), *review denied* (11/27/2019); *Scarborough v. Federated Mut. Ins. Co.*, 379 F. Supp. 3d 772 (D. Minn. 2019); *Stewart v. Qwest Corp.*, CV 17-5354 (DSD/DTS), 2018 WL 6704752 (D. Minn. 12/20/2018); *Sellner v. MAT Indus., LLC*, CV 13-1289 ADM/LIB, 2018 WL 4829184 (D. Minn. 10/4/2018); *Naguib v. Trimark Hotel Corp.*, 903 F.3d 806 (8th Cir. 2018); *Osland v. City of Minneapolis*, A18-0301, 2018 WL 4201218 (Minn. Ct. App. 9/4/2018); *Schrammen v. ConAgra Foods Inc.*, 368 F. Supp. 3d 1323 (D. Minn. 2018), *aff'd*, 762 Fed. Appx. 361 (8th Cir. 2019); *Warmbold v. MINACT, Inc.*, CV 16-554 (DWF/KMM), 2017 WL 4838752 (D. Minn. 10/24/2017); *Ugrich v. Itasca Cty, Minnesota*, CV 16-1008 (DWF/LIB), 2017 WL 4480092 (D. Minn. 10/6/2017).

[25] *Id.*

[26] *Schrammen v. ConAgra Foods Inc.*, 368 F. Supp. 3d 1323, 1328 (D. Minn. 2018), *aff'd*, 762 Fed. Appx. 361 (8th Cir. 2019); *Naguib v. Trimark Hotel Corp.*, 903 F.3d 806, 811-12 (8th Cir. 2018).

[27] *Olinger*, 2019 WL 5901379, at *6.

[28] *Schrammen*, 368 F. Supp. 3d at 1328.

[29] *Id.*

[30] *Wingate v. Metro. Airports Comm'n*, A19-0226, 2019 WL 3890451 (Minn. Ct. App. 8/19/2019); *Moore v. City of New Brighton*, 932 N.W.2d 317 (Minn. Ct. App. 2019), *review denied* (10/15/2019); *Benner v. St. Paul Pub. Sch., I.S.D. #625*, 380 F. Supp. 3d 869 (D. Minn. 2019); *Scarborough v. Federated Mut. Ins. Co.*, 894 F.3d 1277 (8th Cir. 2018).

Landmarks in the Law

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

ADMINISTRATIVE LAW

JUDICIAL LAW

Minnesota Administrative Procedure Act; rule clarification. The Minnesota Supreme Court has held that a 2013 amendment to section 14.63 of the Minnesota Administrative Procedure Act (MAPA) eliminated the requirement that parties seeking *certiorari* review of contested case hearings serve the agency within 30 days—but maintained that requirement for service on parties.

The case involved a claim by Midway against the city of St. Paul for statutory relocation benefits after it was displaced by construction of the Allianz Field soccer stadium. The Office of Administrative Hearings (OAH) denied Midway's claim after a contested case hearing. Midway's petition for *certiorari* review of OAH's decision in the court of appeals quickly became embroiled in a service dispute arising under two MAPA provisions.

MAPA section 14.63 currently provides that a petition for a writ of *certiorari* for review of a contested case proceeding "must be filed with the court of appeals and served on all parties to the contested case not more than 30 days after the party receives the final decision and order of the agency." MAPA section 14.64 provides that review under section 14.63 is instituted by serving a petition for a writ of *certiorari* "upon the agency and by promptly filing the proof of service in the Office of the Clerk of the Appellate Courts[.]" A series of convoluted procedural turns in the court of appeals ultimately resulted in Midway serving the city—but not OAH—within the 30-day timeframe of section 14.63. The city moved to dismiss the appeal, arguing that failure to serve OAH within 30 days was a jurisdictional bar to review. The court of appeals disagreed, finding it had jurisdiction over the appeal under the plain language of these statutory provisions.

The Supreme Court granted review and affirmed the court of appeals. The Court noted that prior to 2013, section 14.63, which includes the 30-day service requirement, referred explicitly to service "on the agency." But that year the Legislature amended the statute to replace "on the agency" with the current language, "on all parties to the contested case." The Court concluded that the legislative intent of this amendment was that section 14.63 should no longer govern the timing of service on the agency. In a brief footnote, the Court acknowledged the city's policy concerns with this interpretation but suggested that the city seek redress in the Legislature. ***In re Midway Pro Bowl Relocation Benefits Claim***, 937 N.W.2d 423 (Minn. 2020).

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CRIMINAL LAW

JUDICIAL LAW

Firearms: Expungement by inherent authority itself does not satisfy federal "expungement" requirement for reinstatement of right to carry firearms. In 2007, the district court granted respondent's request to expunge his 1996 domestic assault conviction under the court's inherent expungement authority. From 2008 until 2018, respondent was granted a permit to carry a firearm, but his application was denied due to his 1996 conviction. The district court denied respondent's petition for a writ of mandamus, concluding the sealing of respondent's 1996 conviction did not remove or eliminate the conviction as defined under federal law. The court of appeals reversed, finding the 2007 expungement order met the plain meaning of "expunged" in the federal law, 18 U.S.C. §921(a)(33)(B)(ii), and the sheriff appealed.

A sheriff may not issue a permit to carry a firearm to a person prohibited from possessing a firearm under Minn.

Stat. §624.713 or "any federal law." Minn. Stat. §624.713, subd. 1(10)(viii) specifically prohibits "a person who… is disqualified from possessing a firearm under [18 U.S.C. § 922(g)(9)]" from possessing a firearm. 18 U.S.C. §922(g)(9) prohibits any person convicted of a misdemeanor crime of domestic violence from possessing firearms. However, under 18 U.S.C. §921(a)(33)(B)(ii), a person is not considered convicted if the conviction was expunged or set aside. Because Minnesota law incorporates federal law, the federal meaning of expungement must be applied to determine whether a conviction of a misdemeanor crime of domestic violence was expunged so as to reinstate firearm rights in Minnesota.

The federal statute does not define "expungement," but legal dictionaries define it as "[t]o remove from a record, list, or book; to erase or destroy." The 2007 expungement order here was issued pursuant to the district court's inherent expungement authority and sealed only the judicial records relating to respondent's 1996 conviction. The conviction was not removed, erased, or destroyed form the executive branch records relevant to considering his application to possess a firearm, such as the records held in the National Instant Background Check System and the Minnesota Crime Information System. Thus, respondent's right to carry a firearm in Minnesota cannot be reinstated.

The Supreme Court does note, however, that since respondent's 2007 expungement, statutory expungement has been specifically provided for by the Legislature, including statutory expungement of misdemeanor crimes of violence. The Court declines to express an opinion as to whether statutory expungement satisfies 18 U.S.C. § 921(a)(33)(B)(ii)'s expungement requirement. ***Bergman v. Caulk***, 938 N.W.2d 248 (Minn. 2/5/2020).

■ **Firearms: Amendment removing theft of motor vehicle from list of crimes of violence does not apply retroactively to lift appellant's lifetime ban on possessing a firearm.** Appellant was adjudicated delinquent for felony theft of a motor vehicle in 1998, when that offense was considered a crime of violence under Minn. Stat. §624.712, subd. 5, making appellant ineligible to possess a firearm for 10 years. In 2003, the Legislature created a lifetime ban on possessing a firearm once a person is deemed ineligible, which applied retroactively and applied to appellant. The definition of "crime of violence" was changed in 2014 to remove theft of a motor vehicle, but the amendment was not retroactive. Appellant was issued a permit to carry in March 2017, but the permit was voided in July 2018 after the sheriff's office discovered appellant's juvenile delinquency adjudication. The district court denied appellant's petition for a writ of mandamus to order the sheriff to issue him a permit to carry, and appellant appealed, arguing the 2014 amendment rendered him eligible to possess a firearm.

The court of appeals finds the language of the 2014 amendment is clear and unambiguous in its application to only crimes committed on or after the amendment's effective date (8/1/2014). Appellant's theft of a motor vehicle offense occurred before this date, and is, therefore, still considered a crime of violence. ***Tapia v. Leslie***, No. A19-0627, 2020 WL 770063 (Minn. Ct. App. 2/18/2020).

■ **Sentencing: District court erred by imposing a greater-than-double durational departure based on single, "non-severe" aggravating factor.** Appellant was convicted of three counts of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct for abusing his daughter when she was 10 to 12 years old. His daughter has a chromosomal defect that causes cognitive developmental delays. She reported the sexual and physical abuse, along with her parents' failure to feed and clean her or the house regularly, to a school counselor. Appellant's wife, the mother of their daughter, was also present during instances of sexual abuse. The district court sentenced appellant on two first-degree convictions, imposing greater-than-double durational departures on both, resulting in two 360-month consecutive sentences. The departures were based on the daughter's vulnerability and the repeated and extended abuse of the daughter, which the court found demonstrated particular cruelty. The court of appeals affirmed the district court's imposition of sentences on the two first-degree convictions, but found the 720-month cumulative sentence excessive. Specifically, it found that the sentence on one count was appropriate, and that a durational departure on the second count was allowed, but the more-than-double departure was not appropriate in appellant's case.

The Supreme Court agrees with the court of appeals that the district court's greater-than-double upward durational departure was proper as to count one, but not count two. Departures are warranted under the sentencing guidelines "only when substantial and compelling circumstances are present in the record," *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003)—that is, when there is evidence demonstrating that "the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2009).

Focusing on only the counts of conviction, and not other conduct relating to appellant's other offenses, the court agrees that the record shows appellant acted with particular cruelty as to count one, based on appellant's multiple forms of penetration during the incident underlying count one. However, the court disagrees with the district court that appellant acted with particular cruelty when committing the offense described in count two, as that incident involved only one form of sexual penetration or contact. Next, the court finds that appellant's daughter's cognitive delays were substantial at the time of appellant's abuse and, as such, concludes that the district court did not abuse its discretion in finding that his daughter was particularly vulnerable as it relates to a departure on both counts one and two.

While aggravating factors exist to support a durational departure, the court finds that they do not justify the greater-than-double durational departures imposed by the district court. Generally, double the presumptive guideline sentence is the upper limit for upward durational departures, except in "rare cases in which the facts are so unusually compelling," *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981), involving "severe aggravating factors." *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). As to count one, the court finds that the presence of multiple aggravating factors—both the daughter's particular vulnerability and appellant's particular cruelty—when compared to prior similar cases, warrants a greater-than-double durational departure imposed by the district court on that count.

However, the court finds the district court abused its discretion by imposing the greater-than-double durational departure on count two. Although appellant's daughter's vulnerability is an aggravating factor, the court finds that it is not a *severe* aggravating factor. The court compares the facts underlying count two with other cases, finding that it is much different from those in which a greater-than-double durational depar-

ture was affirmed and similar to those in which such departures were reversed. The court reverses appellant's sentence on count two, but recommends that, when resentencing, the district court impose a harsh sentence given appellant's "horrific" conduct, and highlights that the district court has the discretion to impose a sentence on count two of up to double the upper limit of the presumptive range. ***State v. Barthman***, 938 N.W.2d 257 (Minn. 2/5/2020).

■ **Traffic: Minn. Stat. §169.19, subd. 1(b), does not require driver turning left to turn into innermost lane.** Appellant was observed turning from a southbound left-turn-only lane into the outermost, right lane of two eastbound lanes of travel. Police stopped appellant and he was ultimately arrested for DWI and his driver's license revoked. The district court affirmed the revocation, concluding Minn. Stat. §169.19, subd. 1(b), required appellant to turn into the innermost lane, and that appellant also violated Minn. Stat. §169.18, subd. 7(a), by slightly crossing the lane line between the two eastbound lanes of travel as he turned into the outermost lane.

The court of appeals disagrees with the district court, ultimately concluding that appellant did not violate either traffic statute, leaving no reasonable articulable suspicion for the stop, and remanding to the district court to rescind appellant's driver's license revocation. First, the court holds that turning left into the outermost lane of traffic does not violate Minn. Stat. §169.19, subd. 1(b). The statute states that after entering the intersection to make a left turn, "the left turn shall be made so as to leave the intersection to the right of the centerline of the roadway being entered." The court finds this portion of the statute unambiguous and silent as to which lane to the right of the roadway a driver must enter. As such, the court finds it not an objectively reasonable mistake of law for the officer here to stop appellant's vehicle for turning into the outermost lane.

Next, the court also finds that the district court erred in finding a reasonable articulable suspicion that appellant violated Minn. Stat. §169.18, subd. 7(a), which states that "a vehicle shall be driven as nearly as practicable within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety." The record shows appellant drove directly into the outermost lane, meaning he never travelled in more than a single lane, and that no other vehicles were present, indicating any lane change was not done unsafely. ***Birkland v. Comm'r Pub. Safety***, No. A19-0937, 2020 WL 770067 (Minn. Ct. App. 2/18/2020).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Whistleblower retaliations; railroad claim reversed.** A ruling by the Department of Labor that a railroad violated the whistleblower retaliation provisions of the Federal Rail Safety Act (FRSA) by suspending a local motor engineer was reversed by the 8th Circuit of Appeals. The decision, written by Judge James Loken of Minnesota, held that the administrative review process was imbued with legal error because of refusal to follow the precedent that an employer must prove that "the contributing factor" for disciplinary action is "intentional" retaliation prompted by the employee engaging in protective activity. ***Dakota, Minnesota & Eastern Railroad Corp. v. U.S. Department of Labor Administrative Review Board***, 948 F.3d 940 (8th Cir. 1/30/2020).

■ **Race discrimination; federal question jurisdiction upheld.** A claim by a ground freight employee for race discrimination in violation of the Federal Labor and Management Relations Act (FLMA) properly invoked federal court jurisdiction. The 8th Circuit held that the LMRI claim furnished federal court jurisdiction in affirming a lower court ruling allowing the case to proceed. ***Johnson v. Humphreys***, 949 F.3d 413 (8th Cir. 2/4/2020).

■ **Disability discrimination; Macalester faculty termination upheld.** The termination of an assistant college professor at Macalester College due to a sexual relationship with a student constituted legitimate basis to terminate employment. The 8th Circuit upheld a ruling by U.S. District Court Judge Patrick Schiltz in Minnesota. The 8th Circuit rejected a claim of disability discrimination by the ousted academic, holding that she did not counter the college's establishment of a "legitimate, non-discriminatory reason" for the discharge, but presented sufficient evidence of pretext. ***Naca v. Macalester College***, 947 F.3d 500 (8th Cir. 1/16/2020).

■ **ERISA claims upheld; 8th Circuit rules for employees.** The 8th Circuit ruled in favor of employees in recent cases

brought under the Employee Retirement & Income Security Act (ERISA), which governs benefits for employees in the private sector.

An objection to challenging certification of approval of a settlement agreement in an ERISA class action was rejected and the settlement upheld. The 8th Circuit held that the plaintiffs had standing to bring a class action and it was properly certified because it was brought on behalf of the ERISA plan and requested plan-wide relief, which warranted affirming the lower court judgment and its awards to various employees, as well as their attorney's fees. ***McDonald v. Edward D. Jones & Co. L.P.***, 2020 WL 504865 (8th Cir. 1/31/2020) (unpublished).

A service provider to an ERISA plan was subject to potential liability as a fiduciary in setting the composite crediting rate for employee contributions. Reversing a judgment of the lower court, the 8th Circuit held that the plaintiff, who invested in an ERISA plan, could pursue an action against the provider on grounds that it violated fiduciary duty. ***Rozo v. Principal Life Insurance Company***, 949 F.3d 1071 (8th Cir. 1/3/2020).

■ **Deposition of counsel barred; work-product exclusion, too.** The deposition of an adversary attorney in an employment retaliation case under the Railway Fair Labor Standards Act was barred. The 8th Circuit held that the claimant failed to satisfy the narrow grounds for conducting such a deposition and, further, that material used by an expert witness for the employer was off-limits under the work-product doctrine. ***Smith-Bunge v. Wisconsin-Central, Ltd.***, 948 F.3d 420 (8th Cir. 12/27/2019).

■ **Hostile work environment; claim rejected.** An employee's claim that she was subjected to a hostile work environment was rejected. The 8th Circuit ruled that the behavior in the workplace was not substantially severe or pervasive and the retaliation claim lacked a causal connection to the employee's complaints. ***Paskert v. ASA Auto Plaza, Inc.***, 2020 WL 727740 (8th Cir. 2/13/2020) (unpublished).

■ **Unemployment compensation; baseless claim bars benefits.** An employee's baseless claim for unpaid wages, accompanied by a refusal to work unless she was paid for time she did not work, constituted disqualifying misconduct. The court of appeals affirmed a decision denying benefits. ***Bild v. Agape Healthcare Services, Inc.***, 2020 WL 413349 (Minn. Ct. App. 1/27/2020) (unpublished).

■ **Union election, NLRB ruling enforced.** A ruling by the National Labor Relations Board (NLRB) that an employer improperly interfered with a union representation election was enforced. The 8th Circuit ruled that the employer's' actions, including witness intimidation, constituted an unfair labor practice. ***Dolgencorp, LLC. v. NLRB***, 2020 WL 727943 (8th Cir. 2/13/2020) (unpublished).

■ **Gramm-Leach-Bliley Act; claim dismissed.** An employee's who sued for retaliation after he was demoted and had his pay reduced was unsuccessful in pursuing a retaliation claim under the Federal Gramm-Leach-Bliley financial reporting law. The 8th Circuit held that the employee's report of his boss's failure to comply with the act (by not informing customers that their data had been stolen) did not include a recognized "public policy." ***Holbein v. Baxter Chrysler Group, Inc.***, 948 F.3d 931 (8th Cir. 1/29/2020).

■ **Workers compensation; no liability after injury is resolved.** An employer is not required to pay for an injured employee's rehabilitation after the workplace injury had been resolved. The Supreme Court reversed a ruling of the Workers' Compensation Court of Appeals requiring continued payment until the employee files a rehabilitation request for assistance. ***Ewing v. Print Crafts, Inc.***, 936 N.W.2d 886 (Minn. 2/3/2020).

■ **Unemployment compensation; quitters lose again.** The Minnesota Court of Appeals, following typical practice, upheld a denial of unemployment compensation benefits to a pair of workers who resigned their jobs.

An employee who claimed that a number of actions by his employer made his life a "living nightmare" was not entitled to unemployment compensation benefits on grounds that he quit due to a good reason caused by the employer. While agreeing with the claim that the employee's working conditions were not good and he may have personally found it intolerable, the Minnesota Court of Appeals held that did not suffice in meeting the standard of "good reason caused by the employer" to warrant unemployment benefits for a resigning employee. ***Kimble v. Empire Beauty School***, 2020 WL 522193 (8th Cir. 2/3/2020) (unpublished).

An employee who quit his job because he found out after beginning work that the wage was less than he believed was not entitled to unemployment compensation benefits. The appellate court held that the employee did not have "good reason" to quit the job caused by the employer, nor did he quit because the employment was unsuitable within 30 calendar days from the beginning of work. ***Larson v. Heymann Construction Company***, 2020 WL 522185 (Minn. Ct. App. 2/3/2020) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **Minnesota Court of Appeals reverses PUC's denial of MEPA review of Wisconsin power plant project.** The Minnesota Court of Appeals reversed the Minnesota Public Utilities Commission's (PUC) decisions to deny the request for an environmental assessment worksheet (EAW) and to approve the affiliated-interest agreements for a natural gas power plant in Superior, Wisconsin.

The Minnesota Environmental Policy Act (MEPA) requires governmental agencies to consider environmental consequences when deciding whether to approve a proposed project. Minn. Stat. §§116D.01-.11 (2018). In July 2017, the respondent, Minnesota Power, petitioned PUC for approval of its agreement with its Wisconsin affiliate to construct and operate a 525-megawatt natural gas power plant, known as the Nemadji Trail Energy Center (NTEC). The NTEC power plant was to be constructed in Wisconsin only 2.5 miles over the MN-WI state border and similarly close to Lake Superior. The appellant first submitted public comment requesting an environmental impact statement (EIS), then filed a petition to request an EAW. An EAW is a short preliminary report used to determine whether a proposed project requires the more rigorous review of an EIS. The PUC denied the EAW petition, and approved the agreement to allow NTEC to move forward. The appellant and other parties appealed the decision by writ of *certiorari*. The court of appeals disagreed with both of PUC's decisions.

The PUC's decision to deny the EAW was based on two parts: first, PUC reasoned that MEPA does not apply to affiliated-interest agreements

because the approval of the agreement will not "cause" the construction and operation of NTEC; and second, that PUC lacks jurisdiction to order an EAW for a project outside of Minnesota. First, the court held that MEPA does apply to affiliated-interest agreements because MEPA only requires an indirect causal connection between the government approval and the actual project. The court recognized that oftentimes multiple approvals from many governmental agencies may be necessary for a project to actually occur, and that because construction and operation of NTEC would not be possible without PUC's approval of the agreement, the approval of the agreement will indirectly cause the project to take place.

Second, the court of appeals reversed PUC's decision that it lacks jurisdiction to order an EAW for a project outside of Minnesota by concluding that PUC's jurisdiction is not defined in terms of geographical boundaries, but rather in terms of the entities that PUC regulates, i.e. Minnesota public utilities. Furthermore, the court disagreed with PUC's decision that applying MEPA standards to projects outside of the state would violate the Commerce Clause of the United States Constitution by imposing Minnesota's environmental regulations onto the state of Wisconsin. The court concluded that MEPA's jurisdiction contains no geographical limitations; it simply requires an EAW if a project demonstrates a potential for significant environmental effects in the state of Minnesota. The court held that applying MEPA, and issuing an EAW, in this situation neither regulates commerce in Wisconsin nor dictates whether Minnesota Power constructs, operates, or purchases power from NTEC; MEPA merely provides a mechanism for informing PUC's decision as to whether the agreement is reasonable and consistent with the public interest with regard to NTEC's environmental impact on the state.

The court of appeals reversed and remanded, ordering PUC to determine whether NTEC may have the potential for significant environmental effects and, if so, to prepare an EAW before reassessing whether to approve the agreement. Petitions have been filed with the Minnesota Supreme Court requesting review of the court of appeals' decision. ***In the Matter of Minnesota Power's Petition for Approval of the EnergyForward Resource Package***, 2019 WL 7042812 (938 N.W.2d 843, 12/23/2019).

8th Circuit clarifies categorical exclusions from NEPA. On 12/6/2019, the 8th Circuit Court of Appeals concluded that those right-of-way projects which fall entirely within an existing operational right-of-way are categorically excluded from the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.S. §4321 et seq., reporting requirements.

The appellants, led by George Wise, brought the action against the appellees, the United States Department of Transportation (USDOT), the Federal Highway Administration (FHWA), and the Arkansas Department of Transportation (ArDOT), due to the appellees' decision to widen a portion of Highway 630 from six lanes to eight lanes within the City of Little Rock without first preparing an environmental assessment (EA) or an environmental impact statement (EIS).

Under NEPA, federal agencies are required to prepare an EA or an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). However, certain categories of actions "which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect" do not require an EA or EIS. 40 C.F.R §15089; *see Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1185-87 (8th Cir. 2001). The FHWA's regulations implementing NEPA include one such categorical exclusion for highway projects that take place "entirely within the existing operational right-of-way." 23 C.F.R. §771.117(c)(22).

Prior to beginning construction on the project, the appellees determined the project qualified for this categorical exclusion because the proposed improvements of the project would not require any additional permanent right of way. At trial, an ArDOT representative explained that existing operational right-of-way at the project site comprised not just the traffic lanes themselves, but rather a 220 to 400-foot wide expanse that included clear zones, mitigation areas, drainage areas, interchange ramps, and other areas maintained or used for transportation purposes.

Due in part to this testimony, the district court found that Wise had failed to establish that any portion of the project would fall outside the existing operational right-of-way; therefore, the project was reasonably found to be categorically excluded from NEPA's requirements. In making this determination, the district court denied injunctive relief, in part because Wise had failed to show he was likely to succeed on the merits of his claims.

On appeal, Wise argued that ArDOT erroneously interpreted "existing operational right-of-way" to mean the entire right-of-way owned by ArDOT, rather than just lanes of travel, shoulders, and clear zones. The court of appeals found this limitation to be in conflict with the broad definition of "existing operational right-of-way" provided in regulation, which at the time, was, a "right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose." *See* C.F.R. §771.117(c)(22)(2016). (The regulation now states, "Existing operational right-of-way means all real property interests acquired for the construction, operation, or mitigation of a project." *Id.* (effective 11/28/2018).) Wise also pointed to language in the preamble to the final rule creating the categorical exemption, which provided that "a project within the operational right-of-way that requires the creation of new clear zones or extension of clear zone areas beyond what already exists would not qualify" for categorical exclusion. 79 Fed. Reg. 210701, 2113 (1/13/2014). The court held, however, that in light of the plain language of the regulation, the explanatory text must be interpreted as not applying when the newly created clear zone or extended clear zone falls entirely within the existing operational right-of-way. Thus, the court found that the district court properly rejected Wise's argument and appellees were not required to prepare an EA or EIS for the project. ***Wise v. DOT***, 943 F.3d 1161 (8th Cir. 2019).

9th Circuit rejects *Juliana* climate case on standing grounds. Twenty-one youth plaintiffs in *Juliana v. United States* brought suit in Oregon federal district court, alleging violations of their 5th Amendment substantive due process right to a "climate system capable of sustaining human life" and of the public trust doctrine, among other claims. They asked the court to compel the federal government to implement a federal carbon emission plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]." The district court held the plaintiffs not only had standing to sue but also that they had presented sufficient evidence to survive summary judgment. The district court certified the orders for interlocutory appeal, allowing the government defendants to appeal the orders to the 9th Circuit.

A divided 9th Circuit panel reversed the district court and remanded with instructions to dismiss the case for lack of Article III standing. Although the panel held the plaintiffs had satisfied two of the three standing elements—by claiming concrete and particularized injuries, and by raising a genuine factual dispute regarding whether federal policies were a substantial factor in causing the plaintiffs' injuries—the plaintiffs could not demonstrate the third standing element, that their claimed injuries were redressable by an Article III court.

Specifically, the panel held that that the relief plaintiffs sought was both (1) not likely to redress their injuries; and (2) outside the district court's power to award. First, a declaration that the government has violated plaintiffs' constitutional rights would be unlikely on its own to redress their injuries without further court action. And even if the court could order Congress to curtail petroleum use, plaintiffs could not show that a full elimination of fossil fuel use would slow climate change enough to prevent further injury.

Second, the panel held that establishing the requested relief is not within the power of an Article III court. The relief would require court directives to create extensive changes to the national energy system, necessarily requiring a host of complex policy decisions within the purview of the executive and legislative branches rather than the judiciary. Appellants filed a petition on 3/2/2020 for rehearing *en banc* on the question of standing. ***Juliana v. United States***, 947 F.3d 1159 (9th Cir. 2020).

■ **10th Circuit constricts EPA ability to extend renewable fuel standard exemptions.** On 1/24/2020, the 10th Circuit Court of Appeals vacated and remanded extensions of the small refinery exemption from the Clean Air Act (CAA) renewable fuel standard (RFS), which EPA had granted to three renewable fuel producers. The extensions were challenged by a group of renewable fuel producers who claimed to be harmed by increased competition and lower revenues.

The CAA establishes a renewable fuel program mandating that gasoline contain minimum thresholds of renewable fuel. 42 USCS §7545(o). Section 7545(o)(9) exempted small refineries (those with an average throughput of 75,000 barrels) from meeting the renewable fuel mandates through 2011 and provides that the exemption could be extended for not less than two years for any small refinery that would suffer "disproportionate economic impact" if it were to comply with the mandates.

At issue was whether the exemptions could be "extended" where none of the small refineries in this case was operating under an exemption in the year prior to EPA granting the extension. In vacating the extended exemptions, the court adopted the ordinary and common-sense definition of "extension" to conclude that the subject of the extension must be in existence before it can be extended. The court also found that EPA had exceeded its statutory authority by deciding that "disproportionate economic hardship" could be shown by conditions not directly related to compliance with the RFS, such as references to "[a] difficult year for the refining industry as a whole" and an "industry-wide downward trend" of lower net refining margins. 948 F.3d at 1253.

Although the 10th Circuit opinion only applies in 10th Circuit states, it will likely affect how EPA grants extensions within other jurisdictions, potentially affecting refiners in Minnesota. The small refinery rule remains valid, but EPA cannot now issue extensions in the 10th Circuit—and will be hesitant to issue them in other jurisdictions—when the refiner seeking an extension is not currently operating under an exemption. ***Renewable Fuels Ass'n et al. v. EPA***, 948 F.3d 1206 (10th Cir. 2020).

ADMINISTRATIVE ACTION

■ **EPA and U.S. Corps finalize (again) new Clean Water Act jurisdictional rule.** The U.S. Army Corps of Engineers and the Environmental Protection Agency (EPA) issued a final rule defining "waters of the United States" (WOTUS) for key Clean Water Act (CWA) permitting programs. By way of brief background, WOTUS (synonymous with "navigable waters" under the CWA) is a critical term under the CWA because it determines the regulatory reach of the CWA and which waters are subject to the NPDES, Section 404, or other permitting programs arising under the Act. There is little debate that traditional navigable waters (TNWs) such as the territorial seas, rivers, and lakes fall within the CWA's reach; more contentious is whether the CWA covers marginal waters such as remote wetlands, ditches, and solely intrastate waters.

The agencies' early, bare-bones definitions of WOTUS from the 1970s and '80s were challenged in extensive litigation that culminated in several dense and divided decisions from the U.S. Supreme Court, the most recent of which was *Rapanos v. United States*, 547 U.S. 715, 739 (2006). The EPA in June 2015 proposed a revised definition of WOTUS that keyed off Justice Kennedy's concurring opinion in *Rapanos*, which proposed CWA jurisdiction over waters with a "significant nexus" to TNWs. *Id.* at 759. Many viewed the rule as an expansion of the CWA's jurisdictional scope. But the new rule was immediately challenged and stayed in many jurisdictions. In October 2019, the agencies published a final rule repealing the 2015 rule and reinstating the definition that existed prior to the 2015 Rule. 84 Fed. Reg. 56626. Now, with the new definition of WOTUS, the agencies have attempted to limit the number of waters to which the CWA applies, in line with Justice Scalia's plurality opinion in *Rapanos*, which set forth a more narrow jurisdictional scope than Justice Kennedy's "significant nexus" test. *See, e.g.*, *Rapanos* at 742 (CWA covers only wetlands with a "continuous surface connection" to "relatively permanent" waters connected to TNWs).

The new WOTUS definition prioritizes "categorical bright lines" to divide waterbodies subject to federal jurisdiction from those being left to the states. It includes: (a) a list of four types of waters that are jurisdictional, (b) a list of 12 types of waters that are not jurisdictional, and (c) numerous definitions. The four types of jurisdictional waters are: (1) the territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) tributaries; (3) lakes and ponds, and impoundments of jurisdictional waters; and (4) adjacent wetlands. The list of non-jurisdictional waters includes, for example: groundwater; ditches that do not fall within category 1 or 2 of the jurisdictional waters; prior converted cropland; artificially irrigated areas; artificial lakes and ponds; certain water-filled depressions incidental to mining or construction activity; certain groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds; and waste treatment systems.

Among the noteworthy changes to the agency's 2015 rule is a rejection of the 2015 rule's case-by-case analysis of a "significant nexus" between upstream and downstream waters. In its place, the new rule's analytic framework focuses on whether a stream, wetland, or other non-TNW has a surface link to a TNW during a "typical year" (defined as when

precipitation and other climatic variables are within the normal periodic range based on a rolling 30-year period). Another significant change is the new rule's approach to jurisdiction over wetlands. Whereas the 2015 rule asserted jurisdiction over wetlands that were "hydrologically connected" to other waters, the new rule only covers waters with direct links to flowing waters in a typical year—a change likely to encompass fewer wetlands. The rule also eliminated language from the 2015 rule's definition of "tributary" that focused on the presence of "bed and banks and an ordinary high water mark." The definition of "tributary" in the new rule focuses more on whether there is a "channel that contributes surface water flow" to a TNW.

Note that EPA's WOTUS rulemaking does not affect Minnesota's own statutory authority to regulate just about every type of water body, including groundwater, under its state disposal system (SDS) permitting and other programs. However, dischargers to waters subject to CWA jurisdiction must meet certain unique and often onerous federal requirements, including mandatory industry-specific technology-based effluent limitations and ongoing EPA enforcement oversight. EPA's new WOTUS definition becomes effective 60 days after the date of publication in the Federal Register (which had not yet occurred at time of writing). **EPA, Corps, Final Rule, "The Navigable Waters Protection Rule: Definition of 'Waters of the United States'"** (EPA-HQ-OW-2018-0149) (1/23/2020).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **28 U.S.C. §1446(d); effect of removal on state court action.** Relying on the plain language of 28 U.S.C. §1446(d), the United States Supreme Court held that a Puerto Rico court lacked jurisdiction to take any further action following the filing of a notice of removal, meaning that its subsequent actions were "absolutely void," and that the lack of jurisdiction was not cured by the federal district court's *nunc pro tunc* remand order that purported to make the remand effective as of an earlier date, because "*nunc pro tunc* orders are not some Orwellian vehicle for revisionist history." ***Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano***, 140 S. Ct. 696 (2020).

■ **Grant of motion to extend time to file appeal reversed; abuse of discretion.** Where the putative appellants missed their deadline for filing a notice of appeal by more than two weeks, blaming a computer server malfunction for a portion of their error while failing to explain the remainder of the delay, and the district court granted the appellants' motion to extend their time to file their appeal, the 8th Circuit found that the appellants' failure to explain the reason for all of their delay meant that they could not establish the excusable neglect required. Accordingly, the district court's order was reversed and the appeal was dismissed. ***Morgan v. Vogler Law Firm, P.C.***, 793 Fed. App'x 460 (8th Cir. 2020).

■ **Personal jurisdiction; multiple decisions.** The 8th Circuit found that the guarantor of an Arkansas law firm's client's obligations was subject to personal jurisdiction in Arkansas, finding that the guarantor's contacts with Arkansas were sufficient "in the aggregate" where the guarantor made three trips to Arkansas in connection with the underlying litigation, his contractual obligations were to be performed in Arkansas, and he made calls and sent "hundreds" of emails to Arkansas. ***Henry Law Firm v. Cuker Interactive, LLC***, 950 F.3d 528 (8th Cir. 2020).

In an action brought by a Minnesota-based employer against a former non-Minnesota employee and his new employer arising out of the alleged breach of a noncompete agreement, where all defendants moved to dismiss for lack of personal jurisdiction, Chief Judge Tunheim denied the former employee's motion, finding that his contacts sufficiently "implicated" Minnesota to make him subject to personal jurisdiction, but rejected the argument that the new employer was subject to personal jurisdiction under the *Calder* "effects test" (*Calder v. Jones*, 465 U.S. 783 (1984)). ***H2I Group, Inc. v. Miller***, 2020 WL 618471 (D. Minn. 2/10/2020).

That same day, Chief Judge Tunheim found that the defendants were subject to specific personal jurisdiction in Minnesota where they "purposefully availed themselves of the privilege of conducting business in Minnesota by visiting Minnesota to promote their business and extending a loan to a Minnesota resident." ***Ahlgren v. Muller***, 2020 WL 618372 (D. Minn. 2/10/2020).

One week earlier, Chief Judge Tunheim granted a motion to dismiss for lack of personal jurisdiction brought by New Zealand defendants, rejecting the plaintiff's argument that defendants' presence at trade shows in Nevada, entering into a contract with a Minnesota resident, and their maintenance of a "passive" website were sufficient to confer jurisdiction. ***Ahlgren v. Bilkey***, 2020 WL 529144 (D. Minn. 2/3/2020).

Judge Nelson denied a motion to dismiss for lack of personal jurisdiction in a contract dispute, finding dispositive the fact that the contract was to be performed primarily in Minnesota and the defendant's employees traveled to Minnesota for sales training and strategic conversations, and sent "thousands" of emails to the plaintiff in Minnesota, while rejecting the defendant's argument that Massachusetts choice-of-law provisions were sufficient to defeat personal jurisdiction in Minnesota. ***StoreWorks Techs., Ltd. v. Aurus, Inc.***, 2020 WL 336025 (D. Minn. 1/21/2020).

Applying federal circuit law, Judge Wright applied the doctrine of pendent personal jurisdiction to exercise jurisdiction over defendants who were already subject to personal jurisdiction in the District of Minnesota under the jurisdictional provisions of the Clayton Act. ***Willis Elec. Co. v. Polygroup Macau Ltd. (BVI)***, ___ F. Supp. 3d ___ (D. Minn. 2020).

■ **Motion to compel; deficient privilege log; attorney's fees awarded.** Where the defendants made at least three attempts over six months to generate a proper privilege log, and Magistrate Judge Thorson subsequently conducted an *in camera* review, found that dozens of documents appearing in the Second Amended Privilege Log were not privileged, and found that defendants had waived any privilege relating to email attachments that were not listed in the Second Amended Log, she ordered defendants' counsel to "carefully review" the few remaining documents for which privilege claims remained, and awarded the plaintiff its reasonable attorney's fees and costs relating to the privilege log dispute. ***MPay, Inc. v. Erie Custom Computer Applications, Inc.***, 2020 WL 748237 (D. Minn. 2/14/2020).

■ **Statute of limitations; commencement of action; choice of law.** Where the timeliness of the action hinged on whether it was governed by New York or

Minnesota law, Judge Davis found that the action was governed by New York law, including its rules providing for commencement by filing, meaning that the action was timely. ***ILKB of CNY, LLC v. Franchoice, Inc.***, 2020 WL 635266 (D. Minn. 2/11/2020).

■ **Motion to restrict or redact settlement offer denied.** Where the plaintiff's objection to a report and recommendation described a settlement offer she had received from the defendant and attached an email detailing the terms of that offer, and the defendant moved to restrict or redact that information, Judge Schiltz relied on the presumption of public access to judicial records in denying that motion, while also finding that Fed. R. Evid. 408 did not apply because it did not control access to court files. ***Truong v. UTC Aerospace Systems***, ___ F. Supp. 3d ___ (D. Minn. 2020).

■ **Fed. R. Civ. P. 6; weekend deadline; motion deemed timely.** Following the prevailing practice in the district regarding the "last day" rule, Magistrate Judge Wright declined to treat defendants' motion to amend as untimely when it was filed on the Monday after the weekend deadline set forth in the scheduling order. ***ARP Wave, LLC v. Salpeter***, 2020 WL 881980 (D. Minn. 2/24/2020).

■ **Motion for leave to amend denied.** Magistrate Judge Menendez denied the plaintiff's motion for leave to amend its complaint to add an additional claim against the defendant where that motion was brought six months after the deadline for amending pleadings in the scheduling order, finding that a "diligent attorney" would have chosen to pursue discovery prior to the deadline and would have had sufficient information prior to the deadline to seek leave to amend at that time. ***Cardiovascular Systems, Inc. v. Cardio Flow, Inc.***, 2020 WL 949117 (D. Minn. 2/27/2020).

■ **Local Rule 7.1(c); untimely declaration excluded.** Where the plaintiff filed a declaration accompanied by 16 exhibits more than five weeks after oral argument on the defendants' motion to dismiss and the plaintiff's motion for a preliminary injunction, and the defendants objected to the filing of that declaration, Judge Nelson found that the filing of the declaration violated Local Rule 7.1(c) and refused to consider the declaration. ***Mainstream Fashions Franchising, Inc. v. All These Things, LLC***, 2020 WL 968217 (D. Minn. 2/28/2020).

■ **Fed. R. Evid. 1006; trial exhibit or demonstrative aid; foundation inaccuracies.** Where the defendant intended to offer a summary of data as a demonstrative aid or a trial exhibit and the plaintiff objected, Judge Nelson held that the summary contained inaccuracies, and that it was also inadmissible because it was prepared by the defendant's counsel rather than the witness who was to testify regarding its contents. ***ResCap Liquidating Trust v. Primary Residential Mortgage, Inc.***, 2020 WL 635265 (D. Minn. 2/11/2020).

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INDIAN LAW

JUDICIAL LAW

■ **Tribal officer may detain and deliver non-Indian suspected of on-reservation state-law offense to state authorities.** After a spate of cases rejected defense arguments that questioned tribal officers' authority to detain and remove non-Indians from within a reservation, the Minnesota Supreme Court considered whether a tribal police officer acted within his lawful authority when he detained a non-Indian on the reservation and transported him out of the reservation to Beltrami County law enforcement. The unanimous Court held that, irrespective of state powers, tribes possess the sovereign power to exclude unwanted persons from their lands. Because tribal officers may restrain and eject individuals who disturb public order on the reservation, the detention and transport was lawful, and the Court affirmed the defendants' conviction. ***State v. Thompson***, 937 N.W.2d 418 (Minn. 2020).

■ **Governing body of tribe immune absent an express waiver.** The plaintiff, a *pro se* Fond du Lac tribal member, filed suit against the Fond du Lac Reservation Business Committee, arguing that the business committee had entered into easements crossing her land without her consent, and that a tribal police officer had improperly arrested her on a charge of trespass. The magistrate judge liberally construed her complaint as one under 42 U.S.C. §1983, but nevertheless recommended granting the tribe's motion to dismiss because the plaintiff failed to establish a waiver or abrogation of the tribe's sovereign immunity from suit. Upon review of the magistrate judge's report and recommendation, the district court rejected the plaintiff's objections and adopted the magistrate judge's report, finding that the 8th Circuit has held that sovereign immunity extends to tribal entities, and the Fond du Lac Reservation Business Committee is the governing body on the Fond du Lac Reservation. ***Dobbs v. Fond du Lac Reservation Business Committee***, No. 19-cv-1289 (SRN/LIB), 2020 WL 206347 (1/14/2020).

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REAL PROPERTY

JUDICIAL LAW

■ **Allocation of equity in partition action affirmed.** An unmarried couple purchased a home together in May 2009. Plaintiff moved out in July 2010 and defendant remained in the home with the couple's child and members of defendant's family. Over the next eight years, defendant or her family contributed all mortgage payments, paid property taxes, and paid $28,500 for repairs and improvements. Prior to anyone moving into the home, plaintiff contributed $5,200 to the property and retained an $8,000 tax credit for himself. The parties agreed physical partition of the property was impractical. Following trial, the district court ordered an appraisal and equally allocated the equity, which it calculated as follows: "[c]urrent market value minus... current mortgage balance minus... amount of principal [mortgage] reduction [defendant] paid for minus... [defendant's out-of-pocket repair costs] equals divisible equity." Defendant appealed, arguing the district court should have allocated to her: (i) all mortgage interest and taxes she paid, not just the reduction of the principal balance; (ii) a greater portion of the equity because she was responsible for maintenance and loan payments after plaintiff moved out; and (iii) half the tax credit that plaintiff previously retained. The court of appeals observed the district court's "broad discretion when fashioning an equitable remedy" in a partition action and noted that "divisions of equity need not be equal to be equitable," and held the district court did not abuse its discretion in determining that: (i) defendant's paying mortgage interest and taxes were effectively rent payments, so no further offset

was appropriate; (ii) plaintiff's moving out was not evidence of unclean hands when defendant remained in the home with their child; and (iii) the tax credit plaintiff retained was already offset by his receiving no credit in the allocation for his repair contribution. ***Henel v. Salas***, (No. A19-0431), 2020 WL 610522 (Minn. Ct. App. 2/10/20) (unpublished). *https://mn.gov/law-library-stat/archive/ctapun/2020/OPa190431-021020.pdf*

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TAX LAW

JUDICIAL LAW

■ **Income tax: Condition subsequent "savings clauses" that operate to override regulatory protections requiring that conservation easement value be protected in perpetuity result in the disallowance of the charitable deduction.** Charitable grantees of conservation easements must be entitled to a proportionate share of the proceeds in the event the property is sold following a judicial extinguishment of the easement.

Internal Revenue Code Section 170(h)(5)(A) allows for the deduction of a charitable contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. To be treated exclusively for conservation purposes, the conservation purpose itself must be protected in perpetuity. The intent of the requirement is to ensure that as the conservation easement changes in value over time, appreciation in value will not be disproportionately assigned back to the grantor if the easement is extinguished.

In a recent case determining whether a condition subsequent value allocation is a savings clause, the tax court applied Section 170(A)-14(g)(6)(ii), which provides "the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift bears to the property as a whole at that time." The requirements of this regulation are strictly construed.

On the date of the gift, the fair market value of the conservation easement divided by the fair market value of the entire property is determined. The donee must be guaranteed to receive this percentage of any sales proceeds in any future extinguishment of judicial easement. For example, if a conservation agreement attempts to alter this percentage through use of a condition subsequent "savings clause" to enable the donor to retrieve value from subsequent improvements in full before an allocation of sales proceeds between the donor and donee, the courts have consistently declined to uphold the deduction even when no extinguishment has occurred.

The tax court cited several prior cases and stated that when a savings clause allows for future events to alter the tax consequences of a past conveyance, the impact of the savings clause is that of a condition subsequent that will not be enforced. Petitioner's charitable deduction of $155,000,000 was denied in full and petitioner was subjected to accuracy-related penalties. ***Coal Property Holdings, LLC v. Comm'r***, 153 T.C. No. 7 (2019).

■ **Series of whistleblower cases highlight jurisdictional limits.** Individuals who tip the Service off to third parties who are skirting their tax obligations may be eligible for whistleblower payments. In particular, Section 7623(a) authorizes the Secretary to pay discretionary awards while 7623(b) provides for nondiscretionary awards to whistleblowers in particular circumstances. A whistleblower award ultimately depends upon the initiation of an "administrative or judicial action" based on the whistleblower's information and that some "proceeds [are] collected as a result of the action"; both are necessary prerequisites for an award. The tax court, a court of limited jurisdiction, has power to review the Secretary's award determination. The court typically does not, however, have authority to direct the Secretary to proceed with an administrative or judicial action. In other words, the court has the power to address complaints about the size of a whistleblower's award. The court does not, however, have the power to offer relief where the whistleblower alleges that the IRS allowed the target to pay less in tax than it should have. ***Apruzzese v. Comm'r***, T.C. Memo. 2019-141 (2019). The first stop for whistleblower complaints is the IRS's Whistleblower Office (WBO). In some cases, complaints do not make it past the WBO's screening; claims are rejected unless the whistleblower can provide "specific and credible" information about the target. *E.g.*, ***Alber v. Comm'r***, T.C. Memo. 2020-20 (1/30/2020). The court previously clarified that it "review[s] for abuse of discretion the WBO's summary rejection of a claim for failing to meet certain threshold requirements even where, because of that rejection, there has been no administrative or judicial action initiated by the IRS as a result of the information that is the basis of the whistleblower's claim." *Id.* (citing *Lacey v. Comm'r*).

In a procedurally problematic case, however, the tax court faced the question of whether it had "jurisdiction to review the WBO's actions or inactions that forestalled further [administrative] proceedings." ***Lacey v. Comm'r***, No. 9761-16W, 2019 WL 6313190 (T.C. 11/25/2019). The whistleblower in this complicated case provided information to the WBO alleging that the multinational oil and gas company BP evaded millions of dollars in taxes after BP's massive gulf oil spill. The whistleblower's first submission provided few details, and the WBO determined that the initial submission did not meet the requirements for an award. The whistleblower retained counsel and submitted additional information. Although the WBO sent the whistleblower another letter reiterating its conclusion that the whistleblower did not meet award criteria, the tax court noted that the court "cannot tell the nature and extent of any consideration that WBO personnel gave to [the whistleblower's] second submission." *Id.* The whistleblower sought the tax court's review of the WBO's rejection. The Commissioner requested summary judgment, arguing that since there was no administrative or judicial action, the whistleblower could not be entitled to an award. The court rejected the Commissioner's logic, holding that its "review of a WBO determination to 'reject' a claim is not preempted by the absence of 'action' and 'proceeds', which will always be absent in the instance of the WBO's 'rejection' of a claim." The tax court has authority to review the WBO's decision to reject a claim for failure to meet threshold requirements. In the instant case, however, the administrative record was insufficient for the court to exercise its discretion, and the court ordered the parties to recommend a schedule for further proceedings.

■ **Operation of a legal medical marijuana dispensary under state law does not permit taxpayers to take deductions or credits resulting from trafficking in a federal controlled substance.** States have enacted statutes that have contrib-

uted to the increasing number of medical marijuana dispensaries that operate legally under state law. Yet marijuana remains a Schedule I controlled substance within the meaning of the Controlled Substances Act.

Internal Revenue Code Section 280E was enacted by Congress as a tax on gross income directed at persons who operate a business in violation of federal or state law. Marijuana dispensaries may be legal under state law, but federal law does not recognize the legality of this income. Section 280E states, "No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business... consists of trafficking in controlled substances (within the meaning of Schedule I and Schedule II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted."

Here, petitioner contended that the disallowance of certain deductions was a penalty. The tax court stated that the fact deductions are authorized for other, legal enterprises does not compel the extension of those deductions to drug dealers. In the 37 years since its enactment, there has not been a federal court opinion that has held that Section 280E is a penalty. Thus, denials of deductions, even for cost of goods sold, are up to the discretion of Congress. The taxpayer's 8th Amendment challenges on limits of deductions of gross income were a "nonstarter."

Further, petitioner contended that if Section 280E limited deductions for Section 162, it did not limit them for Sections 164 (which allows deductions for certain taxes in the year paid or accrued) and 167 (depreciation). The first line of Section 280E controls this determination: "No deduction or credit shall be allowed."

The tax court noted that "Congress has not carved out an exception in Section 280E for businesses that operate lawfully under State law. Until then, petitioner is not entitled to deduct expenses incurred in the operation of its drug-related businesses." Petitioner was denied all deductions against gross receipts for the tax year and was subjected to accuracy-related penalties. ***N. Cal. Small Business Assistants, Inc. v. Comm'r***, 153 T.C. No. 4, (2019).

■ **Individual income; exemption permitted.** Vitaly Nikolaevich Baturni is a Russian citizen performing work as a research scientist in Virginia. In 2010 and 2011, Baturni received a Form W-2 documenting the income he received. Baturni claimed this income was exempt under Article 18, section 1 of the U.S.-Russia Treaty. The IRS issued a notice of deficiency for the tax years 2010 and 2011, claiming wages are ineligible for the Article 18 exemption. Section 1 of Article 18 provides "an individual who is a resident of a Contracting State… and who is temporarily present in that other State for the primary purpose of: studying or doing research as a recipient of a grant, allowance, or other similar payments from a… scientific organization, shall be exempt from tax by that other State."

Baturni was temporarily present in the United States for the purpose of doing research, and the payments at issue came from a scientific organization. The issue remaining was whether the payments made were grants, allowances, or other similar payments. The words "grant" and "allowance" are not defined by the Code. Article 18 has no requirement for how the grant or allowance must be characterized. Article 18 exempts from taxation payments made in exchange for the services of "doing research," whether the individual is paid as an independent contractor or an employee, so long as the payment is similar to a grant or allowance. A grant does not become a salary merely because an institution reports its payment on a Form W-2.

The court determined that Baturni was engaging in the kind of research that the U.S.-Russia Treaty signatories intended to include in the Article 18 exemption, and the funds to pay Baturni were specifically set aside for this research project. Baturni's income earned in 2010 and 2011 was exempt under Article 18 of the U.S.-Russia Treaty. ***Baturin v. Comm'r***, 153 T.C. No. 10 (2019).

■ **Court grants motion to seal physician compensation records to protect third party from competitors.** Perham Hospital District owns and operates several parcels of real property as medical clinics and claims those parcels are exempt from property tax. The district and Otter Tail County expect to present evidence regarding physician compensation to determine whether the clinics are exempt. The district moved to seal certain documents and to seal anticipated briefing and trial testimony regarding physician compensation at district clinics. The county did not oppose the motion.

The documents at issue include: (1) a physician compensation memorandum, provided by Sanford Health, a nonprofit organization that leases physician services to the district, and (2) a deposition of a physician providing services to the district that answered questions regarding employee compensation.

Although tax court proceedings "are required to be open under state statute and rule," the Minnesota Supreme Court "has recognized that... each case involves a weighing of the policies in favor of openness against the interests of the litigant in sealing the record." *In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001). A court may seal court records to protect confidential information submitted as evidence. *Id.* at 576. The particular standard to be applied when considering whether to limit public access depends upon the nature of the particular judicial record or proceeding. *See Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 204 (Minn. 1986).

The court categorized the documents in two ways: (1) those filed in support of a motion to seal; and (2) those filed to obtain a merits resolution. With respect to the first category, the Minnesota Supreme Court has emphasized that proceedings on a motion to seal should be held *in camera* to provide the moving party with the opportunity "to explain in sufficient detail the nature of the information it seeks to protect and the consequences of disclosure." *Rahr Malting*, 632 N.W.2d at 577. With respect to the second category, the Minnesota Court of Appeals has indicated there is "a common-law presumption of access... to documents that have been filed with the court," including documents "filed in connection with pretrial motions that require judicial resolution of the merits of the case." *Star Tribune v. Minn. Twins P'ship*, 659 N.W.2d 287, 296 (Minn. App. 2003). To overcome this presumption of access, "a party must show strong countervailing reasons why access should be restricted." *Minneapolis Star & Tribune*, 392 N.W.2d at 205-06.

The district argues that Sanford's physician compensation information should be sealed from public access because it contains trade secret information. Alternatively, the district argues that the information merits protection because it is: (1) highly proprietary and confidential third-party information; (2) Sanford makes extensive efforts in maintaining the secrecy of the information; and (3) Sanford would be harmed if competitors had access to the information.

After reviewing evidence and testimony of the executive directive of legal for Sanford, the court granted the

district's motion to seal. ***Perham Hospital District v. Otter Tail Cty***, 2020 WL 756967 (Minn. Tax Court 2/7/20).

■ **Landowners challenge ditch assessments; court lacks jurisdiction to decide drainage code issues.** These matters stem from a 2016 redetermination of benefits proceeding for Sibley-McLeod Counties Joint Ditch 18 (JD 18). That proceeding concluded with a determination that Sibley-McLeod Counties Joint Ditch 17 (JD 17), which drains into JD 18, receives an "outlet benefit" from JD 18 and, thus, property owners along JD 17 should be assessed for the benefits their properties receive from JD 18. Ditch assessments are collected with a landowner's property taxes.

Petitioners Roger A. Laabs and Adeline D. Laabs, along with seven other landowners on JD 17, each filed a property tax petition for taxes payable in 2019 challenging the legality of the JD 18 ditch assessments based on the JD 18 redetermination proceeding. Sibley and McLeod counties moved to dismiss each petition. For purposes of hearing the counties' motion, the court consolidated the cases and grouped the nine petitioners into two groups: (1) four who owned property on *both* JD 18 and JD 17; and (2) five who owned property on JD 17 only. Petitioners fall into the second category.

Minnesota law provides that "[a]ny person having… any estate, right, title, or interest… in any parcel of land, who claims… that the tax levied against the same is illegal, in whole or in part… may have the validity of the claim… determined by the district court of the county in which the tax is levied or by the Tax Court[.]" Minn. Stat. §278.01, subd. 1(a) (2018). On 4/29/2019, petitioners filed a chapter 278 petition in the Minnesota Tax Court. Petitioners allege that as a result of the outlet benefits determined by the order, expenses related to the proceedings on the order have been levied as additional taxes against petitioners' real property on JD 17. Petitioners challenged the validity of the underlying ditch proceeding and the resulting levy, alleging: (1) that the Drainage Authority did not establish jurisdiction over petitioners or their property; (2) that petitioners did not receive proper, legally sufficient notice of the redetermination proceedings; and (3) that petitioners never had any means of appeal to district court under Minnesota Statutes Chapter 103E. Petitioners claim the special assessment levied against the petitioners' real property in the form of property taxes is invalid.

On 7/29/2019, Sibley County and McLeod County filed respective motions to dismiss their county petitioners' chapter 278 petitions for lack of subject matter jurisdiction. The counties argued that the court does not have jurisdiction to hear cases pertaining to a Drainage Authority's decision under Minnesota Statutes chapter 103E. Additionally, the counties argued that [t]he provisions governing appeal under [chapter 103E], Minn. Stat. §§103E.091 and 103E.095, both *clearly* state under subdivision one of each provision that such appeals must be brought in district court. The counties also assert that petitioners were improperly seeking to use tax court processes to undo drainage law processes.

Petitioners opposed the counties' motions to dismiss. Petitioners agree that their appeals are based on a drainage assessment governed by Minnesota Statutes 103E, but contend that the tax court has jurisdiction to adjudicate their claims based on controlling precedent. The rule in the Minnesota Supreme Court case *Saxhaug v. County of Jackson* (215 Minn. 490, 10 N.W.2d 722 (1943)) is that a property owner can object to a ditch assessment via Chapter 278 where the property owner's right to object has not been foreclosed by the drainage proceeding. Petitioners assert that they had no avenue of appeal under the drainage code and that Minnesota case law permits petitioners to appeal under Section 278.01. Because the court has jurisdiction over claims brought under Section 278.01, petitioners claim the court has jurisdiction over the matters.

In a lengthy analysis, the court noted that while it does have jurisdiction to determine the lawfulness of a property tax assessment, the court agrees with the counties that it lacks jurisdiction to adjudicate the several drainage code issues on which petitioners' chapter 278 illegal assessment claim ultimately turns. The court denied the counties' motions to dismiss, transferred the matters to its respective district courts for decision of any drainage code issues, and stayed further proceedings in the tax court until the matters are transferred back for final decision. ***Laabs v. McLeod Cty***, 2020 WL 868141 (Minn. Tax Court 2/13/20); ***Laabs v. Sibley Cty***, 2020 WL 869248 (Minn. Tax Court 2/13/20).

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TORTS & INSURANCE

JUDICIAL LAW

■ **Insurance; interest on appraisal awards.** Plaintiffs suffered fire damage to their home. After plaintiffs and defendant insurer were unable to agree on the amount of the loss, plaintiffs requested an appraisal under the provisions of their fire insurance policy. In March 2016, the appraisal panel issued its award, which defendant paid. Plaintiffs had not sought, nor did the appraisal panel award, any pre-award interest as part of the appraisal award. Over a year later, plaintiffs sent a letter to defendant demanding $94,009.18 in pre-award interest, which defendant declined to pay. In October 2017, plaintiffs moved the district court to confirm the award under the Minnesota Uniform Arbitration Act. As a part of the confirmation, plaintiffs also sought pre-award interest on the appraisal award. The district court ruled that the motion for pre-award interest was untimely under Minn. Stat. §572B.24(a) because it concluded that the motion was one to modify an arbitration award and was thus outside the 90-day limitation period in the statute. The court of appeals reversed, holding that although appraisal awards are subject to the Minnesota Uniform Arbitration Act, the 90-day limitation period for motions to modify an arbitration award does not apply to motions for pre-award interest on appraisal awards.

The Minnesota Supreme Court affirmed the decision of the court of appeals, but on different grounds. The Court began by reviewing the scope of the Minnesota Uniform Arbitration Act, noting that it "govern[s] agreements to arbitrate." Minn. Stat. §572B.03. The Court held that "that the appraisal process under the Minnesota Standard Fire Insurance Policy is not an 'agreement to arbitrate' under section 572B.03 of the Minnesota Uniform Arbitration Act. Therefore… the Act's 90-day limitation to modify an award does not apply to an appraisal award." The Court remanded the case to the district court "to determine whether [plaintiffs are] owed pre-award interest and if so the amount of interest that… is owed." ***Oliver v. State Farm Fire & Cas. Ins. Co.***, No. A18-0367 (Minn. 3/4/2020). *https://mn.gov/law-library-stat/archive/supct/2020/OPA180367-030420.pdf*

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Laurette Hankom
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Theresa Murray Hughes
Nancy Kleeman
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School Law Center LLC
Ambrea Segner
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Heather & Daniel Vlieger
Total Quality Logistics LLC
Thomas Walsh
Molly Whelan
Paul Ziezulewicz

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SEELEY

Allison M. Seeley has joined Greenberg Traurig, LLP as of counsel in the firm's corporate trust services practice. Seeley focuses her practice on advising financial institutions on their corporate trust transactions, with a concentration on structured finance transactions.

MCLEOD

LAMMERS

CROWLEY

FARRELL

SENYANA

Best & Flanagan announced Robert A. McLeod, Jennifer A. Lammers, Janna M. Crowley, Alexander J. Farrell, and Bernadette Samali Senyana as additions to their expanding private wealth planning, intellectual property, and business law practices.

CHUDASAMA

Anu Chudasama has joined Bassford Remele. She is a litigator who focuses her practice on medical and legal malpractice, personal injury, and general liability, and is a no-fault arbitrator.

CURTIS

Kathleen A. Curtis has joined HKM law firm as a senior litigation attorney. Prior to joining HKM, she practiced for 10 years with a Minneapolis firm representing both plaintiffs and defendants, primarily in personal injury cases.

FERIANCEK

Jerome D. (J.D.) Feriancek of Trial Group North has been appointed to the Federal Practice Committee. The committee was established as an advisory committee to determine the rules of practice and internal operating procedures of the Minnesota federal courts. The advisory committee makes recommendations to the court concerning rules and procedures that affect attorneys practicing in federal court.

FROEHLE

Stephen G. Froehle has joined Coloplast Corp. as vice president and general counsel for North America, Chronic Care and Wound & Skin Care. In assuming this newly created role, Froehle will join the North America senior leadership team and lead the North America legal team.

TRIFEL

WILLIAMS

Vadim Trifel and Faline Williams joined Hellmuth & Johnson as litigation associates. Trifel's practice is focused on all aspects of civil litigation, both state and federal, at the trial and appellate levels. Williams focuses her practice on business litigation, class action litigation, and real estate litigation.

We gladly accept press releases and announcements regarding current members of the MSBA for publication, without charge.
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In Memoriam

Mark Daniel Thompson, age 71, of St. Paul passed on December 17, 2019. He was a graduate of William Mitchell College of Law. He served as a captain in the U.S. Air Force and worked at the U.S. Postal Service.

Stephanie M. Helgesen, of Minneapolis, died at the age of 76 on January 28, 2020. She received her law degree from William Mitchell College of Law. Always a champion for social justice, she actively participated in the civil rights movement in the '60s, working with voter registration drives in the Deep South. She primarily represented labor unions while practicing law and, in her later years, was able to combine her love of writing with her fascination with computers by serving as a technical writer for such companies as Ciprico, Compellent, and Dell.

Melvin D. Heckt, age 95 of Golden Valley, passed away on February 7, 2020. He received his law degree from the University of Iowa Law School in 1950. He practiced law for 45 years with the law firm of Bassford, Heckt, Lockhart, Truesdell & Briggs and then with Luther & Heckt well into his late 80s.

James Robert Pielemeier passed away in his home in St. Paul on February 7, 2020. He was a retired professor emeritus of law at Hamline University School of Law. Prior to joining the Hamline law faculty in 1976, Professor Pielemeier was in private practice with Dorsey & Whitney, specializing in civil litigation.

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FULL-TIME ATTORNEY position with the Pipestone County Attorney's Office and O'Neill, O'Neill & Barduson law firm. This is a dual government-private practice position; the attorney will be employed by both the Pipestone County Attorney's Office and O'Neill, O'Neill & Barduson. As Assistant Pipestone County Attorney, duties will include prosecution of adult criminal cases and juvenile delinquency cases, handling child protection cases, civil commitments, and child support matters. As associate attorney with the law firm, the attorney will be practicing in the areas of estate planning and real estate. This is a unique opportunity to gain government courtroom experience while simultaneously gaining valuable private practice experience with potential rapid advancement. We are looking for someone who wants to live in Southwest Minnesota, just 50 miles from Sioux Falls, SD. Email resume and references to ooblaw@iw.net.

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STAFF COUNSEL for Risk Control. Minnesota Counties Intergovernmental Trust (MCIT) is seeking applicants for the position of Staff Counsel for Risk Control. MCIT is a joint powers government entity made up of Minnesota counties and associated public entities that pool resources to provide property, casualty and workers' compensation coverage to members. MCIT also offers risk management and loss control services. Staff Counsel for Risk Control is responsible for serving as a legal resource for MCIT staff, providing risk management advice and training to members, serving as a technical resource to conduct or facilitate MCIT research activities, providing written articles and resources for MCIT publications, conducting legal research and providing written and oral reports as needed on claims, risk management, loss control and other pertinent issues. Applicants must have a law degree, be licensed to practice law in the State of Minnesota and have three to five years of experience in law, government, service organizations or the insurance industry. Applicants must also possess a valid motor vehicle driver's license and access to a reliable vehicle. MCIT offers excellent benefits and a pension plan. A full position description and application requirements can be found on the MCIT website at: www.mcit.org/employment-opportunities/. See website for application deadline.

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THE GLOBAL LAW firm of Faegre Drinker Biddle & Reath LLP is actively recruiting an Associate to join its technology transactions and intellectual property licensing practice in Minneapolis, Chicago, or Indianapolis. Faegre Drinker Biddle & Reath LLP is an AmLaw 50 firm with offices located throughout the U.S., plus offices in Asia and the UK. Our ideal candidate will possess four or more years of technology and intellectual property contract drafting and negotiation experience, including licensing, outsourcing, IT transactions and merger and acquisition support. We are also interested in speaking with candidates with strong transactional and commercial contract experience who are looking to make a transition into a technology and intellectual property transactions practice. The candidate should be ready to apply their experience to interesting and challenging matters in a thriving and fast-paced practice. Excellent writing skills, attention to detail, and strong academic credentials are required. This position offers competitive compensation and unlimited potential for professional growth. If you are looking for an opportunity with a growing, collaborative firm, please apply online and include your cover letter, resume, law school transcript, writing sample, and list of deal experience to: www.faegredrinker.com/careers.

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TRUST AND ESTATE Planning Associate Attorney Wanted — Moss & Barnett, A Professional Association, seeks a Wealth Preservation and Estate Planning Associate. Preferred candidates will have two to four years' experience in drafting sophisticated estate planning

documents, tax planning, estate and trust administration, and conflict resolution. Candidates should 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.

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COUREY, KOSANDA & Zimmer, PA is seeking an associate attorney with one plus years' experience in estate planning and trust and probate administration. Experience in business law is a plus. Please send resume to: Tammy Bickler, 505 Highway 169 N, Suite 350, Minneapolis, MN 55441, or tbickler@ckzlawfirm.com No telephone calls please.

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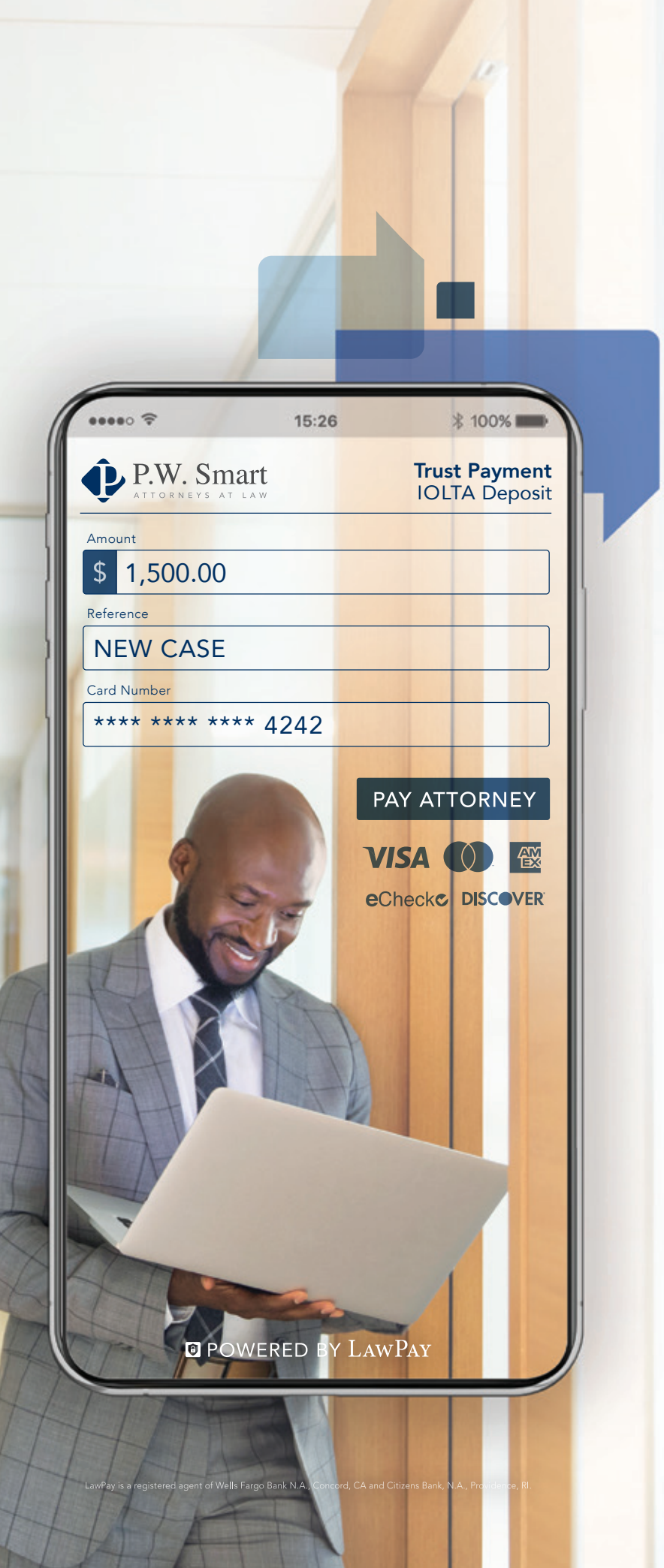

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