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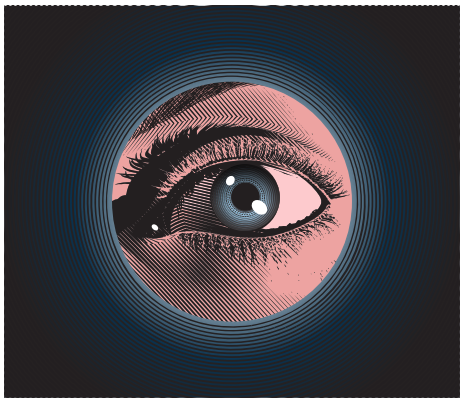

features

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EDITOR
Steve Perry
sperry@mnbars.org

ART DIRECTOR
Jennifer Wallace

LAYOUT/PRODUCTION
Tom Fosse

ADVERTISING SALES
Pierre Production & Promotions, Inc.
(763) 497-1778

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THE MSBA: WE ARE FAMILY

BY PAUL D. PETERSON

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

I want to start my first President's Page with an expression of gratitude to our immediate past president, Jennifer Thompson. I have had the pleasure and honor to serve as the president-elect to Jennifer during her incredible year of leadership. My mere words on this page do not do justice to the outstanding service she gave to our organization. She is a visionary leader and I have big shoes to fill. Jennifer, thank you for your service. Our profession is better because of you.

Our leadership, however, is not embodied by the president but by the varied positions that make up the organization. From our bar foundation and our section leadership to our wonderful staff, strong committees, and outstanding New Lawyers Section, the president of the MSBA is but one of many leaders. My goal in this coming year is to humbly assist the great leadership we have in place so that our organization can shine.

As you will see elsewhere in this edition of Bench & Bar ("Answering the call," p. 14), I was born at second base from a legal standpoint. I didn't hit a double. I did not set out to be a lawyer in my formative years, despite being the son of someone I consider to be one of the greatest lawyers I've ever met. I was born on second base in the legal profession because my parents, and especially my dad, created opportunities for me. I was and am lucky.

But what about the next generation? Who will be the leaders to emerge in our profession? Many of them may be like my dad, the first in his family to go to college and certainly the first to go to law school. I know I will meet in the coming year people like him, the first attorneys in their families. When we speak about diversity, it is important to note that we must embrace diversity not only from the standpoints of gender, race, origin, or sexual orientation, but also from an economic standpoint.

Often diversity is embodied by a combination of the factors I just mentioned. Those of us who are second or third or fourth generation in the legal community must have the awareness that we enjoy a leg up. We are blessed. It is incumbent upon us to recognize our good fortune and to lift up those who are new to our organization and to our profession and to provide them opportunity. If we do this, we will not only be fulfilling our personal responsibility to make our society and our profession better. We will be paying forward the good fortune our families delivered to us.

Who are we? We are the Minnesota State Bar Association. We are the voice of our profession. We are the leaders, each and every one of us, in a profession vital to a society committed to the rule of law. We are not always appreciated and even frequently vilified. This gig isn't for the faint of heart. But in the bar association, we come together as a family to represent our profession. We come together as a family to lift each other up and make our profession the best it can be. The MSBA is also the pre-eminent organization in which anyone in our profession can become a part of something bigger than their own practices and personal situations.

It is my honor to serve as your president. It is my honor to be a lawyer. To absolutely steal a phrase from one of my favorite people, Justice Paul Anderson, I like lawyers. I like being around lawyers. Lawyers are good people. I thank you all for the honor of serving as the MSBA president. I look forward to our joint efforts to make things better in all respects in the coming year. Jennifer, if I have a "walk-up" song for the coming year, it's "We are Family" by Sister Sledge. But I won't forget "Here Comes the Boom!" ▲

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COURT AMENDS MRPC

MSBA member Fred Finch writes: On May 13, 2022, the Minnesota Supreme Court amended the lawyer advertising and communication rules of the Minnesota Rules of Professional Conduct (MRPC). The Minnesota Rules are based on the American Bar Association's Model Rules of Professional Conduct for Lawyers. In August 2018, the ABA adopted changes to Rules 7.1 through 7.5. The MSBA Professional Regulation Committee and the Lawyers Board each decided to petition the Court to adopt the ABA amendments.

In July 2021, the MSBA and the Lawyers Board (joined by the Office of Lawyers Professional Responsibility) each filed petitions with the Court asking it to adopt amendments to Rules 7.1 to 7.5, MRPC. The two petitions differed only in that the MSBA petition proposed imposing limits on when lawyers can advertise as specialists, while the Lawyers Board petition imposed no such requirements.

After a hearing in January 2022, the Court issued amended rules on May 13. The Court adopted all the proposed amendments except the rules on advertising specialization. The Court rejected the parties' proposed rules and drafted its own rule 7.2(c), which permits lawyers to advertise that they are specialists in a field of law but requires uncertified lawyers to clearly state that they are not certified as a specialist by an organization accredited by the Minnesota Board of Legal Certification.

The Court rejected both sets of proposed comments and asked the parties to jointly submit new proposed comments by June 17. Because the Lawyer Board does not meet before June 17, it cannot approve a joint petition. Therefore, the parties have asked the Court to delay the deadline for requested comments for 60 days. Unless the Court delays the effective date, the amended rules 7.1 through 7.3 will take effect on September 1, 2022, without comments. ▲

ATTENTION, NORTH STAR LAWYERS

We're over halfway through the year and it's time for an intentional pro bono practice check-in. How are your hours? How have you affected your community? The court system? Being a volunteer attorney isn't only about helping that one client. Pro bono is also about the impact of our collective action for the public good. It helps shine a spotlight on inequities, provides a chance for good case law to be made, makes our court system run more efficiently, and helps build trust in our legal system. The individual case or clinic may have a great outcome, or it may just feel like a lot of work. It still has value and contributes to increased access to justice.

We were thrilled to announce and recognize our 2021 North Star Lawyers in last month's Bench & Bar. Minnesota is fortunate to have a strong pro bono community that is dedicated to ensuring low-income clients get a fair chance at justice. If you are behind in your hours or want to join this collective effort, reach out to your favorite legal aid agency, visit ***www.projusticemn.org*** to find an opportunity, or reach out to us at the MSBA by contacting Access to Justice Director Katy Drahos ***(kdrahos@mnbars.org)***. ▲

2022 BECKER AWARD WINNERS ANNOUNCED

The Bernard P. Becker Awards are given every year to legal services staff and a law student who provide outstanding leadership or service to clients from low-income and marginalized communities. This year's winners were chosen from an impressive set of nominees and exemplify what it means to be dedicated to access to justice. Congratulations to all the winners!

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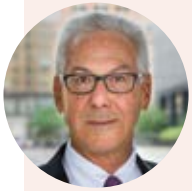

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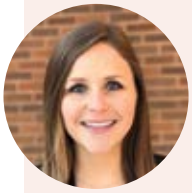
Charles Thomas
Southern Minnesota Regional Legal Services

Emerging Leader
Robyn Meyer-Thompson
Immigrant Law Center of Minnesota

Advocate
Luci Russell
Mid-Minnesota Legal Aid



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Minnesota Assistance Council for Veterans
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Missions Inc.
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Restorative Justice Community Action
Seward Longfellow Restorative Justice
Sojourner
Standpoint
The Advocates for Human Rights
Tubman
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ADVERTISING *RULE CHANGES*

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

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

Effective September 1, 2022, the section of the ethics rules colloquially called the "advertising rules" will undergo substantial revisions. Notably, most instances of the word "advertising" are gone from the rules, with a broader focus on *information* relating to a lawyer's services. Let's review the changes.

Rule 7.1: Communications Concerning a Lawyer's Services

The cardinal rule remains the same: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The rule continues to state: "A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

Remember, this rule applies to all communications about the lawyer's services, whether in writing on your website bio or through verbal communications you have with clients or prospective clients at any point. Do not try and upsell your experience or expertise. Make sure all claims regarding your credentials, experience, and services are grounded in facts you can substantiate. It should go without saying, but if you have not done something before, do not claim that you have done so. Take care not to mislead by omitting relevant facts that place any statement in context.

Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules

New Rule 7.2 is substantially revised, starting with the title. No longer called "Advertising," the rule addresses specific issues, building on the cardinal rule of Rule 7.1—be truthful and non-misleading. Rule 7.2 carries forward the prohibition against paying for referrals, except in specifically delineated situations. Lawyers may still pay for the reasonable costs of advertisements. Lawyers can pay the usual charges of a legal services plan.

Lawyers may also pay the usual charges of a lawyer referral service, both not-for-profit lawyer referral services (which has always been permissible) and now also the reasonable costs of other "qualified" lawyer referral services. "Qualified" services can be for-profit referral services that are qualified by the regulatory authorities. As stated in the petition to the Court, the purpose of qualification is generally to ensure the referral service is: (1) consumer-oriented; (2) provides unbiased referrals to lawyers with appropriate experience in the subject matter of the representation; and (3) affords other client protections, such as complaint procedures or malpractice insurance requirements. The ABA has such a qualified referral program, which many non-profit and for-profit referral services use to show they are qualified within the meaning of the rule.

Perhaps most notably, new Rule 7.2(b)(5) allows nominal "thank you" gifts as an exception to the general prohibition against paying anything of value for recommendations. Specifically, lawyers may now give a "nominal gift as an expression of appreciation" as long as those nominal gifts are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

We frequently receive questions on the ethics hotline about how to ethically thank someone for a referral. Before September 1, 2022, the answer was a nice written thank you. Now you can provide, for example, a gift card to Target or to a local restaurant as a thank you for the referral. What is nominal is not defined but it should be something one would consider to be a token of appreciation. Remember, there is no such thing as ethically permissible finder's fees in Minnesota or otherwise paying for referrals. You may share attorney's fees with an attorney not in your firm if you comply with Rule 1.5(e), Minnesota Rules of Professional Conduct (MRPC). Otherwise, you should not be providing anything of value (beyond that approved in Rule 7.2) for a referral or recommendation.

In the changes effective September 1, 2022, the Court also maintained the "specialist" language previously in Rule 7.4(c), moving it to Rule 7.2. As a reminder, a lawyer cannot state or imply that they are a specialist or certified as a specialist in a particular field of law unless they identify the certifying organization and disclose whether it is accredited by the Minnesota Board of Legal Certification. You may remember from a prior article that there was debate between the state bar, the Lawyer's Board, and others as to use of the term "specialist" or the phrase "certified as a specialist." The Court continued with the status quo but moved the text from Rule 7.4 to Rule 7.2.

Finally, in another rule expansion that should

be noted by the bar, for all communications relating to the lawyer's services in any media, lawyers need to include the name of the individual lawyer or law firm responsible for the communication (this has always been the case) as well as contact information (this is new). So please remember to include some form of contact information to ensure that questions regarding content can be addressed.

Notably absent from the revised rules is a requirement that anything be marked "Advertising Material." Yay! Keep the language if you like, but it is no longer ethically required.

Rule 7.3: Solicitation of Clients

There are several changes to Rule 7.3 worth your attention. The rule now includes a definition of "solicitation" in Rule 7.3(a) as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person whom the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter." Thus, solicitation is specific to a communication that is directed at someone you know or should know needs a lawyer and includes an offer to provide legal services.

The rule then narrows the prohibited solicitation to "live person-to-person contact." The exceptions to the prohibition were also expanded to make live contact permissible if: the person contacted live is a lawyer; a person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or a person who routinely uses for business purposes the type of legal services offered. The rule maintains the prohibition against any solicitation if the target has made known the desire not to be solicited or the solicitation involves coercion, duress, or harassment.

Importantly, the rule no longer covers live person-to-person efforts to secure business if made generally and not to individuals known to be in need of particular legal services. Further, "live person-to-person contact" can mean in person, or real-time telephonic or Zoom-like communications, but it is not meant to cover chat rooms, text messages, or other written communications that recipients may easily disregard. Together, these changes broaden the population of individuals that can be personally contacted to request work, hopefully facilitating business development efforts, while maintaining the portions of the rule designed to prohibit overreach toward individuals in need of legal services at a time when they are vulnerable to potential undue influence.

Since the ABA expanded the model advertising rules in 2018 (most of which Minnesota is adopting now), questions and experience led the ABA to provide further guidance on solicitation, particularly around the supervision obligations relating to solicitation. In April 2022, the ABA issued Formal Opinion 501 on solicitation. It is worth your time if you have decided to use individual lead generators or other personnel to expand your marketing efforts.

It is well-settled that lawyers supervising others—whether they are lawyers or non-lawyers, employees, contract personnel, or vendors—have an ethical obligation to make reasonable efforts to ensure that all persons working with the lawyer are trained to comply with the ethics rules, including the expanded solicitation rules. Further, a lawyer cannot do through others that which they cannot do themselves. Helpfully, the opinion goes through several hypotheticals of permissible and impermissible solicitation examples.

Conclusion

The new rules regulating communications about a lawyer's services streamline and simplify our obligations and are a welcome update. Please take the time to familiarize yourself with the changes. Most of us market ourselves or our services and, particularly if you wish to up your marketing game or expand your lead-generation work, you should make sure that you and the others with whom you are associated understand the new rules of engagement. As noted in the Court's May 13, 2022 order adopting the changes to the text of the rules (available on our website), the comments are still a work in process as of the writing of this article, so please watch our website for additional updates. And as always, please contact us if you have questions regarding your ethical obligations at 651-296-3952, or *www.lprb.mncourts.gov* ▲

HOW THE AMERICAN CHOICE AND INNOVATION ONLINE ACT MAY AFFECT CYBERSECURITY

BY MARK LANTERMAN ✉ mlanterman@compforensics.com

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

Less than a decade and a half into the smartphone era, it is already hard to envision a world in which instant information gathering, communication, and computing abilities aren't available to us all the time, anywhere. Much of our lives is tracked and stored on our phones, making our lives easier but also less private and less secure. A pending piece of federal legislation, the American Choice and Innovation Online Act,[1] highlights the tension and illustrates the complicated set of expectations we have for Big Tech.

The American Choice and Innovation Online Act is intended to address online discrimination, and "would ban major tech firms like Amazon and Google from favoring their products over their competitors."[2] The bill is being presented as a means of counteracting the enormous influence that big tech companies have over consumer experience, from search results to the availability of applications. The hope is that the measures outlined in the bill would allow for competitive pricing, encourage improvement of products and services, and prioritize the experience of consumers.[3]

While consumer choice and antitrust action are being framed as the primary issues driving this bill, many are concerned about the far-reaching implications the legislation would have on other facets of technology. Opponents worry that default security measures may not be implemented properly on platforms, users may not be able to opt out of cross-site tracking, and insecure websites, apps, and links will be given equal ranking on Google.[4]

Another concern involves the privacy and security vulnerabilities of Apple's iPhone if sideloading becomes an option. "Sideloading" essentially refers to the process of installing third-party software, such as an app, that is not directly approved by the original retailer. In Apple's case, this would be any app not originating from the App Store, which is known for its "walled garden" approach to security. In response to the bill, Apple's head of federal government affairs, Tim Powderly, stated in a letter this past February, "Sideloading would enable bad actors to evade Apple's privacy and security protections by distributing apps without critical privacy and security checks. These provisions would allow malware, scams, and data exploitation to proliferate."[5] Apple essentially pre-approves applications before making them available via the App Store. The unhindered installation of unvetted third-party apps weakens this process and make users susceptible to cybercrime.

Powderly also wrote in his letter that this change would effectively extend to social media platforms, allowing them to bypass Apple's App Store policies. In an article I wrote here last year, 'Apple's new iOS strikes a blow for data privacy' (May/June 2021), I described Apple's efforts to maintain user privacy through app tracking transparency as well as privacy nutrition labels (which essentially give users a summary of how an app developer protects their data). These kinds of measures are intended to give users greater control of their data and online presence, especially when it comes to custom advertising.

This past May, it was announced that the American Choice and Innovation Online Act was being amended to address some of these issues. But concerns about allowing unauthorized applications still remain. Apple responded to the revision by noting, "The changes made to the bill are a recognition that the legislation, as originally drafted, created unintended privacy and security vulnerabilities for users. We believe the proposed remedies fall far short of the protections consumers need, and urge lawmakers to make further changes to avoid these unintended consequences."[6] Indeed, the sheer number of iPhone users and the vast variety of data stored on these devices make the risks particularly alarming. The vague language of the bill may cause problems for consumers down the road, including an increase in malware attacks.[7] While some may want the ability to easily download third-party apps, security risks may be amplified for all iPhone users should Apple be forced to change its policies.

The American Choice and Innovation Online Act is being promoted as a blow for consumer choice in a world where we increasingly rely on Big Tech to make a living and operate in daily life. But it remains to be seen how these changes could negatively affect digital security. Some argue the legislation would ultimately hurt consumers while only benefitting other tech companies. Many fear that sideloading iPhones opens a door to increased cybercrime and diminished privacy, and that the risks outweigh the benefits. As Tim Cook has said, android phones are an alternative for those who believe Apple's requirements are too restrictive. No piece of technology is ever going to be perfect, and there is always room for improving functionality. But favoring convenience over security is never the best idea, and any act of legislation designed to improve consumer experience must fully reckon with the importance of both. ▲

NOTES

[1] *https://www.congress.gov/bill/117th-congress/house-bill/3816/text*

[2] *https://www.politico.com/news/2022/05/26/vulnerable-senate-democrats-back-off-big-tech-bill-00035307*

[3] *https://bipartisanpolicy.org/explainer/s2992/*

[4] *https://www.csis.org/analysis/breaking-down-arguments-and-against-us-antitrust-legislation*

[5] *https://www.bloomberg.com/news/articles/2022-02-02/apple-urges-senate-to-reject-bill-that-allows-outside-app-stores*

[6] *https://www.macrumors.com/2022/05/26/apple-statement-revised-sideloading-bill/*

[7] Supra note 3.

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Q: What are the biggest misconceptions other attorneys have about your practice area?

Satveer Chaudhary
s@chaudlaw.com

Satveer Chaudhary is past chair of MSBA's Immigration Law Section and current chair of MSBA's Criminal Law Section. Born and raised in Minnesota, he was a Minnesota lawmaker from 1996 to 2010 and the first Indian-American state senator in U.S. history.

In *Padilla v Kentucky* (2010), a landmark decision expanding rights of noncitizens regarding proper immigration advice before a guilty plea, the U.S. Supreme Court stated, "Immigration law can be complex, and it is a legal specialty of its own." The court was right to underscore this, and it's understandable how my colleagues can overlook just how complex immigration law is.

For example, different "legal statuses" exist for noncitizens depending on their purpose of entry. There are temporary entries ranging from visitor or student to refugee, and myriad narrowly defined occupations. Then there is "permanent residency," or green card, and finally citizenship. Some gain these statuses prior to entry and some change status once they're here. Within this framework, there are additional (or fewer) options depending on a noncitizen's country of origin. Not only is immigration a specialty of its own, but immigration from particular areas of the world can be specialties too.

Eligibility is just the beginning. The application for a typical H1B (tech worker) visa, for example, will go through four federal agencies: Department of Labor, USCIS, Department of State, and Customs and Border Patrol. And each agency has the right to question every aspect of the application even if prior agencies have approved it.

There are layers of rights, privileges, and consequences that come along with each different status. For example: Noncitizens, legal or not, have relatively few constitutional rights in the deportation process, because that process is civil. Yet within the criminal process, noncitizens have equal rights under the Constitution. This difference often leads to confusing public (and legal) debate over the future of immigrants.

The immigration law practitioner also faces unique day-to-day challenges. For example, although dual representation is frowned upon in most areas of law, it is commonplace in immigration. Noncitizens are sponsored by a family member or future employer; a lawyer must therefore walk the fine line of representing both interests. In effect, one fee covers two separate clients who must be served according to the same ethics laws followed by all attorneys, but concurrently. Keep in mind that two-thirds of all immigration lawyers are solo practitioners. Yet the challenges, such as language barriers and acquiring documentation (which may have been destroyed in a war-torn country), remain formidable.

Shauna Kieffer
shauna.kieffer@hennepin.us

Shauna Kieffer has been a public defender in Minneapolis for 10 years. Before that, she clerked for a judge and worked in private practice. She has taught privacy issues statewide and her district court arguments prevailed at the Minnesota Supreme Court in State v. Leonard in 2020.

The most common misperception about public defenders is that we are subpar lawyers. When I applied for my job, over 200 other attorneys did as well. I work with Ivy League graduates, people who have served in the military, people from all backgrounds who are exceptional at the work they do and here because they want to be. Please humor me and google the NY Times opinion video "True Believers in Justice." Though it's about defenders in the south, it still rings true post-George Floyd in Minneapolis. We can't play along with a broken system, but holding people in power accountable can make us the targets of unfounded personal attacks. A subpar lawyer would not take the risks, make the sacrifices, and fight the system the way we do every day.

The second most common misperception about defense attorneys in general is that we are like car dealers—as if we are scheming to sell our client's story when in reality we are upholding the Constitution that is essential to our justice system, whether our client is guilty or not. Oftentimes, the crimes our clients are accused of doing or have done are imputed on to us and our arguments. Unlike a prosecutor, whose role is to seek justice, not a conviction at all costs, defense attorneys advocate for their clients alone. I advocate for my clients to the best of my ability even if I don't personally like them or what they are accused of doing or may have actually done.

Another common misperception is that we represent clients who are guilty. Many of my clients are innocent of what they are charged with, and

frequently issues like mental health, childhood traumas, addiction, and poverty make concepts like "innocence" and "guilt" more grayscale than black and white.

Jill Sauber
jill@sauberlaw.com

Jill Sauber is managing attorney at Sauber Legal Services, a boutique elder law firm in the Edina area. She focuses her practice on estate planning, probate/trusts, long-term care planning, Medical Assistance benefits, and related litigation.

When most people hear "elder law attorney," the first thing that pops into their mind is Saul Goodman in *Better Call Saul*. Thankfully, the practice is not as portrayed on that show—at least not all of it. People think elder law attorneys practice in a boring area of law, where they assist "old people" who have no funds and help them get into nursing homes. Sure, we do that, but the practice is far from boring and is so much more!

The term "elder law" is a bit of misnomer. The practice mainly entails assisting clients over the age of 18 who have mental or physical infirmities, planning for future or current government benefits (think: Medicaid, Supplemental Security Income, Section 8, etc.), and protecting assets (such as inheritance or settlement proceeds) so the client can use the funds for their benefit while remaining on means-tested benefits. Clients may have diminished capacity or mental health issues, physical disabilities, or may have a family member or child with a disability.

Elder law attorneys are adept at navigating ethical issues regarding representation and capacity. Depending on the scope of the elder law practice, the attorney may also do special needs planning for children or young adults (minors) and related issues. Elder law issues touch almost every other practice area, commonly including estate planning, tax, business, family law, real estate, probate/trusts, guardianship and conservatorship or protective proceedings, asset protection, long-term care planning, contested matters—all under an umbrella of "public benefits" and how those benefits affect each area of a client's life. This practice area is exciting, challenging, and ever-changing since the laws in this area are constantly in flux. All practitioners should be aware of some basics of elder law in their own practice, since these issues will touch everyone at some point. Elder law is extremely rewarding. If anyone wants to know more, or needs proof that elder law attorneys are not all old fuddy-duddies, I will gladly talk shop over coffee!

MSBA PRESIDENT
2022–23

Photographs by Sarah Mayer

Answering the Call

Paul Peterson continues a family legacy at the plaintiff's bar

BY AMY LINDGREN

For Paul Peterson, incoming president of the Minnesota State Bar Association, being a lawyer is more than a job. As Bill Harper, his law partner at Harper & Peterson, PLLC, says, "It's a calling. He knows he's doing what he's supposed to be doing." Law is also a legacy for Peterson, something he's carrying forward from his father, the late Duane Peterson, who served as a judge in Minnesota's Third Judicial District. Before spending the last 12 years of his career as a judge, the elder Peterson was a practicing small-town plaintiff's attorney with a statewide reach. A number of his cases went to the Minnesota Supreme Court, creating case law that his son and others have relied on in the years since.

In relating his own story of practicing law, Paul Peterson refers to his father often, entwining or comparing their two paths in the profession while also acknowledging the advantages he believes he gained from his father's mentorship and reputation—not to mention the early privilege of working in his father's law firm. Whatever edge Peterson may have started out with, however, it's clear that he's carried the legacy far beyond any concept of being "the boss's kid" when it comes to the practice of law.

Winning the big cases

In 26 years of representing plaintiffs in personal injury cases, Peterson has built an enviable portfolio of wins, along with a reputation for excellence. Retired Judge Arthur Boylan, of Boylan ADR, says he has heard from a number of trial lawyers who have "consistently described Paul as the best trial lawyer they've ever seen in a courtroom." Peterson has stacked up the industry honors to prove the point, including 20 consecutive years with such designations as a Minnesota Top 100 lawyer and as a Super Lawyer. But more than the professional accolades, Peterson values the plaintiff's awards he's been able to secure for his clients. At this stage in his career, he's regularly arguing for settlements or jury awards in the multi-millions of dollars, while helping to create precedents that shape policy.

One such case that deeply impressed Boylan involved a suit against ADT Security. The case was brought by Harper & Peterson on behalf of the surviving children of a woman who was murdered when an ex-boyfriend entered her home despite the newly installed alarm system. "I was the chief magistrate for the state of Minnesota," Boylan says, "and it landed in my lap to get the case settled if possible, before going to court. Bill [Harper] was the guy who was the bulldog, so to speak, and Paul was the guy who really connected with the family. Paul, to his credit, really listened and helped guide them to make the right decision for these kids."

Harper, who was building a case that included a detailed three-dimensional rendition of the house demonstrating each failure of the security system, says he very much wanted a

jury trial. But it was only after Judge John Tunheim denied ADT's motion for summary dismissal that they were assured of that possibility. "Paul's part in that was enormous," Harper says, "because it was his briefing and his arguments to Judge Tunheim that allowed us to go forward. His appreciation and understanding for the law carried the day. With Jack Tunheim's ruling that we could proceed with a gross negligence argument, we could hang them—and we did."

The "hanging" in this case came not by jury as Harper had wished, but by settlement just three days before the trial was scheduled to begin—and nearly five years after the suit was first initiated. The settlement amount was undisclosed but is widely considered to have been substantial. The case law was also notable, breaching the immunity claimed by ADT's customer contract and inspiring more cases nationwide. In all, it was a huge win for the plaintiffs, for the firm, and for Peterson himself. But it was also just one of many cases Peterson has argued or helped settle for his clients, often against similarly daunting odds. And yet, such successes notwithstanding, Peterson's law career was never a foregone conclusion, even as he grew up in the shadow of his father's law practice.

Growing up in Winona

Rosemary O'Brien, a Toronto-based insurance advisor, grew up with Peterson in Winona, Minnesota, a thriving but sleepy river town that was home to three colleges. It was a place that really fostered its youth, O'Brien says, and her friend Paul took advantage of the opportunities. "Our running joke is that we were both going to run for class president," she says, "but we both kind of knew he was more popular than I was. So I finally said, 'Okay, you be president, I'll be vice president.' And ever since he's said, 'I'm so annoyed with you for doing that,' because he's had to run the class reunions." As O'Brien recalls, the Peterson home was a gathering place and a comfortable spot to hang out. Peterson's mother, Patte, was an avid volunteer and his father was active in politics, leading him to a natural affinity for serving the community. "For years my dad was first party chair of the congressional district there," Peterson remembers. "When I was really young I would be helping with dropping off literature. As I got older I'd help with door-knocking. We also had some pretty amazing times when there'd be a meeting or a fundraiser, with people like Hubert Humphrey and Walter Mondale in our home."

Peterson toyed with a career in politics himself, and also thought about going into communications and broadcasting—a family business of sorts, since his mother had hosted a local radio show on weekday mornings while he was growing up. The fact that he didn't immediately imagine law as a career is a testament to his father's ability to separate his work and home lives, and his commitment to letting his kids choose their own paths. Even so, all five Peterson children took a turn working for their father's Main Street practice, doing daily after-school chores such as submitting filings at the courthouse or delivering packages to clients around town.

> **"Can we do this law thing better? Not to say we don't do it pretty darn well now. I'm very proud of our profession."**

For Peterson, the turning point toward law came in a surprising way, at the bidding of someone outside the family. As he tells it, "Going into my senior year of high school, about mid-summer when nobody was paying attention, the school board decided to cut all the extracurriculars in the junior and senior high school. It was a budget decision to save one of the elementary schools, but at the cost of athletics and pretty much everything else at the upper schools." Peterson took it upon himself to rally others and pressure a re-vote, and then became the spokesperson at the school board meeting. "So I spoke," he recalls, "and I liken it to doing a closing argument for a trial. I've always said that when a closing goes well, there's a feeling like electricity or a sizzle in the room and that's what I felt. A parent actually interrupted

while I was speaking and she was very emotional when she said, 'I wish we could bring in an elementary student and he could be as eloquent as Mr. Peterson.' And I turned to her without even hesitating and said, 'If you give an elementary student all the opportunities that I've had, I guarantee he will be as eloquent as I am.' It's one of the moments when you realize, maybe law school would be for you."

Peterson's parents hadn't attended the school board meeting but the chair of the school board—one of their friends—came to the law office the next day and asked Peterson's father, "Have you talked to Paul about going to law school?" When the elder Peterson answered "No, I don't push anything on the kids," the reply was, "Well, you should."

A legacy and a responsibility

Once the idea was planted, Peterson found himself more and more drawn to his father's work. He started college at St. Thomas in St. Paul, working summers in the practice doing research and administrative tasks. As he started to realize he might take over the practice one day, he switched to Florida State University to experience a different part of the country before settling into the life of a small-town attorney himself. He was still working for the practice during the summers, but things were changing. Now he was the boss's kid, with the potential to make things awkward for the professional legal team already in place. "I was going to the paralegals for help and asking questions, but I could tell there was this whole sideways kind of look: What's this going to be? Is he going to be our boss someday?" Peterson learned quickly "that I was underneath them. That was made real clear from the top guy: 'Don't come in here and shoot your mouth off because I'll drop you.' He would have, too." Instead, Peterson worked to earn their respect while coming to appreciate their talents, "a good life lesson no matter what you do."

The question of becoming the boss was resolved in a frightening way shortly before Peterson started law school. His father had a serious heart attack that summer and they realized he couldn't maintain the stressful life he'd been leading. The opportunity to become a judge meant closing the practice, but Peterson believes it also gave the family another three decades with him they wouldn't have had otherwise. The younger Peterson headed off to law school knowing he would be a lawyer, but not what kind of law he would practice, or where.

Even so, Peterson believes he had a significant advantage in starting his career because of his father's example and mentoring, not to mention his reputation and the opportunities he'd already given his son. In law school, Peterson says, he became very aware of friends who hadn't had those advantages. Indeed, the same had been true for his father, who grew up in Duluth with a father who discouraged him from going to college at all. Peterson's father had put himself through law school as part of a combined Bachelor's / Juris Doctorate program at the St. Paul College of Law, working as a claims adjuster to pay the tuition. When he graduated with a law degree, Peterson says his father had no connections and nowhere to start as an attorney. "One lesson he taught me is that being active in the professional associations is a way to connect with the legal community," Peterson says. "I think about that a lot. He graduates and has to find a job and make his own connections. I graduate and sit in an interview and I'm the son of a judge. I had to bring something to the table, but he paved a lot of trails for me. It would be foolish to think that the connections didn't matter."

A Star is Born

Think of your typical 15-year-old boy, and what comes to mind? Shy, perhaps? Slow to open up to others? Now put him in a roomful of people he's never met, in a foreign country no less, and check to see where he lands. If he's typical for his age, he might be on the edge of the group or standing just outside the door. But if he's 15-year-old Paul Peterson, meeting dozens of his kin for the first time on a family trip to Ireland, you'll have to place him center stage, about to win everyone's respect as the day's best storyteller.

Or at least, that's the event as recalled by Peterson's younger sister, Nora Rogers—no mean storyteller herself. Rogers describes the tradition of their maternal grandmother's family, many of whom still live in Ireland: "One of the great things when our family gets together in Ireland is you have to sing songs or tell stories to entertain everyone."

Did Peterson recite a poem, or perhaps a story from growing up in America? No, Rogers explains: "He basically made up this long joke from something he had seen in a birthday card once." The joke in its original version was about someone receiving a little animal called a rary that keeps growing and growing until the owner can't contain it anymore. Since he can't seem to get rid of it, he eventually brings it up a tall cliff and tips it over the edge. Punchline? It's a long way to tip a rary. Ouch. That's enough of a groaner as it is, but apparently Peterson won over his clansmen by taking 10 minutes to get there. "He just kept extending the joke," Rogers recalls, "dragging the story out with all these details he's making up on the spot. First it gets too big for the bed, and then the house and whatever and he keeps trying different ways to give it away until he finally tips it off the cliff. Paul was just pretty funny telling it and everyone loved that he was beating out all the older guys."

Peterson never outgrew his love for the spotlight, becoming in later years what his law school friend Roger Kramer calls a comedian and frustrated actor. "He was made for the stage, more than most people," Kramer says. "He's very, very funny. Many times when we were out at parties, he would do impersonations and make people laugh." In fact, pre-covid, Peterson and sidekick Steve Kirsch of Larson-King would co-host the Bench & Bar benefit for the Ramsey County Bar Foundation's annual fundraiser, delivering well-received send-ups of local sports figures and national politicians. But even though he gained relative infamy for his convincing Bill Clinton impersonations, Peterson's *chef d'oeuvre* might turn out to be telling the entire Rudolph the Red-Nosed Reindeer saga from memory, handling every voice himself, a feat he mastered when he and Nora were still kids.

Just the facts

BIOGRAPHICAL NOTES ON PAUL PETERSON

Family
Raised in Winona, MN by Duane and Patte Peterson in a family of five siblings: Mark, Dan, Joan, Paul, and Nora
Spouse, Stephnora Jacob
Children: Charlie, 24; Tommy, 21; Jordan, 9; Ellie, 1

Education
Juris Doctorate, cum laude, Hamline University School of Law, 1989
Bachelor of Arts (History and Political Science), Florida State University, 1986
Winona High School, National Merit Scholar, 1982

Legal career
Founding partner, Harper & Peterson PLLC, Woodbury, MN (2000-present)
Solo practitioner, Paul D. Peterson, LTD, Woodbury, MN (1996-2000)
Shareholder and treasurer, King & Hatch, PA, St. Paul, MN (1993-1996)
Associate attorney, Murnane, Conlin, White & Brandt, St. Paul, MN (1990-1993)
Judicial law clerk, Hennepin County District Court, Minneapolis, MN (1989-1990)

Professional leadership roles & memberships (selected)
President, Minnesota State Bar Association (2022-2023); Executive Council member since 2019
Board member, American Academy of Certified Trial Lowers (ACTLM) (2010-2020)
Assembly member, Minnesota State Bar Association (2006-present)
Chair, MSBA Joint Coordinating Committee (2018-2019)
President, Ramsey County Bar Association (2017-2018); member, Board of Directors
President, MN Chapter, American Board of Trial Advocates (ABOTA) (2012)
Board member, American Board of Trial Advocates (ABOTA) (2015-present)
President, MN Chapter, Douglas K. Amdahl Inn of Court (2011)
Member, American, Minnesota, Ramsey, and Hennepin County Bar Associations
Member, American, Minnesota and Wisconsin Associations for Justice
Member, MSBA Civil Litigation Section
Member, Campaign for Legal Aid Urban Leadership Committee
Member, Public Justice Foundation
Member, International Society of Barristers

Certifications & bar admissions
Minnesota and Wisconsin State Courts
Minnesota and Wyoming Federal Courts
Western District of Wisconsin Federal Courts
United States District and Circuit Courts
8th Circuit Court of Appeals
Board Certified Civil Trial Advocate, certified by the National Board of Trial Advocacy
Board Certified Civil Trial Specialist, certified by the Minnesota State Bar Association

Honors (selected)
Top 100 Minnesota Lawyers, SuperLawyers Magazine (2003-present)
AV rating by Martindale-Hubble, 20 years in a row (2002-present)
Super Lawyer designation, Thomson Reuters (1999-present)
Named "Rising Star," Minnesota Law & Politics, 1999

Additional pro bono and work experiences
Legal assistant / courier, Duane Peterson Law Office, junior high through college years
Volunteer attorney, SMRLS (Southern Minnesota Regional Legal Service)
Fundraiser, co-auctioneer, Ramsey County Bar Foundation

Civic volunteering
Baseball and basketball coach for sons' teams in Woodbury, MN

Acknowledging that difference created a sense of responsibility for Peterson to watch for others in the legal community who don't have a similar background. "Whether it's economic, like my dad experienced, or whether it's first generation to grow up in this country, or someone from a minority background, it reminds me to be on the lookout and to have our professional groups be on the lookout for promoting people of diverse backgrounds who are new to the profession." Service to the profession is another legacy Peterson feels committed to continuing, having seen his father co-found the MSBA's Civil Litigation Section and later become active in the Minnesota Association for Justice, an organization in which the younger Peterson has also been active.

Building a career and a life

While Peterson may not have followed directly in his father's footsteps in terms of his legal practice, he came close. After working as a judicial clerk in law school and then as an attorney for two defense firms, he switched gears to start his own solo practice as a plaintiff's personal injury attorney in 1996. He was influenced, he says, partly by the volunteer work he'd been doing for SMRLS (Southern Minnesota Regional Legal Services) and largely by his father's example of representing plaintiffs in workers' compensation and injury cases. "It's an area of law where you get to directly help people, but also create public policy," Peterson explains. "Lawsuits drive changes. That really draws me to do what I do." He also believed that he could create more of a community-based practice in plaintiff's work and thereby avoid the travel that sometimes comes with successful defense practices—two important ingredients for settling down with a family.

Retired Judge Arthur Boylan says he has heard from a number of trial lawyers who have "consistently described Paul as the best trial lawyer they've ever seen in a courtroom."

In those years it was just him and an administrative assistant working from an office in Woodbury, with Peterson still taking some defense cases from friends in the business who helped his business survive initially. In 2000, he joined forces with Bill Harper and the two formed an unusual but highly successful partnership in which they both maintained their own practices while also trying cases together and, eventually, buying their business building together. As Harper explains, "We have always operated as separate corporations and we've worked together on cases and then sat down together to figure out the fees. It has always worked wonderfully for us and in all these years we have never had a dispute or an argument about money." The arrangement has been satisfying on other levels as well, according to Harper. "I really appreciate what Paul has brought to my life," he says. "Paul has a true affection for the law. He's given me a greater respect for the law, even though I still disagree with it from time to time, in terms of what it keeps from the have-nots. And we represent the have-nots."

Top: Peterson with sons Tommy, 21 (left) and Charlie, 24; bottom: Peterson with wife Stephnora, son Jordan, 9 (left), and daughter Ellie, 1. (Submitted photos)

At about the same time that Peterson and Harper were creating their business life together, Peterson was starting a family that would eventually include two sons, Charlie and Tommy, now 24 and 21, and a home in Woodbury near the law office. Peterson followed in his father's footsteps again. Where his dad had coached him in basketball in junior high, he now coached his kids in basketball and baseball for community leagues, often going to comic lengths to fit it in with his growing law practice: "The baseball fields were just a couple of blocks away and I still remember, I'm out there in a suit over the lunch hour and maybe I have a hearing in an hour and I'm out there trying to rake the field and get it dry in time for a game that night."

Unfortunately, one way Peterson's path diverged from his father's was in the dissolution of his marriage, following a separation when the boys were teenagers. It's unusual in Peterson's family, which he says brings pressure, even though the split was amicable. When it happened, Peterson says, he wasn't expecting to find a new partner in life, much less start a new family. But that's exactly what happened, starting with a chance meeting and evolving into a relationship with his now-spouse, Stephnora Jacob. Now he and Jacob live with one-year-old Ellie and nine-year-old Jordan in their Shakopee home. Jacob, who immigrated from Nigeria in her 20s, had earned a Bachelor of Laws (LL.B.) and built a career there in broadcasting and film. In the United States she earned an MBA from the University of Phoenix and now does the marketing for Harper & Peterson while also running a retail business called StyleLiz. Peterson and Jacob each speak highly of the other, with Jacob especially appreciating Peterson's commitment to family and his sense of humor, saying, "It's one of the things that first drew me to him." When Ellie was born last year, Peterson was delighted by the prospect of adding a girl to the family of three boys, although he's already disavowing any wish to be the disciplinarian. "I told Stephy, you have to do that because I'm not going to be able to say anything to this little girl." In all, Peterson counts himself surprised but lucky by this turn of events, saying, "This is nowhere I expected to be on the one hand, but on the other hand, I'm really loving it."

Goals for the bar

By contrast, leading the Minnesota State Bar Association is exactly where Peterson expected to be at this point, having started on the leadership track four years ago as MSBA secretary. Before that, he led the Ramsey County Bar Association (2017-2018), giving him a total of eight years already in officer roles. In that time he's had the opportunity to hone his ideas, coming to the conclusion that his will be more of a management role than direct leadership. He wants to facilitate progress in three areas, without imposing an exact agenda.

Chief among the three is wellness, an issue he and other MSBA officers have been intentional about developing, at least since pre-pandemic days when the Minnesota Supreme Court created a task force to take on the topic. They were responding at the time to the Hazelden report on the pervasive and disproportionate rate of chemical dependency and mental health issues in the legal profession. Although a new report hasn't been made, Peterson feels certain the issue could only have worsened since the pandemic.

"I'm very concerned," he says. "I look at wellness as more than the things that Hazelden was discovering. Those are the symptoms, but we have to re-examine how the profession operates. What we're talking about is, how do law firms re-examine how they do things? How do solo practices re-examine things? How do we reconfigure, if we can, the public defender system so they're not handling caseloads far in excess of what's really possible? Really, how do we re-examine things so we can make the profession better? Because I think the reason it's disproportionate to other industries and professions is because we are dealing with a lot of strife in life."

As Peterson notes, his own work has brought him into highly stressful situations, working directly with families who have lost loved ones under sometimes gruesome circumstances. "And that's tough," he says. "You have to find a way to manage that. Nobody taught me that in law school and I haven't done it well at all times in my life, quite frankly. I'm not sure I do it well today, but I'm trying. All of us have to take a step back and say, 'Yeah, it's always been done that way, but we can re-examine that."

In addition to wellness, Peterson plans to continue to promote diversity, in alignment with the MSBA's strategic plan, and with a particular eye on first-generation attorneys. The third focus for his presidency will be operational in nature, he says, with the goal of better leveraging the knowledge and skills of the permanent staff to create more consistency and forward progress from one set of volunteer leaders to the next.

If there's a theme to these goals, Peterson says it might be, "Can we do this law thing better? Not to say we don't do it pretty darn well now. I'm very proud of our profession. I'm very proud to be a lawyer. But we're in a changing world and change is happening very fast. The excitement I have coming out of the pandemic is that it has caused us to re-think everything. I want to take that spirit this year. I don't know if I'm going to ever be the one with the answers, but I want to take that discussion and facilitate it. Because I do think we can do this law thing better, and use the technology to serve our clients better and give ourselves more time with our families."

Roger Kramer, Peterson's long-time friend from law school, is one of many who are excited to see his term begin. "He's going to do great things for the bar," Kramer predicts. "He's going to work really hard. Nobody I've met cares more about the law than Paul. The bar should be excited. They're getting a terrific president." ▲

5 additional facts ABOUT PAUL PETERSON

1) He and his friends worked for three years during high school at Taco Johns and learned to tolerate smelling like taco meat.

2) He and his sister Nora learned to dance in the family basement, following Arthur Murray footprint decals their parents practiced with.

3) He suffered a collapsed lung in high school that knocked him out of contention for Air Force fighter pilot training during ROTC.

4) He worked as a Florida poll taker during college and knew early on that Reagan would beat Mondale by a landslide.

5) He loves cartoons and can do a killer Elmer Fudd impersonation.

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- Military & Veteran Affairs
- Probate, Trusts & Estates
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- Public Law
- Public Utilities
- Real Property Law
- Social Security Disabilities Law
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- Tax Law
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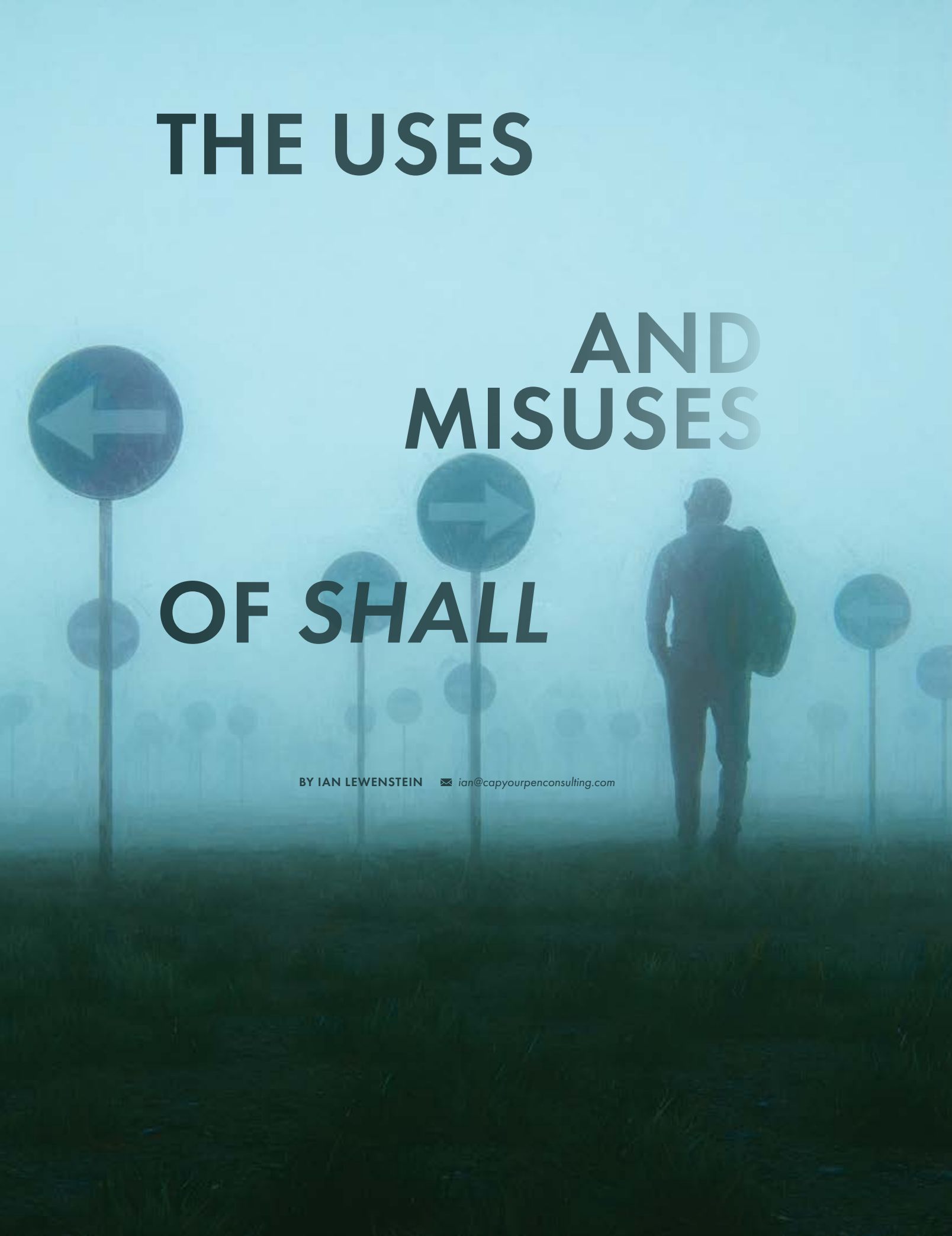
- Workers' Compensation

***Specific benefits vary by Section**

THE USES AND MISUSES OF *SHALL*



BY IAN LEWENSTEIN ian@capyourpenconsulting.com

All lawyers are intimately familiar with *shall*. Even before law school, most lawyers are introduced to the word, which sits prominently in the public domain in legal documents and corporate speak. Once at law school, lawyers encounter *shall* in court cases, statutes, rules, and contracts. Through osmosis, *shall* becomes entrenched as a cornerstone of a lawyer's lexicon. But should it?

What does *shall* mean?

Shall's one meaning is to prescribe a duty; that is, a person has a legal duty to undertake some action. For example, "The petitioner shall submit a filing fee with the petition." Here, the petitioner has a legal duty to submit a filing fee. The petitioner is *required to*. The petitioner *must*. In other words, *shall* is mandatory, and as Anne Sexton wrote in her lawyer's guide to the Minnesota legislative process,[1] *shall* in Minnesota—and pretty much everywhere—is statutorily defined or recognized to be mandatory.[2]

Straightforward, no?

Not so, say state and federal courts, which have ruled that *shall* can also mean *must*, *may*, *will*, *should*, *is entitled to*, and *is*. As Justice Scalia and Bryan Garner wrote in their oft-cited book on canons of construction, "*shall*, in short, is a sloppy mess."[3] And Joseph Kimble, a lodestar of the plain-language movement, has noted—rather alarmingly—that Westlaw's *Words and Phrases* has cited more than 1,775 (and growing) appellate cases interpreting *shall*.[4] As Kimble and many other leading legal-drafting authorities write, *shall* has become inoperable:

> The most telling indictment of most lawyers' drafting incompetence is that they fall apart over the most important words in the drafting lexicon—the words of authority... The prime offender, as it has been for centuries, is *shall*. The word has been so corrupted by misuse that it has become inherently ambiguous...[5]

And if lawyers still remain unconvinced about the ambiguous cloud hovering over *shall*, look to the dedicated dictionary of lawyers, *Black's Law Dictionary*, which provides five different meanings for the word.[6] All lawyers strive for precision and to serve their clients effectively, but these goals are hard to reach when lawyers stubbornly cling to a word whose meaning shifts like a chameleon's hue.

Minnesota courts and *shall*

Various Minnesota court rulings support Garner's and Kimble's assertions that *shall* is defunct through misuse. For instance, the Minnesota Supreme Court wrote back in 1964 that *shall* can mean *may*.[7] So while our Minnesota Legislature has prescribed that *shall* is mandatory, the courts have said otherwise; in effect saying, "That's a nice statute, but it doesn't bind us." This reasoning was firmly established in 1965 in *Agassiz & Odessa Mut. Fire Ins. Co. v. Magnusson*, in which the Court wrote that it can disregard *shall*'s mandatory meaning under Minnesota Statutes, chapter 645, when a contrary legislative intent appears,[8] transforming the mandatory *shall* to the permissive *may*. A sloppy mess indeed.

And Minnesota courts are not the only judicial bodies to disregard legislatively enacted canons of construction meant to bind and direct how courts interpret law. For instance, as far back as the late 1800s, the U.S. Supreme Court has recognized that *shall* can mean *may* unless the plain language indicates otherwise.[9]

Furthermore, both Minnesota and federal courts don't hesitate to override legislative directives when *shall*'s use lacks legal consequences. Take, for example, a legislative directive on rulemaking: "By such and such date, the commissioner shall begin rulemaking." What are the legal consequences for a commissioner's inaction, beyond legislative annoyance? There are none. And as affirmed by the Minnesota Supreme Court in 1974, "A statute which does not declare the consequences of a failure to comply may be construed as a directory statute."[10] In other words, a Minnesota court—and other state and federal courts—will interpret a *shall* sans consequences as precatory, not mandatory.

If you still harbor doubts, look to the federal court system, which has recognized the perils of *shall*: Except for one tricky instance, all four major sets of federal rules (appellate, criminal, civil, and evidence) have had the word extirpated.

More issues with *shall*

Not only is *shall* the king of ambiguity, but it also leads to awkward sentence constructions. Remember, *shall* only fits when a duty is being established; generally, the word is appropriate if it can be substituted with *is required to*. "The petitioner shall [*is required to*] submit a filing fee with the petition." But *shall* has become so ingrained into the legal profession that lawyers and legal drafters all too frequently ignore this limited use and instead generate senseless meanings.

Look to a common drafting construction, for example: "This act shall be cited as the Plain Language Act." The act [is required to be] cited? But no legal duty is being established; rather, a person may cite the act as the Plain Language Act. The drafter isn't requiring the act to be cited as written but rather giving people permission to cite the act. The sentence could also be interpreted to mean that the act *could* or *should* be cited as drafted.

IF LAWYERS REMAIN UNCONVINCED ABOUT THE AMBIGUOUS CLOUD HOVERING OVER *SHALL*, LOOK TO THE DEDICATED DICTIONARY OF LAWYERS, BLACK'S LAW DICTIONARY, WHICH PROVIDES FIVE DIFFERENT MEANINGS FOR THE WORD.

Or take the worst *shall* offender of the false imperative (no command is given) and false future (not really in the future), in which *shall be* is used in an illogical attempt to command something. "There shall be created a Department of Health." There will be created? There must be created? More accurately, there *is* created. In this erroneous *shall* construction, the well-established

IAN LEWENSTEIN has worked for the Minnesota Legislature in the Office of the Revisor Statutes and for several state agencies, helping write clear regulations in plain language. He also runs his own consulting business, which tracks Minnesota rulemaking and provides writing expertise to businesses, nonprofit organizations, city governments, and individuals.

principle of drafting in the present tense is violated.

Drafters write in the present tense because the law is always there, speaking. Yet they frequently violate this presumption when using *shall*, resulting in a stilted and grammatically incorrect writing style. So don't write in the false future by saying that "the plaintiff shall be entitled to a hearing." Instead, state a legal fact and write that the plaintiff *is* entitled to a hearing.

Two of the examples showing the illicit use of *shall be* feature passive voice. Although not an issue in the examples, passive voice can create a litigious minefield; passive voice and *shall* are no peanut butter and jelly. With passive voice, the actor is omitted—we don't know who is acting. And combine that ignorance with *shall*'s ambiguity, and instead of a sandwich classic, you get something akin to lamb and tuna fish, as seen in this dangerous example: "Producers shall not receive more than one negligent violation per growing season." Does this sentence mean that a producer (1) *must not* receive more than one violation from the regulating authority, or (2) *may not* incur more than a single violation? Reasonably, it could be either, and the litigious minefield is created:

1. The regulating authority can levy only a single violation: Issuing more than one violation is prohibited.
2. A producer may not receive more than one violation: There will be consequences, which are left unstated.

With the first option, the sentence could reasonably be construed to mean that the regulating authority is prohibited from levying more than one negligent violation. But the second option implies that the producer could be subject to additional penalties (left unstated) by incurring more than one violation. And even a third option exists—that a producer *should not* receive more than one violation. Because of passive voice, *shall*'s ambiguity, and the lack of stated legal consequences, three varying interpretations exist. And additionally, the negative further complicates the sentence.

When *shall* is combined with a negative, a precarious and wordy construction results: "No person shall violate this requirement." This provision is not really addressed to anyone (no person); better to use the positive, not the negative: "A person may not violate this requirement." The positive is more direct and easier to read. Rewriting the example of the producer in the positive demonstrates this directness: "If a producer receives more than one negligent violation per growing season, the regulating authority must [insert legal consequences]." The conditional *if* creates an easily understandable sentence that then allows the drafter to plug in the legal consequence or, alternatively, to rethink the intent behind the proposed requirement.

A simple solution

Besides being ambiguous and litigious, *shall* is patently not plain language—that is, the broader public does not use it. The word is archaic, obsolete, and, as shown here, highly prone to misuse. Even the most well-intentioned and judicious lawyer should not use *shall*, especially when a better alternative exists with *must*.[11] The word is also greatly preferred to *shall* (83-17 percent), according to a prominent plain-language study.[12]

Must carries no such baggage of ambiguity. True, *must* could also be disregarded as permissive if consequences aren't attached, but this possibility could be rectified with better and more thoughtful legal drafting. *Must* is universally recognized, and its use doesn't lead to the awkward constructions with *shall*.

Finally, if plain language is legally required for consumer contracts[13] and elsewhere in Minnesota Statutes and Minnesota Rules, it should be good enough for the locally focused lawyer who draws up wills and trusts, drafts small-business contracts, and files short and simple briefs with the court. Both judges and the public overwhelmingly prefer plain language,[14] so what better way to serve your client than by using plain language and eschewing the ambiguity of *shall?* ▲

NOTES

[1] Anne Sexton, *A Lawyer's Guide to the Minnesota Legislative Process*, Bench & Bar of Minnesota, January/February 2022, at 22.

[2] Minn. Stat. §645.44, subd. 16. (2020).

[3] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 113 (2012).

[4] Joseph Kimble, *Seeing Through Legalese: More Essays on Plain Language* 87 (2017).

[5] *Id.*

[6] *Shall*, Black's Law Dictionary (10th ed. 2014).

[7] *Stoecker v. Moeglein*, 129 N.W.2d 793, 795-796 (Minn. 1964).

[8] *Agassiz & Odessa Mut. Fire Ins. Co. v. Magnusson*, 136 N.W.2d 861, 868 (Minn. 1965).

[9] *Cairo & F.R. Co. v. Hecht*, 95 U.S. 168, 170 (1877).

[10] *Sullivan v. Credit River Twp.*, 217 N.W.2d 502, 507 (Minn. 1974).

[11] Office of the Revisor of Statutes, *Minnesota Rules: Drafting Manual with Styles and Forms* 34 (1997).

[12] Christopher R. Trudeau and Christine Cawthorne, *The Public Speaks, Again: An International Study of Legal Communication*, 40 U. Ark. Little Rock L. Rev. 249, 273 (2017).

[13] Minn. Stat. §325G.31.

[14] For a good summary of judges' views, *see* Kristen Konrad Robbins-Tiscione, *The Inside Scoop: What Federal Judges Really Think about the Way Lawyers Write*, 8 Legal Writing 257-284 (2002).

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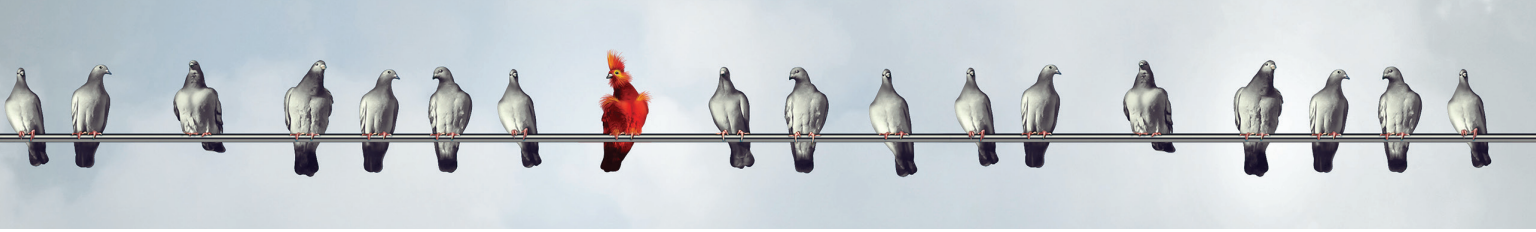

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ENDING FORCED

Over the past few decades, mandatory predispute arbitration agreements (also known as forced arbitration) have become widespread in the fine print of employment and consumer contracts. Forced arbitration agreements require individuals to pursue their claims in arbitration, which lacks transparency, removes the full weight of a court's precedential guidance, and eliminates an individual's right to a jury trial. Forced arbitration agreements are problematic in employment and consumer disputes, particularly in disputes related to sexual harassment and sexual assault.

Practically speaking, until recently, these agreements created a situation in which, if an employee signed a forced arbitration agreement on their first day of work and then was sexually assaulted by their supervisor a year into their employment, the employer was entitled, under the Federal Arbitration Act (FAA), to force the suit into private arbitration. Forcing arbitration in this context has had the effect of silencing survivors of sexual assault and harassment while denying them an opportunity to seek justice in court—or even simply to share their experiences—which often compounds the damage done to the individual while protecting harassers and companies from public scrutiny.

Fortunately, this is no longer the case. On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (H.R. 4445), which amends the FAA to void all forced arbitration agreements for claims of and related to sexual assault and harassment. As a result, individuals may now bring their claims in court and before a jury. The Act, which, as one senator explained, "represents one of the most significant workplace reforms in American history," will have a vast and immediate impact, and "will help [] fix a broken system that protects perpetrators and corporations and end the days of silencing survivors."[1]

Still, as explained herein, courts will be tasked with interpreting the Act to consider what claims it covers—including instances in which there are multiple claims or multiple defendants—and, further, to consider the Act's applicability to existing claims.

THE ACT'S HISTORY AND SIGNIFICANCE

Forced arbitration agreements have increased dramatically over the past few decades. They have become ubiquitous in consumer contracts, and there are an estimated 60 million workers subject to forced arbitration provisions at their place of employment.[2] Notably, forced arbitration clauses are especially common in female-dominated industries,[3] and the ACLU has reported that 57.6 percent of female workers are subject to forced arbitration.[4] Meanwhile, arbitration outcomes are heavily skewed in favor of companies: between 2016 and 2020, on average, only 1.9 percent of employees who brought claims actually won a monetary award in arbitration.[5]

Simply put, forced arbitration is unjust in disputes of and related to sexual harassment or assault. Forcing individuals into arbitration in this context denies survivors of sexual assault and harassment the benefits of our judicial system. As an initial matter, arbitrators or arbitration providers are generally selected by the employer or company.[6] Then, from the outset of the case, individuals are disadvantaged because discovery is limited; individuals forced into arbitration often cannot meaningfully pursue discovery that would help prove their case.[7] Not only are these

ARBITRATION

Understanding the new federal law that prohibits mandatory arbitration in matters of sexual assault or harassment

BY LAURA FARLEY
lfarley@nka.com

survivors denied the right to be heard by a federal or state court judge throughout their case, but, at its end, they are also denied their right to a jury trial, which is otherwise guaranteed under the Minnesota Human Rights Act (MHRA) and Title VII, as amended.[8] Further still, after a binding decision from an arbitrator, the chances of an appeal are incredibly slim: It is only in an "unusual circumstance" that an arbitration award is overturned because they are accorded "an extraordinary level of deference," making a "review of arbitration awards [] extremely limited, and [courts] are not to review the merit."[9]

Moreover, unlike the judicial system, the results of arbitration are generally kept secret—either by an existing non-disclosure agreement signed at the time of the arbitration agreement or by the rules of arbitration.[10] Forced arbitration therefore often requires individuals to conceal their allegations. In the context of sexual harassment or assault, this silence affords employers and companies protection from public scrutiny, leaving corporate reputations unscathed. Ultimately, concealing allegations from the public has created a system with few consequences, permitting abusers to continue harming and harassing victims, thereby perpetuating institutional protection for harassers and companies that fail to provide a safe place for their employees to work.[11]

The Act seeks to right this injustice:

> The premise of this legislation is simple: Survivors of sexual assault or harassment deserve their day in court. They should be able to choose whether to bring a case forward, instead of being forced into a secret arbitration proceeding where the deck is stacked against them.... [F]orced arbitration clauses have enabled sexual abusers to escape scrutiny while their victims are compelled to stay silent. That is wrong.[12]

After months of bipartisan negotiations and discussions, the Act was introduced in the House of Representatives in July 2021, with a nearly identical measure introduced in the Senate. The bill passed in both chambers with strong bipartisan support—a rarity these days.

LANGUAGE OF THE ACT

While impactful, the language of the Act is concise, adding just two sections to the FAA.

Section 401 of the Act defines terms useful to its interpretation. First, it defines the two types of covered agreements, "predispute arbitration agreements" and "predispute joint-action waivers." Predispute arbitration agreements are individual agreements to arbitrate. Predispute joint-action waivers are agreements that prohibit or otherwise waive a party's right to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum.

The Act then defines the types of disputes covered under the statute. The term "sexual assault dispute" means a dispute involving a "nonconsensual act or sexual conduct." The term "sexual harassment dispute" is broader and covers disputes "relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

Section 402 of the Act then addresses the applicability of

the Act. Under the Act, effective immediately, predispute agreements and joint-action waivers in the context of sexual assault or harassment disputes are no longer valid or enforceable:

> [A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

Thus, an employer cannot force an individual with a claim of or relating to sexual harassment or assault to arbitrate those claims. The individual bringing the claim can still choose to arbitrate claims of or relating to sexual harassment or sexual assault—uncommon as this choice might be—where a predispute agreement has already been signed.

Finally, the Act establishes that its interpretation is determined under federal law, and any disagreement related to applicability, validity, or enforceability of an arbitration agreement is "determined by a court, rather than an arbitrator." Thus, the applicability and enforceability of a forced arbitration agreement would be decided by a court even if the parties had agreed to delegate such decisions to an arbitrator.

THE ACT'S SCOPE AND APPLICABILITY

Courts will be tasked with interpreting the Act to consider what claims the Act covers—including instances in which there are multiple claims or multiple defendants—and, further, to consider the Act's applicability to existing claims.

The Act covers all claims related to sexual harassment or assault.

When an employee or consumer files a case alleging sexual harassment or assault, a single case may include multiple, often inseparable claims alleging retaliation, common law torts, or other employment-related claims, under varying state and federal laws. For example, an individual who is sexually harassed by a co-worker may report the harassment to their employer, only to face retaliation for making that report. That individual may also have related tort law claims under negligence theories, such as a claim for negligent supervision, if the employer failed to adequately supervise the harasser. Further, some claims might be asserted only against the defendant company, while others might be asserted against individuals. Each of these related claims is covered under the Act because claims "related to" sexual harassment and assault are unambiguously included within an individual's case and fall within the protections of the Act.

Under Section 401, the Act defines a "sexual harassment dispute" to mean "a dispute *relating to* conduct that is alleged to constitute sexual harassment under applicable Federal, tribal, or State law."[13] Further, Section 402 explicitly notes that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law *and relates to* the sexual assault dispute or the sexual harassment dispute."[14] Thus, the Act provides individuals the option to bring their full case (i.e., all causes of action) related to sexual assault or harassment into court.

It is important to note, however, that in covering related claims, the Act does not create a new burden on plaintiffs to prove that their claims are related. As the legislative history makes clear, the Act "does not create any new mechanism to allow for dismissal, nor does it require that victims have to prove a sexual assault or harassment claim before the rest of their related case can proceed in court."[15]

Similarly, related claims may exist even without an underlying sexual harassment or assault claim. The word "case" as used in Section 402 of the Act should be interpreted to mean that no claim asserted together in a case with a sexual assault or harassment claim can be forced into arbitration. Explained differently, "for cases which involve conduct that is related to a sexual harassment dispute or sexual assault dispute, survivors should be allowed to proceed with their full case in court regardless of which claims are ultimately proven."[16] Again, the legislative history supports this interpretation: Where "a sexual assault or harassment claim is brought forward in conjunction with another related claim and the assault or harassment claim is later dismissed," the Act "should not be interpreted to require that [] the court must remand the other claim back to forced arbitration."[17] To find otherwise would create the "undesirable effect of hiding corporate behavior such as retaliation and discrimination against women who report assaults and harassment."[18] It would also create the undesirable effect of splitting causes of action, resulting in judicial inefficiency with related claims in two separate forums.

As it relates to individuals and litigants in Minnesota, the Act applies to individuals with claims under the MHRA. This is notable because the MHRA is unique in that it defines sexual harassment explicitly, thus making it clear what facts may be involved in a sexual harassment or assault dispute.[19] The following conduct, which constitutes sexual harassment under the MHRA, is covered under the Act:

> Unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment...;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment...; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment... or creating an intimidating, hostile, or offensive employment...

Given the MHRA's broad definition of sexual harassment, the Act thereby affords survivors of sexual harassment and assault the opportunity to bring these MHRA claims in court, regardless of whether they signed a predispute arbitration agreement.

The Act is effective immediately and retroactively.

The language of the Act, standing alone, unambiguously establishes that it "shall be valid or enforceable *with respect to a case which is filed* under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute."[20] (Emphasis added.) Thus, the Act is applicable to cases filed after its enactment and supports a reading that it applies to these disputes, regardless of when the underlying sexual harassment or assault took place.

Some employers may argue this language bars certain existing claims so they can continue to force matters into arbitration. This argument, however, relies solely on a marginal note to the Act, which states that "[t]his Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act," which was March 3, 2022.[21]

Yet despite reports to the contrary, this language is *not* part of the Act. Marginal notes such as this have no effect on a statute's scope or application because they are not part of the law; courts may simply look to marginal notes (as they would look to section headings) to help clarify legislative intent where a statute's meaning is otherwise ambiguous. Here, particularly given the plain language of the Act, this marginal note should be interpreted as merely clarifying that the Act is inapplicable to claims already filed in arbitration. Put another way, the Act does not necessarily provide an opportunity for someone to remove themselves from currently active arbitration.

Giving any further weight to this marginal note yields results that are unintelligible and contrary to the purpose of this legislative effort. It is illogical to interpret the Act to conclude that Congress intended that someone sexually assaulted at work on March 2, 2022, would be forced to bring their claim in arbitration, whereas someone sexually assaulted the next day could pursue their claims in court. This is particularly true because there is no meaningfully negative impact to companies and employers. Regardless of forum or venue, a claimant still has the burden to prove their case. Proceeding in court—rather than arbitration—does not lessen this burden, and "[i]t does not hurt business to make sure that people who are harassed in the workplace get treated fairly."[22]

Interpreting the statute as retroactively effective is consistent with the legislative history of the Act. During debate, Congress clarified that the Act is retroactive "as to contracts currently signed," but not to "cases currently pending." Consistent with this notion, legislative debate highlighted the importance of the Act's retroactive impact. For example, U.S. Sen. Charles Schumer noted that "[t]he good news about this legislation is all the clauses that people already signed in their employment contracts, even when they didn't know about it, will no longer be valid. So it not only affects the future but affects those who signed in the past."[23] Ultimately, to meet the purpose of the Act, courts must interpret it to apply retroactively to cases not yet filed in arbitration, to provide survivors of sexual harassment and assault the choice of how to pursue their claims.

CONCLUSION

Plaintiffs can now choose to bring claims of sexual assault and harassment in court, without regard to forced arbitration provisions, offering survivors of sexual assault and harassment a meaningful choice in pursuing their claims. This will allow individuals to avoid arbitration, which is often skewed in favor of employers while forcing allegations out of public view.

Employers would be wise to review their arbitration and other employment and consumer agreements to ensure that they comply with the Act, in addition to other state and federal laws. Employers should likewise be mindful in evaluating employee or consumer claims when considering whether to compel arbitration.

Although courts will be tasked with interpreting the practical impacts of the Act, including the applicable timing and what constitutes a related claim, the Act is ultimately a meaningful step to empower survivors of sexual assault and harassment to seek accountability and justice. ▲

LAURA FARLEY is an associate attorney at Nichols Kaster, PLLP. She represents individuals in employment and civil rights litigation.

NOTES

[1] Congressional Record—Senate, S627 (2/1/2022).

[2] "The growing use of mandatory arbitration," Economic Policy Institute (EPI), 4/6/2018, *https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barredfor-more-than-60-million-american-workers/*.

[3] Congressional Record—Senate, S627 (2/1/2022).

[4] *Id.*

[5] Forced Arbitration in a Pandemic: Corporations Double Down, American Association for Justice, 10/27/2021, *https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic#:~:text=Despite%20roughly%2060%20million%20workers,in%20forced%20arbitration%20in%202020*.

[6] Katherine V.W. Stone & Alexander J.S. Colvin, Econ. Policy Inst., The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights 17 (2015), *https://www.epi.org/publication/the-arbitration-epidemic/*.

[7] *See* Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 Elder L.J. 453, 478 n.172 (2006).

[8] Minn. Stat. §363A.33, subd. 6.

[9] *SBC Advanced Sols., Inc. v. Commc'ns Workers of Am., Dist. 6*, 794 F.3d 1020, 1027 (8th Cir. 2015) (quotations and citations omitted); *see United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.").

[10] For example, the American Arbitration Association states that arbiters of consumer disputes must "maintain the privacy of the hearing to the extent permitted by applicable law." Nat'l Consumer Disp. Advisory Comm., *Consumer Due Process Protocol*, Principle 12.2, Am. Arbitration Ass'n, *https://www.adr.org/sites/default/files/document_repositoryy/Consumer%10Due%20Process%20Protocol%20(1).pdf*.

[11] Congressional Record—Senate, S626 (2/1/2022).

[12] Congressional Record—Senate, S626 (2/1/2022.)

[13] 9 U.S.C. §401(4) (emphasis added).

[14] 9 U.S.C. §402(a).

[15] Congressional Record—Senate, S626 (2/1/2022).

[16] Senate, S626-27. (2/1/2022).

[17] Congressional Record—Senate, S626 (2/1/2022).

[18] Congressional Record—Senate, S626 (2/1/2022).

[19] Minn. Stat. § 363A.03 subd. 43.

[20] 9 U.S.C. §402 (a).

[21] 9 USCA §401 Note, Sec. 3.

[22] Congressional Record—Senate, S628 (2/1/2022).

[23] Congressional Record—Senate, S628 (2/1/2022).

MAJOR CHANGES COMING TO HIPAA PRIVACY RULES IN 2022

HERE'S WHAT YOU NEED TO KNOW

BY GREGORY J. MYERS, DAVID W. ASP, AND DEVELYN J. MISTRIOTTI
gjmyers@locklaw.com dwasp@locklaw.com djmistriotti@locklaw.com

In January 2021, the U.S. Department of Health and Human Services (HHS) proposed revisions and additions to HIPAA and HITECH's protected health information (PHI) and privacy regulations.[1] Because the final rule is expected to be published soon, and most provisions likely will be effective six months thereafter,[2] health information professionals should expect some or all of the below-noted regulatory changes in 2022. Compliance will be necessary to avoid the risk of sanctions from the Office of Civil Rights.[3] It thus behooves covered entities (as used in this article, "covered entities" is the statutory term that includes health care providers, health plans, and health care clearinghouses) and, to a lesser degree, their business associates (as used in this article, "business associates" is the statutory term that includes entities that provide services or perform functions that involve use or disclosure of PHI to a covered entity) to prepare for a mandatory overhaul of PHI management and processing systems in the coming months. This article details the proposed rule's alterations to the HIPAA landscape and the major implications for health care entities and patients.

CLEARER, STRONGER INDIVIDUAL RIGHTS TO ACCESS PHI; STRICTER REGULATION OF COVERED ENTITIES

Two new definitions clarify the scope of electronic PHI (ePHI) requests. First, to clarify the scope of information within the purview of individuals' rights to access ePHI, HHS proposes to expand on HITECH's definition of "electronic health record" (EHR).[4] The proposed rule provides:

> Electronic health record means an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff. Such clinicians... include, but are not limited to, health care providers that have a direct treatment relationship with individuals, as defined at §164.501, such as physicians, nurses, pharmacists, and other allied health professionals. For purposes of this paragraph, 'health-related information on an individual' covers the same scope of information as the term 'individually identifiable health information' as defined at §160.103.[5]

As HIPAA's definition of "individually identifiable health information" includes non-clinical records,[6] such as billing records, so too would the new definition of EHR. As such, the scope of records covered entities must produce in response to ePHI requests could be broader under the new rule.

Second, to clarify that use of "personal health applications" (PHA) is a recognized method for individuals to request access to ePHI under HIPAA, the proposed rule gives PHA an overdue definition.[7] Under the rule, PHA would mean:

> [A]n electronic application used by an individual to access health information about that individual in electronic form, which can be drawn from multiple sources, provided that such information is managed, shared, and controlled by or primarily for the individual, and not by or primarily for a covered entity or another party such as the application developer.[8]

New and modified rights and regulations make accessing PHI easier for patients and make delivering PHI potentially more burdensome for covered entities. Current regulations require that covered entities give individuals the right to inspect or obtain copies of their PHI.[9] HHS seeks to strengthen the right of access in several ways under the proposed rule.

First, under the proposed rule, a covered entity would be prohibited from establishing policies and safeguards that impose "unjustified" or "unreasonable" barriers to individual access.[10] The proposed rule does not define unjustified or unreasonable, but does clarify that while an entity could continue requiring individuals to provide written access requests, it may not do so in a way that impedes access "when a measure that is less burdensome for the individual is practicable."[11]

Second, HHS seeks to strengthen the right to in-person inspection by permitting individuals to take notes, videos, and photographs, and to use other personal resources to view and capture PHI.[12] This would include instances when PHI "is readily available at the point of care in conjunction with a health care appointment."[13] (Covered entities would not be required to allow an individual to connect a personal device, such as a thumb drive, to the entity's electronic systems.[14]) Covered entities would need to provide access without imposing a fee,[15] and this could include making space available for in-person inspection. Many covered entities may find it more practicable to simply produce the full record set, rather than allow in-person inspection.

Third, HHS proposes to cut the timeline for responding to access requests in half.[16] Currently, covered entities must respond to requests within 30 days of receiving the request,[17] and if an entity cannot provide access or a written denial within 30 days, it may extend the timeline by another 30 days.[18] The proposed rule requires entities to provide PHI "as soon as practicable" but no later than 15 days after receiving the request[19] and gives entities a single, optional 15-day extension.[20]

Fourth, HHS seeks to minimize financial barriers to access by implementing scenario-specific fee allowances and narrowing the scope of permissible fees.[21] Current rules allow entities to charge a "reasonable, cost-based fee" for processing paper or electronic requests.[22] Under the proposed rule, permissible fees would differ by scenario in the following manner.

Reasonable, cost-based fees would be permitted if:	Access would need to be free of charge if:
1 The individual requests a non-electronic copy of their PHI or agrees to receive a summary or explanation.[23]	1 The individual inspects their PHI in-person.[26]
2 The individual requests an electronic copy of their PHI through a non-internet-based method.[24]	2 The individual uses an internet-based method to view or obtain a copy of their ePHI, and the domain is maintained by or on behalf of a covered entity.[27]
3 The individual requests an electronic copy of their PHI be delivered to a third-party through a non-internet-based method.[25]	

GREGORY J. MYERS (William Mitchell College of Law, 1998, magna cum laude) is a partner at Lockridge Grindal Nauen P.L.L.P. (LGN) in Minneapolis, where he has practiced health care law for 24 years.

DAVID W. ASP (University of Minnesota Law School, 2004, cum laude) is a partner at LGN, where he has practiced health care law for 16 years.

DEVELYN J. MISTRIOTTI (University of Minnesota Law School, 2022) is a third-year law student and law clerk at LGN.

What constitutes a "reasonable, cost-based fee" would also change under the proposed rule. At the moment, HIPAA limits reasonable, cost-based fees to costs for: (i) the labor of copying, whether in paper or electronic form; (ii) supplies for creating paper copies or electronic media, if the individual specifically requests portable media; (iii) postage, when individuals request delivery by mail; and (iv) preparing an explanation or summary of PHI, if agreed to by the individual.[28] Under the proposed rule, when entities engage in non-internet-based processing of ePHI requests, a reasonable, cost-based fee would only include the costs of labor for copying and preparing an explanation or summary; it would exclude supply and postage costs.[29]

Fifth, HHS seeks to clarify form and format requirements for responses.[30] Currently, covered entities must provide access in the form and format chosen by the requesting individual, if readily producible in that form and format. If not so producible, entities must provide either a readable hard copy or a different form and format to which the individual agrees.[31] Under the proposed rule, if other "law requires the provision of access in a particular electronic form and format [*e.g.*, access via secure, standards-based API], the [PHI] is deemed readily producible in such form and format...."[32]

Other proposed changes to the individual right of access include requiring covered entities to post approximate access fee schedules online, to provide individualized estimates of fees upon request, and to provide itemized bills for completed requests;[33] limiting the scope of requests directing PHI to third-party designees to only electronic copies of PHI, and expanding that right to allow oral, electronic, or written requests;[34] reducing identity verification burdens on individuals exercising access rights;[35] requiring entities to inform individuals they retain the right to obtain or direct copies of PHI to third parties when a summary of PHI is offered in lieu of a copy;[36] and requiring providers and health plans to respond to certain records requests received from other covered entities when directed by individuals.[37]

NEW RULES FOR USING AND DISCLOSING PHI WITHOUT PATIENT AUTHORIZATION

Unless otherwise specified in its provisions, HIPAA prohibits covered entities from using or disclosing PHI without a patient's express authorization.[38] There are many exceptions that permit or even require entities to use or disclose PHI in the absence of patient consent.[39] The proposed rule would add to and broaden the scope of such exceptions.

First, HIPAA currently permits certain non-patient-authorized uses and disclosures of PHI for purposes of certain "health care operations" (HCO).[40] The current definition of HCO expressly includes population-based activities related to improving health or reducing health care costs; it does not expressly include individual-level care coordination and case management.[41] As such, "some covered entities [have interpreted this definition] to include only *population-based* care coordination and case management,"[42] and HHS proposes to clarify that disclosures related to individual-level care coordination and case management are included in the definition of HCO and, therefore, the HCO exception.[43]

Second, HHS proposes a new exception to the "minimum necessary" requirement.[44] Under the minimum necessary requirement, covered entities are required to use, disclose, or request only the minimum PHI necessary to meet the purpose of said use, disclosure, or request.[45] The proposed rule creates an exception to this requirement for disclosures to, or requests by, a health plan or covered healthcare provider for care coordination and case management purposes at the individual level.[46]

THERE ARE MANY EXCEPTIONS THAT PERMIT OR EVEN REQUIRE ENTITIES TO USE OR DISCLOSE PHI IN THE ABSENCE OF PATIENT CONSENT. THE PROPOSED RULE WOULD ADD TO AND BROADEN THE SCOPE OF SUCH EXCEPTIONS.

Third, HHS seeks to streamline PHI disclosure to, and use by, social services agencies and community-based organizations.[47] The current rule permits, but does not require, covered entities to obtain patient consent before using PHI or disclosing it to entities for health-related social and community-based services as part of treatment activities.[48] The proposed rule would categorically allow disclosures to social services agencies, community-based organizations, home- and community-based service (HCBS) providers, and similar third parties that provide health services to individuals.[49] The purpose of said disclosure would need to be individual-level care coordination or case management, but entities to whom the disclosure is made would not need to be healthcare providers covered by HIPAA.[50]

Fourth, many HIPAA provisions allow providers to use or disclose PHI pursuant to "the exercise of [their] professional judgment."[51] Encouraging providers to liberally use or disclose PHI to assist individuals experiencing substance use disorder, mental illness, or in emergency circumstances, HHS proposes to replace the "exercise of professional judgment" standard with a more lenient "good faith" standard.[52] Under the new rule, good faith uses or disclosures would be permitted: (1) to

the individual's personal representatives; (2) when the patient is unable to agree or object to the use or disclosure; and (3) to avert serious threats to health or safety.[53] Notably, whereas the current rule permits PHI use or disclosure to address a "serious and imminent threat" to health or safety,[54] the proposed rule would allow such use or disclosure when the threat is merely "serious and reasonably foreseeable."[55] HHS proposes a presumption that providers comply with good faith requirements absent any evidence of bad faith.[56]

Other proposed changes to rules governing non-patient-authorized PHI use and disclosure include permitting PHI disclosures for Telecommunications Relay Services for individuals who are deaf, hard of hearing, or deaf-blind and for people with a speech disability;[57] and permitting PHI use or disclosure for *all* Uniformed Services personnel when deemed necessary to the proper execution of the Uniformed Services mission by the appropriate command personnel.[58]

ELIMINATING THE REQUIRED NOTICE OF PRIVACY PRACTICES (NPP) TO PATIENTS; CREATING RELATED RIGHTS AND REQUIREMENTS

Currently, providers must obtain a patient's written acknowledgment of receipt of the provider's NPP.[59] Providers who cannot obtain written acknowledgment are required to document reasons for the failure to do so and maintain that document for six years.[60]

Under the proposed rule, there would be no need to obtain written acknowledgment or to retain documentation in the absence of such acknowledgment.[61] Instead, the rule would require that the NPP's header discuss how to access PHI, how to file a HIPAA complaint, and the patient's right to receive a copy of the NPP.[62] The NPP would also need to include the email address and phone number of a person designated to discuss the entity's privacy practices.[63]

CONCLUSION

These changes are coming. Health care providers, health plans, and their business associates should begin planning, in consultation with legal counsel, to update policies, procedures, contracts, and staff training programs related to handling and processing PHI. ▲

NOTES

[1] *Proposed Modifications to the HIPAA Privacy Rule To Support, and Remove Barriers to, Coordinated Care and Individual Engagement,* 86 Fed. Reg. 6446 (1/12/2021) (to be codified at 45 C.F.R. pts. 160, 164) (Proposed Rule). See also Health Insurance Portability and Accountability Act of 1996 (HIPAA); Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH).

[2] *Proposed Rule*, 6448 ("Effective and Compliance Dates").

[3] *Id.*

[4] *Id.* at 6455; *see* 42 U.S.C. §19721(5) (HITECH defining EHR as "an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff.").

[5] *Id.* at 6532 (to be codified at 45 C.F.R. §164.501); *see id.* at 6455 (explaining the addition).

[6] 45 C.F.R. §160.103.

[7] *Proposed Rule*, 6533 (to be codified at 45 C.F.R. §164.501); *see id.* at 6456 (explaining the addition).

[8] *Id.*

[9] 45 C.F.R. §164.524(a)(1).

[10] *Proposed Rule*, 6535 (to be codified at 45 C.F.R. §164.524(b)(1)(ii)); *see id.* at 6458 (explaining the addition).

[11] *Id.* at 6459.

[12] *Id.* at 6535 (to be codified at 45 C.F.R. §164.524(a)(1)(ii); *see id.* at 6457 (explaining the addition).

[13] *Id.* at 6457.

[14] *Id.* at 6458.

[15] *Id.* at 6457.

[16] *Id.* at 45 C.F.R. §164.524(b)(2)(i); *see id.* at 6459 (explaining the reduction).

[17] 45 C.F.R. §164.524(b)(2)(i).

[18] 45 C.F.R. §164.524(b)(2)(ii)(A)–(B). An extending entity must, in the initial 30-day window, provide the requestor with a written statement of the reason for delay and expected completion date. *Id.*

[19] Where other federal or state law requires an entity to provide access sooner, that shorter period will be deemed "practicable." Proposed Rule, 6459–60. By statute, at least eight states require access provision in less than 30 days, and at least five states give individuals the right to view or inspect the record in fewer than 30 days. *See id.* (CA, CO, HI, LA, MT, TN, TX, and WA).

[20] *Id.* at 6535 (to be codified at 45 C.F.R. §164.524(b)(2)(ii), with subsection 164.524(b)(2)(ii)(A)–(C) listing preconditions to exercising the optional extension, such as preestablishing expedited procedures for handling "urgent" or "high priority" requests).

[21] *See id.* at 6464–67 (explaining permissible fees by scenario).

[22] 45 C.F.R. §164.524(c)(4).

[23] *Proposed Rule*, 6536 (to be codified at 45 C.F.R. § 164.524(c)(4)); *see again id.* at 6464–67 (explaining the modification).

[24] *See id.* at 6466.

[25] *Id.* at 6536 (to be codified at 45 C.F.R. §164.524(d)(6)).

[26] *Id.* (to be codified at 45 C.F.R. §164.524(c)(4)).

[27] *Id.* In this scenario, HHS "intends that such access would be provided without charging a fee to the individual *or the personal health application developer*." *Id.* at 6465 (emphasis added).

[28] 45 C.F.R. §164.524(c)(4).

[29] *Proposed Rule*, 6536 (to be codified at 45 C.F.R. §164.524(c)(4)(i)(B)–(C)); *see id.* at 6466 (explaining the modified definition). This would also be the case when the recipient is a third party. *Id.* at 6536 (to be codified at 45 C.F.R. § 164.524(d)(6)).

[30] *See id.* at 6461 ("Addressing the Form of Access").

[31] 45 C.F.R. §164.524(c)(2)(i).

[32] *Proposed Rule*, 6535 (to be codified at 45 C.F.R. §164.524(c)(2)(iii)).

[33] *Id.* at 6538 (to be codified at 45 C.F.R. §164.525); *see id.* at 6467–68 (explaining the additions).

[34] *Id.* at 6536 (to be codified at 45 C.F.R. §164.514(d)(1)); *see id.* at 6492–93 (explaining this modification is a codification of the decision in *Ciox v. Azar*, 435 F. Supp. 3d 30 (D.D.C. 1/23/2020)).

[35] *Id*. at 6534 (to be codified at 45 C.F.R. §164.514(h)(2)(v)); *see id*. at 6493 (explaining the adjustment).

[36] *Id*. at 6536 (to be codified at subsections 164.524(c)(2)(iv)(B) and 164.524(d)(4)(ii)); *see id*. at 6464 (explaining the addition).

[37] *Id*. at 6537 (to be codified at 45 C.F.R. §164.514(d)(7)); *see id*. at 6491–92 (explaining the addition).

[38] 45 C.F.R. §164.502(a).

[39] *See, e.g.*, 45 C.F.R. §164.502(a)(1)–(4).

[40] 45 C.F.R. §164.506.

[41] 45 C.F.R. §164.501.

[42] *Proposed Rule*, 6472 (under "Amending the Definition of [HCO] To Clarify the Scope of Care Coordination and Case Management").

[43] *Id*. at 6532–33 (to be codified at 45 C.F.R. §164.501); *see id*. at 6472–73 (explaining the modification).

[44] *Id*. (to be codified at 45 C.F.R. §164.502(b)(2)(vii)); *see id*. at 6473–74 (explaining the addition).

[45] 45 C.F.R. §164.502(b)(1). Currently, the following exceptions apply: (1) Disclosures to, or requests by, a health care provider for treatment purposes are excluded from the minimum necessary standard; (2) Disclosures to the patient of their own information; (3) Uses and disclosures made pursuant to an individual's authorization; (4) Disclosures to HHS when disclosure of information is required under the Privacy Rule for enforcement purposes; and (5) Uses or disclosures that are required by other law. 45 C.F.R. § 164.502(b)(2).

[46] *Proposed Rule*, 6533 (proposed at subsection 164.502(b)(2)(vii)).

[47] *Id*. at 6533 (to be codified at 164.506(c)(6)); *see id*. at 6476 (explaining the modification under "Proposal").

[48] 45 C.F.R. §164.506(b)(1).

[49] *Proposed Rule*, 6533 (to be codified at 164.506(c)(6)).

[50] *Id*.

[51] *See* 45 C.F.R. §§164.502(g)(3)(ii)(C), 164.510(a)(3), 164.510(b)(2)(iii), 164.510(b)(3), and 164.514(h)(2)(iv).

[52] *Proposed Rule*, 6475–84 (explaining the adjustment in the five subsections noted in footnote 51, *supra*).

[53] *Id*.

[54] 45 C.F.R. §164.512(j)(1)(i)(A).

[55] *Proposed Rule* 6533 (to be codified at 45 C.F.R. § 164.512(j)(1)(i)(A)); *see id*. at 6482–83 (explaining the modifications).

[56] *Id*. (to be codified at 45 C.F.R. §164.502(k)).

[57] *Id*. at 6534 (to be codified at 45 C.F.R. §164.512(m)); *see id*. at 6486–87 (explaining the addition).

[58] *Id*. (to be codified at 45 C.F.R. §164.512(k)(1)); *see id*. at 6487–88 (explaining the modification).

[59] 45 C.F.R. §164.520.

[60] *See* 45 C.F.R. §§164.520(e), 164.530(j)(2).

[61] *See Proposed Rule*, 6534 (proposed subsection 164.520); *id*. at 6484–86 (explaining the deletion and following additions, *infra*).

[62] *Id*. (to be codified at 45 C.F.R. §164.520(b)(1)(iv)(G)).

[63] *Id*.

LANDMARKS IN THE LAW

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

Criminal Law
JUDICIAL LAW

6th Amendment: Covid limitations did not violate right to a public trial. Appellant faced a jury trial for murder and arson. His trial was delayed due to covid-19. Per the Minnesota Supreme Court's executive orders, the district court created a covid safety plan that allowed the district court to recommence jury trials. The plan took notice of the resources and capacity of the court facilities, required social distancing, and allowed the public and media to observe proceedings via ITV from other rooms within the courthouse. Given the setup of the courtroom in question, public viewing within the actual courtroom itself was not possible. Appellant did not object to any of the covid-related trial restrictions, and his counsel acknowledged the need for social distancing. After the trial, the jury found appellant guilty on all counts. On appeal, appellant argues the covid restrictions violated his 6th Amendment right to a public trial.

First, the Supreme Court finds the closure did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." The Court looks to *State v. Benton*, 858 N.W.2d 535 (Minn. 2015), in which the defendant argued that a courtroom closure he requested violated his right to a public trial. In that case, the court recognized that a violation of the right to a public trial is a form of structural error, but noted that reversal is not automatic when such a violation occurs. Instead, the court *may* exercise its discretion to reverse a conviction, *if* the closure seriously affected the fairness, integrity, or public reputation of judicial proceedings. Thus, the Court holds that, whether the error is affirmatively invited or simply unobjected to, the Court will not exercise its discretion to grant relief to correct the unpreserved public trial right structural error unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Here, the covid protocols were carefully considered and allowed the trial to proceed without further extended delays. The Court sees no reason why a failure to correct the alleged error would cause the public to seriously question of fairness and integrity of the judicial system. Thus, the Court finds it is not permitted to exercise its discretion to grant appellant's requested relief. Appellant's conviction is affirmed. ***Pulczinski v. State***, 977 N.W.2d 347 (Minn. 4/6/2022).

Shoplifting: Material manufactured for lawful purpose but modified to assist a shoplifter was "designed" for an unlawful purpose. Appellant was caught by police with unpaid merchandise from two stores in her bag, with aluminum foil wrapped around the antitheft sensors. After a jury trial, appellant was convicted of possessing a shoplifting device. The district court denied her petition for postconviction relief. Minn. Stat. §609.521(b) prohibits possessing "any device, gear, or instrument designed to assist in shoplifting or defeating an electronic surveillance system with intent to use the same to shoplift and thereby commit theft." Appellant argues her conviction should be reversed because the state failed to prove that aluminum foil was designed by the original manufacturer for shoplifting.

The Minnesota Court of Appeals rejects appellant's interpretation of the statute, which would require that the original design of the item in question be to assist in shoplifting. Any raw material, such as aluminum foil, can be designed for one purpose by the manufacturer but thereafter altered by a user for an altogether different purpose. It is the altered design that is relevant. The district court is affirmed. ***Douglas v. State***, 973 N.W.2d 925 (Minn. 4/18/2022).

Interference with privacy: Recording a woman in the same room does not amount to using a recording device "through the window or any other aperture" of a dwelling. Appellant spent the night with a woman at her home. During an investigation into the woman's claims that appellant sent naked pictures from her phone to his own phone, without her consent, appellant told police he also took a nude video of the woman while in bed with her. He pleaded guilty to interference with privacy. Prior to sentencing, appellant moved to withdraw the plea, but his motion was denied and the court of appeals affirmed.

The Supreme Court emphasizes that, while voyeurism has evolved given rapid advances in technology, it is not the Court's role to determine what types of voyeurism *should* be criminalized, only what types *are* criminalized

under existing law. As is relevant here, Minn. Stat. §609.746, subd. 1(b), makes it a crime to (1) enter another's property; (2) "surreptitiously... use[] any device for... recording... sounds or events through the window or any other aperture of a house or place of dwelling of another"; and (3) do so with intent to intrude upon or interfere with the privacy of a member of the household. The parties disagree as to the meaning of "aperture." The state argues that a camera can satisfy this requirement, but the Supreme Court disagrees. The statute requires that the aperture be "of a house or place of dwelling of another," meaning that the aperture belongs to or is connected to the house or dwelling.

Reluctantly, the court concludes that appellant's guilty plea is not accurate, because the plain language of section 609.746, subd. 1(b), does not apply to his conduct, recording a naked woman without her consent while in the same room as the woman. ***State v. McReynolds***, 973 N.W.2d 314 (Minn. 4/27/2022).

Exoneration compensation: Vacation of conviction due to change in law is not "exoneration." Appellant was convicted in 2010 of being a felon in possession of a firearm after holding a woman against her will with an air-compressed BB gun. His conviction was vacated after *State v. Haywood*, 886 N.W.2d 485 (Minn. 2016), held that an air-compressed BB gun is not a "firearm" under the felon-in-possession statute. Appellant petitioned for an order determining he was eligible for compensation based on exoneration, but his petition was denied by the district court and court of appeals.

The Supreme Court finds appellant's conviction was not vacated "on grounds consistent with innocence," as required by Minn. Stat. §590.11. To be "exonerated" under section 590.11, as is relevant here, a person's conviction must be vacated by a court on grounds consistent with innocence, that is, exonerated based on factual innocence or exonerated because a conviction was vacated or reversed and there is evidence of factual innocence.

A vacated conviction alone is insufficient under section 590.11—there must also be a showing of "factual innocence." The court notes "the Legislature used a very specific form of 'innocence' to ascribe meaning to 'grounds consistent with innocence': 'any evidence of *factual* innocence.'" The Court notes that the plain and ordinary meaning of "factual innocence" is "the state of being not guilty of a crime (innocence) but only when the reason is restricted to or based on facts (factual)."

Here, appellant's claim of innocence is not based on the facts. His case turns on a legal consideration, the statutory meaning of "firearm." The facts of his case did not change and his conviction was vacated based on a decision that the state did not have a *legal* basis to charge an individual with unlawful possession of a firearm based on an air-powered BB gun. Thus, because appellant did not demonstrate he was exonerated on grounds consistent with innocence, he was not "exonerated" under section 590.11. ***Kingbird v. State***, 973 N.W.2d 633 (Minn. 5/4/2022).

Restitution: Court must consider the value of economic benefits conferred on a victim in calculating victim's economic loss. Appellant was disqualified from participating as a medical assistance provider due to a 2010 conviction for medical assistance fraud. From 2012 to 2015, however, she formed, owned, and operated eight agencies and businesses that billed the Department of Human Services (DHS) for nursing services. She pleaded guilty to racketering in 2016, admitting her agencies billed DHS for services provided to clients eligible for medical assistance programs, that she billed DHS for more services than were provided, and that her agencies gave clients kickbacks and other incentives. The district court ordered appellant to pay DHS $2.64 million in restitution. In her postconviction petition, Appellant argues that $1.1 million of the $2.64 million her agencies received from DHS was used to pay for nursing services provided to Medicaid beneficiaries, so that amount should not be included in the restitution award. The district court denied her petition and the court of appeals affirmed.

The Supreme Court holds that the district court must consider the value of economic benefits a defendant confers on a victim when calculating the amount of economic loss the victim sustained. The restitution statute includes a list of factors to consider when determining the proper amount of restitution, which includes the amount of economic loss sustained by the victim as a result of the offense. Minn. Stat. § 611A.045, subd. 1(a)(1). "The amount of economic loss" is not defined in the statute. Looking to dictionary definitions and prior case law interpreting the term "result," the Court finds that "the amount of economic loss sustained by the victim as a result of the offense" "is the total or aggregate diminution or deprivation of money, goods, or services that a victim suffers as a direct result or natural consequence of the defendant's crime." Implicit in this definition is a requirement that the court consider what benefits, if any, a victim received from the defendant, as such benefits would offset a loss.

Here, appellant's agencies were ineligible for any medical assistance payments from DHS, even though some services may have been provided to otherwise eligible recipients. Finding support in federal case law, the Court concludes that, because appellant was disqualified from receiving *any* medical assistance payments, there was no benefit to DHS in disbursing funds to providers who were not entitled to receive them. The Court holds the district court did not abuse its discretion in calculating DHS's economic loss was the full $2.64 million it paid to appellant's agencies. ***State v. Currin***, No. A20-0603, 2022 WL 1654376 (Minn. May 25, 2022).

Juvenile law: Juvenile is "found to have committed a misdemeanor" in a prior case if the court accepted the juvenile's guilty plea and found the allegations were proved beyond a reasonable doubt. In 2017 appellant, a juvenile, pleaded guilty to fifth-

degree assault. The district court accepted her plea and continued the case without adjudication for six months, after which the case was dismissed. In 2021, the state filed a delinquency petition against appellant alleging misdemeanor disorderly conduct. When committed by a juvenile, disorderly conduct is generally treated as a petty offense, unless, among other exceptions, the juvenile was "found to have committed a misdemeanor" in a prior matter. Minn. Stat. §260B.007, subd. 16(c)(3). The district court accepted appellant's guilty plea to misdemeanor disorderly conduct and adjudicated her delinquent.

The Minnesota Court of Appeals is asked to determine the meaning of "found" in section 260B.007, subd. 16(c)(3), which is not defined in the juvenile delinquency statutes and is subject to more than one reasonable interpretation given its various uses throughout the statutes. The court notes that the statute specifically requires that the juvenile was "found to have *committed*" a prior misdemeanor, not that the juvenile was *adjudicated* delinquent for a prior misdemeanor. In addition, the juvenile delinquency procedural rules also distinguish between a court's finding that a juvenile committed an offense and adjudicating a juvenile delinquent.

Here, because appellant pleaded guilty to fifth-degree assault and the district court found the charge was proved beyond a reasonable doubt, the district court properly concluded she was "found to have committed a misdemeanor" in a previous matter and did not err by adjudicating appellant delinquent for a misdemeanor in this case. ***Matter of Welfare of A.J.S.***, No. A21-1046, 2022 WL 1751410 (Minn. Ct. App. 5/31/2022).

Samantha Foertsch
Bruno Law PLLC
samantha@brunolaw.com

Stephen Foertsch
Bruno Law PLLC
stephen@brunolaw.com

Employment & Labor Law

JUDICIAL LAW

Overtime wages; offer of judgment accepted. A claimant who timely accepted an offer of judgment was not entitled to proceed with a lawsuit against his employer, and his claim for overtime wages under the Fair Labor Standards Act was barred. Affirming a lower court ruling, the 8th Circuit Court of Appeals held that timely acceptance of the offer of judgment precluded the claim, and the trial court did not abuse its discretion in denying a recusal motion. ***Skender v. Eten Isles Corp.***, 33 F.4th 515 (8th Cir. 05/04/2022).

Workers' compensation; company exempt from liability. A locomotive engineer who brought a negligence claim against a company that had contracted with his employer was not entitled to proceed with his action. The 8th Circuit held that because the claimant had received a workers' compensation settlement from his employer, the other contracting entity was exempt from liability on grounds that the injured party was covered by his immediate employer. ***Blanton v. The Kansas City Southern Railway Company***, 33 F.4th 979 (8th Cir. 05/10/2022).

Unemployment benefits; employee denied benefits after quitting. An employee whose job included driving for his employer was denied unemployment compensation benefits after he quit his job because he had lost his commercial driver's license. A decision of a ULJ, in the appellate court, held that the employee did not have "good reason attributable to the employer" solely because he feared losing his job at some time in the future. ***Feist v. City of Plymouth***, 2022 WL 1210267 (Minn. Ct. App. 04/25/2022) (unpublished).

Unemployment benefits; pair of decisions reversed. A pair of decisions by a ULJ with DEED were reversed and remanded.

A request for reconsideration was allowed based upon evidence submitted by the employee post-hearing, which contradicted testimony from the owner of the business in the initial hearing. The appellate court held that the ULJ's declination of the requested reconsideration constituted an abuse of discretion because the new evidence presented by the employee for reconsideration showed a material difference from the employer's testimony previously offered at the hearing. ***Viarden v. Eclipse Select, MN, LLC***, 2022 WL 1210265 (Minn. Ct. App. 04/25/2022) (unpublished).

An employee who filed a late appeal was entitled to remand and a new hearing because a ULJ did not consider the *Murack* factors under *In re Murack,* 957 N.W.2d 1214 (Minn. App. 2021). The court of appeals reversed the ULJ decision and directed a new hearing on those factors. ***Addow v. Monarch Bus Services, Inc.***, 2022 WL 1210153 (Minn. Ct. App. 04/25/2022) (unpublished).

Unemployment benefits; calling DEED suffices. Another employee whose claim was denied was entitled to a new hearing under the *Murack* "substantial compliance" standard. The appellate court held that by calling DEED to inquire about his case and attempting to appeal in a timely manner, the employee provided adequate notice of a prospective appeal, constituting "substantial compliance" under Minn. Stat. §268.101 regarding timely appellate timetable, and the case was remanded for a new hearing. ***Thomas v. Prime Pork, LLC***, 2022 WL 1211191 (Minn. Ct. App. 04/25/2022) (unpublished).

Marshall H. Tanick
Meyer, Njus & Tanick
mtanick@meyernjus.com

Environmental Law

ADMINISTRATIVE ACTION

EPA Proposes Section 401 water quality certification improvement rule. In June the U.S. Environmental Protection Agency (EPA) published its proposed rule to replace and update the procedural requirements for water quality certification under Section 401 of the Clean Water Act (CWA). 40 C.F.R. §121. EPA reviewed and reconsidered the 2020 CWA Section 401 Certification Rule (2020 Rule) in response to the 1/20/2021 Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." The proposed rule will update the previous regulations to be more consistent with the original statutory text of the CWA.

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

During the previous administration, EPA issued the 2020 Rule, which, among other things, narrowed the scope of Section 401 certification to be based on the potential for a project to result in actual point source discharge into waters of the United States, rather than the overall activity of which the discharge is a part, ultimately limiting the authority of states and tribes to certify projects and protect water resources within their jurisdiction.

The newly proposed "Section 401 Water Quality Certification Improvement Rule" does keep some principles of the 2020 Rule, but bolsters the role of states, territories, or authorized tribes in the water quality certification decision-making process. At the same time, the proposed rule issues many significant changes, including but not limited to: 1) requiring a pre-filing meeting request, in order to engage the project proponents, federal agencies, and certifying authorities early in the process; 2) establishing certain elements for a proper request for certification, to establish an efficient, predictable, and transparent certification process; and, 3) expanding the scope of review for a certifying state when reviewing a request for certification, which would allow the certifying authority to evaluate whether the proposed activity as a whole will comply with water quality requirements within the state.

Ultimately the components included in the proposed rule will empower the states, territories, and tribes in their authority to protect water quality and resources and reaffirm the cooperative federalism established in the CWA. The published proposed rule is open for public comments until 8/8/2022. **Clean Water Act Section 401 Water Quality Certification Improvement Rule**, 87 Fed. Reg. 35318 (6/9/2022).

President Biden uses 1950 Defense Production Act to increase domestic clean energy manufacturing. In early June President Joe Biden issued a set of Memorandums on Presidential Determination, under which he authorized the Department of Energy to use the Defense Production Act (DPA) to increase domestic manufacturing of clean-energy technologies, specifically for: solar energy; heat pumps; building insulation; clean electricity-generated fuels; and critical power grid infrastructure components.

The DPA, which was passed by Congress in 1950 and can be invoked by the president of the United States, has the primary purpose of expediting and expanding the supply of materials and services needed to promote the national defense of the United States. One of the tools most utilized by the government under the DPA is making advance market commitments. These advance market commitments are essentially promises to buy a certain volume of a product in order to ensure its production. For each of the five areas addressed by President Biden, he authorized the Department of Energy to either make purchases, or make advance market commitments to purchase, the products needed to address each area from domestic producers.

The rationale for investing in each of the areas addressed by President Biden's memorandums is to boost the domestic production of such materials, which would likely result in an increase in the domestic supply chains. These increases in domestic supply chains would likely result in more affordable clean energy alternatives across the United States, while also lessening the country's dependence on fossil fuels, both domestic and imported.

In his Memorandum on Presidential Determination addressing solar energy, President Biden directed the Department of Energy to assist in expanding the domestic production capability for solar photovoltaic (PV) modules and module components. Solar PV energy is one of the most affordable new electricity sources in many parts of the United States, but the current levels of domestic PV production does not meet demand.

In his Memorandum on Presidential Determination addressing heat pumps, President Biden directed the Department of Energy to assist in expanding the domestic production capability for electric heat pumps to be used in heating homes and other buildings across the country. As opposed to gas furnaces typically found throughout the U.S., electric heat pumps can both heat and cool a building by utilizing heat from the air or ground and then dispersing it into or out of a room. Electric heat pumps are not widely used throughout the U.S., though demand is currently growing.

In his Memorandum on Presidential Determination addressing building insulation, President Biden directed the Department of Energy to assist in expanding the domestic production capability for modern building insulation. The current level of production of building insulation in the US meets the demand for new buildings, but it's insufficient to address the replacement of insulation used in older homes and buildings. Modern insulation is more efficient at maintaining temperatures in buildings, and updating the insulation used in older buildings will reduce the demand for energy to heat or cool buildings, which will ease the current demand for energy across the U.S. while also lowering energy costs nation-wide. This reduction in energy demand would help the U.S. move toward energy independence.

In his Memorandum on Presidential Determination addressing clean electricity-generated fuels, President Biden directed the Department of Energy to assist in expanding the domestic production capability for electrolyzers, fuel cells, and platinum group metal (PGM), which are all used in clean hydrogen. By increasing the use of clean hydrogen to address the nation's energy needs, the U.S. would be able to move away from imported fossil fuels and further solidify its energy independence.

Finally, in his Memorandum on Presidential Determination addressing critical power grid infrastructure components, President Biden directed the Department of Energy to assist in expanding the domestic production capability for transformers and electric power grid components. An expansion of the domestic production of transformers and electric power grid components would not only enable the U.S. to have more reliable electric power systems across the country but would also allow for the U.S. to increase the current use of electric power systems, which in turn would enhance domestic energy security and decrease the vulnerability of U.S. infrastructure.

Presidential memorandums: *Memorandum on Presidential*

Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Solar Photovoltaic Modules and Module Components (June 6, 2022); *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Electric Heat Pumps* (6/6/2022); *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Insulation* (6/6/2022); *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Electrolyzers, Fuel Cells, and Platinum Group Metals* (6/6/2022); *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Transformers and Electric Power Grid Components* (6/6/2022).


Jeremy P. Greenhouse
The Environmental Law Group
jgreenhouse@envirolawgroup.com


Jake Beckstrom
Vermont Law School, 2015
jbmnusa@gmail.com


Vanessa Johnson
The Environmental Law Group, Ltd.
vjohnson@envirolawgroup.com


Erik Ordahl
Barna, Guzy & Steffen
eordahl@bgs.com

Federal Practice
JUDICIAL LAW

Arbitration; waiver; prejudice not a requirement. In May-June 2021, this column noted an 8th Circuit decision finding no waiver of a right to arbitrate by the defendant where the plaintiff had not shown prejudice.

The Supreme Court recently vacated and remanded that decision and resolved a circuit split, finding that "prejudice is not a condition of finding... that a party... waived its right... to compel arbitration." ***Morgan v. Sundance, Inc.***, 992 F.3d 711 (8th Cir. 2021), *reversed*, ___ S. Ct. ___ (2022).

FCRA; standing; "injury in fact;" "concrete harm." The 8th Circuit held that a plaintiff had not alleged an "injury in fact" or "concrete harm" sufficient to support her multiple FCRA claims. ***Schumacher v. SC Data Center, Inc.***, 33 F.4th 504 (8th Cir. 2022).

CAFA; remands; amount in controversy. The 8th Circuit affirmed a district court's remand of a putative class action that had been removed pursuant to CAFA, where the parties agreed that there were $2.5 million in actual damages and $800,000 in attorney's fees at stake, agreeing with the district court that the value of any prospective injunctive relief was "speculative," meaning that the defendant had not met its burden to establish the required amount in controversy. ***Lizama v. Victoria's Secret Stores, LLC***, ___ F.th ___ (8th Cir. 2022).

Judge Tostrud remanded a putative class action that had been removed pursuant to CAFA, finding that defendants' notice of removal did not include a "plausible allegation" that the amount in controversy exceeded $5 million. ***Dahir v. Cresco Capital, Inc.***, 2022 WL 1751270 (D. Minn. 5/31/2022).

Fed. R. Civ. P. 702; treating therapist. Affirming judgment for an employee in an employment discrimination case, the 8th Circuit reiterated that non-retained experts, including treating healthcare providers, are not subject to the requirements of Fed. R. Civ. P. 702, as long as they do not "testify outside the realm of treatment such as causation of a condition." ***Gruttemeyer v. Transit Authority***, 31 F.4th 638 (8th Cir. 2022).

Preliminary injunction affirmed; "fair chance of prevailing" standard applied. Affirming the entry of a preliminary injunction by Judge Brasel, the 8th Circuit rejected the defendant's argument that the plaintiff's likelihood of success should be considered under a "more likely than not" standard, and instead held that the "fair chance of prevailing" standard controlled. ***Sleep Number Corp. v. Young***, ___ F.4th ___ (8th Cir. 2022).

Argument waived when raised for the first time on appeal. The 8th Circuit found that the appellant had waived an argument that was "advanced for the first time on appeal." ***Kelley v. Safe Harbor Managed Account 101, Ltd.***, 31 F.4th 1058 (8th Cir. 2022).

Motion for extension of time to apply for attorney's fees denied. Finding no "good cause" or "excusable neglect," Judge Wright denied defendants' motion to extend their time to move for attorney's fees, finding that defendants' "mistake of law" "cannot constitute excusable neglect." ***Core & Main, LP v. McCabe***, 2022 WL 1598230 (D. Minn. 5/20/2022).

Motion to dismiss for lack of personal jurisdiction granted. Granting the defendant's motion to dismiss for lack of personal jurisdiction, Judge Doty found that the defendant was not subject to personal jurisdiction in Minnesota despite a number of contacts with the state, where the alleged acts underlying the action occurred in Ohio. ***PolyTek Surface Coatings, LLC v. Ideal Concrete Coatings, Co.***, 2022 WL 1409891 (D. Minn. 5/4/2022).

Sanctions and more sanctions. Judge Wright found multiple counsel and their respective law firms jointly and severally liable for almost $17,000 in fees for a "frivolous attempt" to circumvent prior rulings that "wasted judicial resources." ***Satanic Temple, Inc. v. City of Belle Plaine***, 2022 WL 1639514 (D. Minn. 5/24/2022).

Magistrate Judge Leung sanctioned the defendant $1,000 where it produced more than 35,000 documents under a "blanket" attorney's-eyes-only designation, finding that the blanket designation violated the "implicit duty of good faith" under Fed. R. Civ. P. 26(c). ***CellTrust Corp. v. ionLake, LLC***, 2022 WL 1553558 (D. Minn. 5/17/2022).

Magistrate Judge Wright awarded defendants attorney's fees pursuant to Fed. R. Civ. P. 37(a)(5)(B) in an amount to be determined for having opposed a motion to compel where the plaintiff "failed to meet and confer" and filed a motion for sanctions that was "moot." ***Evans v. Krook***, 2022 WL 1537994 (D. Minn. 5/16/2022).

Fed. R. Civ. P. 45(f); motion to quash subpoena transferred. Where a third party objected to a deposition subpoena and then moved to quash the subpoena, and the party that issued the subpoena opposed the motion to quash and also asked that the motion be transferred to the Southern District of Texas, Magistrate Judge Bowbeer granted the request for a Rule 45(f) transfer to the Southern District of Texas, finding that the underlying litigation was "complex," the trial judge was familiar with the "complex issues in the case," and that a motion to compel the production of documents from the third party was already pending in that court. ***In Re: Subpoena Served on NonParty Winfield United dated Mar. 7, 2022***, 2022 WL 1515461 (D. Minn. 5/13/2022).


Josh Jacobson
Law Office of Josh Jacobson
joshjacobsonlaw@gmail.com

Intellectual Property
JUDICIAL LAW

Patents: "Fair chance" is the appropriate standard for likelihood of success for

many preliminary injunctions. The United States Court of Appeals for the 8th Circuit recently held that a district court did not err by granting a motion for preliminary injunction enjoining further prosecution or amendment of patent applications in dispute. Sleep Number Corporation sued defendants Steven Young, Carl Hewitt, and UDP Labs, Inc. for ownership of the inventions claimed in UDP's patent applications. Sleep Number alleged that defendants Young and Hewitt violated their consulting agreements with Sleep Number, which required the assignment of the rights to inventions formed or developed during the consulting period. During the consulting period, Young and Hewitt created UDP and filed a provisional patent application. After Young and Hewitt terminated their consulting agreements with Sleep Number, they filed another provisional application that included material from the first provisional application. They filed additional applications claiming priority to the two provisional applications. After Sleep Number filed suit, UDP filed requests with the USPTO to remove the priority claim to the first provisional application in its subsequent applications. Sleep Number sought a preliminary injunction to prevent DCI from further prosecuting or amending the patent applications at issue. The district court entered the preliminary injunction.

On appeal, the 8th Circuit panel considered the *Dataphase* factors, noting that the most significant factor was the probability of the movant's success. When evaluating Sleep Number's likelihood of success, the 8th Circuit clarified that the appropriate standard was a "fair chance" of prevailing. Unlike an individual seeking a preliminary injunction against the enforcement of statutes and regulations, which is subject to the "more likely than not" standard, a "fair chance" movant does not need to show more than a 50 percent chance of succeeding. The 8th Circuit explained that this distinction between standards results from the high degree of deference that statues and regulations receive. The court continued by noting that the inability of Sleep Number to participate in the patent prosecution process, the requests for priority amendment by UDP, and the fact that Sleep Number would be subject to the USPTO's discretion regarding the ability to make changes to the applications were sufficient to demonstrate a threat of irreparable harm absent a final Office Action issued in the applications. The 8th Circuit concluded by affirming that the remaining factors also weighed in Sleep Number's favor. ***Sleep No. Corp. v. Young***, 33 F.4th 1012 (8th Cir. 2022).

Trademark: The doctrine of laches is triggered by actionable infringement claims. The United States Court of Appeals for the 8th Circuit recently held that a district court erred by failing to consider the six likelihood-of-confusion factors when it granted summary judgment based on the doctrine of laches. A.I.G. Agency, Inc. sued American International Group, Inc. for common-law trademark infringement and unfair competition related to the "AIG" trademark. Agency began using the AIG mark in Missouri in 1958 in relation to insurance broker services. The earliest possible date International first used the AIG mark was 1968. International obtained a federal trademark registration for the mark in 1981. International sent Agency letters twice, demanding that Agency cease using the AIG mark. Agency responded both times by asserting its right to use the mark in Missouri and Illinois due to its earlier first date of use in those locations. In a third letter, International stated that it would only take legal action if Agency used the mark outside of specific counties in Missouri.

Starting around 2012, Agency alleged, International began a more aggressive advertising campaign that led to a notable increase in customers confusing Agency with International. Agency sued International in 2017. International asserted the doctrine of laches and moved for summary judgment. The district court found that both parties had been knowingly operating with the same mark in the same markets for decades and that Agency had knowledge of the risk of consumer confusion from the date of International's first letter.

On these findings and the basis of laches, the district court granted International's motion for summary judgment. The 8th Circuit reviewed the laches finding and focused on the doctrine of progressive encroachment in relation to inexcusable delay in asserting a claim. Under the doctrine of progressive encroachment, the period of delay relevant for laches begins when the plaintiff has an "actionable and provable" trademark infringement claim. A trademark infringement claim is "actionable and provable" where a plaintiff can demonstrate a likelihood of confusion under a six-factor analysis. A defendant must demonstrate that the plaintiff could have shown a likelihood of confusion under the six-factor analysis at a time point sufficiently far in the past to constitute inexcusable delay. The 8th Circuit noted that the district court did not conduct the six-factor analysis to determine the likelihood of confusion for the issue of progressive encroachment. Genuine disputes of material fact existed that precluded summary judgment. The case was reversed and remanded for further proceedings. ***A.I.G. Agency, Inc. v. Am. Int'l Grp., Inc.***, 33 F.4th 1031 (8th Cir. 2022).

Joe Dubis
Merchant & Gould
jdubis@merchantgould.com

Katherine F.K. Mares
Merchant & Gould
kmares@merchantgould.com

Real Property
JUDICIAL LAW

Zoning ordinance did not prohibit dock installation. The Minnesota Court of Appeals reversed a district court's grant of partial summary judgment and injunctive relief in favor of the city that was premised on the conclusion that a 2006 city ordinance prohibited a dock when it was first installed in 2017. In *City of Shorewood*, property owners installed a dock on a parcel of land without a dwelling that was designed to be removed from the lake before winter and then reinstalled in the spring. The city cited the property owners for a zoning violation based on the 2006 code, which forbids installing floating or permanent docks and based on a 2017 amendment to the 2006 code that forbids docks to be built on land without a dwelling on the lot. On appeal, the property owners argued that the district court erred in concluding that the 2006 code prohibited the installation of a dock on the property and further contended that, because their dock was a legal dock under the 2006 code and was first installed before the 2017 amendments, injunctive relief should not have been granted to the city based on the 2017 amendments. The court noted that when a nonconforming use lawfully exists before an adverse zoning change takes effect, constitutional and statutory protections permit the use to continue. The parties agreed that the property owner's dock is not "floating," but they disagreed concerning whether the property owner's dock is "permanent." The court noted the dock that the property owners installed in 2017 and propose to continue using is a seasonal dock. After reviewing the relevant language of the 2006 code, the court concluded that there exists more than one reasonable interpretation of Sec. 1201.03, subd. 14(b), rendering that portion of the 2006 code ambiguous.

The court looked to several well-established dictionary definitions and concluded that the property owners' dock is not one that is "permanent." All agree that the dock is not "floating." Accordingly, the court held that the dock is not prohibited by the 2006 code which prohibits "[d]ocks and wharves, permanent or floating" on parcels such as this one. The court of appeals further held that when the property owners first placed their dock on the property in 2017, the dock was not prohibited by the 2006 code and when the code was amended in 2017, the dock was a pre-existing nonconforming use. The court continued that the city may not "zone out of existence the dock," which was legally placed before the amendments. Thus, the court of appeals ordered that, on remand, the district court is to address any remaining legal or factual issues, including but not limited to whether the landowners' legal nonconforming use has been discontinued, expanded, or materially changed since the initial lawful installation in 2017. ***City of Shorewood v. Sanschagrin***, No. A21-0992, 2022 WL 764223 (Minn. Ct. App. 3/14/2022).

Whether a person qualifies as an "other regular occupant" is a question of fact considering a totality of the relevant circumstances. A person residing with a party to a residential lease can be an "other regular occupant," and thus a "residential tenant" under Minn. Stat. §504B.001, subd. 12, eligible to petition to recover possession of the dwelling unit under Minn. Stat. § 504B.375. In *Quinn*, a tenant who was not listed on the lease remained living in the apartment after her roommate, who was listed on the lease, vacated the apartment and the written lease had expired. The landlord therefore deactivated the tenant's key fob to the apartment. The tenant then petitioned for recovery of possession and the landlord asserted eviction as a counterclaim. A housing-court referee recommended that the district court conclude the tenant was an "other regular occupant" and thus a "residential tenant," entitled to relief under Minn. Stat. §504B.375, ordering the landlord to reactivate the key fob and to pay reasonable attorney's fees and a penalty.

The district court affirmed the determination that the tenant was a "residential tenant" but reversed the award of attorney's fees and penalty. On appeal, the landlord argued that the tenant was not an "other regular occupant" and as such, not entitled to relief as a "residential tenant." First, the court of appeals noted that tenant status can attach to persons who live in a dwelling unit subject to a valid agreement, lease, or contract, in addition to the lessee or renter, and since the tenant's roommate had a valid lease, tenant status could attach to the tenant. Second, the court held that whether a person qualifies as an "other regular occupant" is a question of fact in each case to be ascertained by consideration of a totality of the relevant circumstances and that no single factor is necessarily dispositive. Third, the court determined whether the district court erred in its determination that the tenant was an "other regular occupant" of the apartment under the facts of the case.

The court looked at the duration, continuity, and nature of tenant's occupancy. It determined that the tenant lived continuously in the apartment as her sole residence for more than two years, used the facilities, received mail and visitors there, used the apartment's key fob daily, walked by the concierge daily, and used the common workspace in the building. In short, the tenant lived in the building continuously for a significant period as a residential tenant customarily would.

Next, the court determined that the tenant's not being listed on the lease, nor having sought or obtained the landlord's written consent as required by the lease, weighed against a determination of an "other regular occupant" status. Finally, the court determined that the landlord knew, or reasonably should have known, of the tenant's occupancy, which weighed in favor of an "other regular occupant" status. The court of appeals affirmed the district court's determination that the tenant qualified as an "other regular occupant" and thus a "residential tenant" entitled to relief under Minn. Stat. §504B.375. ***Quinn v. LCM NE Minneapolis Holdings, LLC*** No. A21-1062, 972 N.W.2d.881 (Minn. Ct. App. Apr. 4, 2022).

Mike Pfau
DeWitt LLP
mjp@dewittllp.com

Tax Law
JUDICIAL LAW

30-day filing deadline for tax court review of CDP determination isn't jurisdictional. A North Dakota law firm was one day late filing its petition for review of an unfavorable collection due process (CDP) decision. The tax court dismissed the petition for lack of jurisdiction, reasoning that the 30-day limit was jurisdictional and that it did not have equitable tolling power; the 8th Circuit affirmed. In a unanimous decision, the Supreme Court reversed and held that the 30-day time limit to file a petition for review of a CDP determination is a nonjurisdictional deadline subject to equitable tolling. Taxpayers who are late in seeking U.S. Tax Court review in a CDP case can attempt to persuade the court that equity would be served by tolling. If the court is persuaded the high bar for tolling is met, the court has jurisdiction to toll the 30-day period. ***Boechler, P.C. v. Comm'r***, 142 S. Ct. 1493 (2022).

Taxpayer subject to unauthorized disclosure not required to demonstrate actual damages to be awarded punitive damages. IRC Section 6103 requires the United States to keep tax returns and return information confidential. Congress authorized a private right of action against the United States for violations of this confidentiality requirement, and the statutory right of action spells out available damages. In the case of "willful... disclosure or [a]... disclosure which is the result of gross negligence," those damages can include punitive damages and attorney's fees. IRC 7431.

In this dispute, a taxpayer involved in a collection due process (CDP) hearing fired her initial representative and hired another. The government was timely informed of the change but following the CDP hearing, the IRS erroneously sent the CDP determination to the fired representative. The IRS conceded their erroneous transmission was an unauthorized disclosure of the taxpayer's return information, and the only issue was the taxpayer's damages. In this 12(c) motion for judgment on the pleadings, the court held that even if taken as true, the facts pleaded by the taxpayer could not support a claim of actual damages resulting from the violation. The court went on to hold, however, that the inability to show actual damages did not preclude the taxpayer from recovering punitive damages. The court recognized a circuit split on this question, which involves the interpretation of Section 7431(c). Further, the court held that the taxpayer's allegations were sufficient to suggest the type of recklessness necessary to satisfy the "gross negligence" standard, so the United States was not entitled to judgment on the pleadings on that issue. The court finally held that the question of attorney's fees was premature. ***Castillo v. United States***, 21cv00007 (DF), 3 (S.D.N.Y. 3/28/2022).

Tax court has jurisdiction to determine whether the Voluntary Classification Settlement Program (VCSP) enters into computation of taxes owed. Taxpayers and the IRS do not always see eye-to-eye on the distinction between employees and independent contractors. This disagreement can have significant tax consequences; employers who erroneously classify employees as independent contracts can face stiff tax liability. The VCSP is available for taxpayers who want to voluntarily change the prospective classification of their workers. The program applies to taxpayers who are currently treating their workers as independent contractors and want to prospectively treat the workers as employees. To be eligible for the VCSP, a taxpayer must: (1) have consistently treated the workers as nonemployees; (2) have filed all required Forms 1099, consistent with the nonemployee treatment, for the previous three years; and (3) not currently be under employment tax audit by the Internal Revenue Service (IRS).

In this case, the tax court reasoned that it "has jurisdiction to determine whether the liability is correct in proceedings for determination of employment status.... Because the denial of a taxpayer's eligibility for VCSP directly affects the amounts of tax, the procedures that Congress has established for judicial review of the Commissioner's determinations logically contemplate review of such a denial as one element of the determination." The court "conclude[d] that [the court has] jurisdiction to determine whether the VCSP enters into the computation of petitioner's taxes owed." ***Treece Fin. Servs. Grp. v. Comm'r***, No. 20850-19, 2022 WL 1154154 (T.C. 4/19/2022).

Matter of first impression: Office of Chief Counsel has authority to determine entitlement to innocent spouse relief. In an unusual impasse, the chief counsel rejected a conclusion from the IRS's Cincinnati Centralized Innocent Spouse Operation (CCISO) that a taxpayer was entitled to innocent spouse relief. The chief counsel had referred the issue to the CCISO to make the determination; CCISO is the IRS unit that receives and processes most requests for innocent-spouse relief. The underlying dispute between the taxpayer's ex-spouse and the commissioner was extensive and was mired in litigation for years. This taxpayer's innocent spouse request was on the backburner as that litigation progressed. Finally, the underlying liability issues were settled, and the innocent spouse issue again took center stage. The tax court was forced to decide whether the chief counsel or the CCISO spoke for the IRS. In an extensive and wide-ranging opinion by Judge Holmes, the court determined that the chief counsel has the final authority to concede or settle an innocent spouse defense raised for the first time in a tax court deficiency proceeding. For readers interested in an overview of innocent spouse relief, this opinion provides a readable primer. ***DelPonte v. Comm'r***, No. 1144-05, 2022 WL 1421068 (T.C. 5/5/2022).

Preemptive protective order not available in property tax challenge. A property owner asked the tax court for a protective order limiting the manner in which the county may use allegedly proprietary information the property owner had not yet furnished the county, but that the property owner planned to furnish. The county had not requested the information, and in fact had not yet promulgated discovery. The property owner also sought an award of costs, including

attorney fees. The court denied the request, reasoning that, on the current record, the property owner had not demonstrated good cause for the order. The court concluded that it "will not issue a protective order simply because one party *believes* its opponent will want certain information (especially where the opponent affirmatively states it currently does not)." ***G&I VIII 605 Waterford LLC v. Cnty. of Hennepin***, No. 27-CV-21-12131, 2022 WL 1654748 (Minn. Tax 5/20/2022).

■ **Failure to appear results in affirmance of assessment.** A property owner contested the assessed value of a property in Washington County. Petitioner did not appear for the remote trial and because Minnesota statute provides that "[i]n case no appellant shall appear the Tax Court shall enter its order affirming the order of the... appropriate unit of government from which the appeal was taken" (Minn. Stat. §271.06, subd. 6(a)), the tax court affirmed the county's assessment. ***Costco Wholesale Corp. v. Cnty. of Washington***, No. 82-CV-20-1921, 2022 WL 1744693 (Minn. Tax 5/24/2022).

■ **Sales and use tax: Credit card surcharge disclosed to customers as separate amount subject to sales and use tax.** Kurt Martin owns real property that he rents through sites such as AirBnB and VRBO. Martin also occasionally rents property directly to customers. Those customers who rent directly from Martin and pay with a credit card are subject to a 4% surcharge. Mr. Martin asserted that the credit card surcharge should be exempt from taxation under Minn. Stat. §297A.61, subd. 7(b)(2). Subdivision 7(b)(2) provides an exception from "sales price" for "interest, financing, and carrying charges from credit extended on the sale of personal property or services" when certain requirements are met. The court articulated three requirements for exemption under 7(b)(2): First, the item in question must be interest, financing, or carrying charges. Second, the item in question must be "from credit extended on the sale of personal property or services." Third, the item in question must be "separately stated." Minn. Stat. §297A.61, subd. 7(b)(2). The credit card surcharges at issue here were separately stated, but because the surcharges were admittedly not from credit extended on the sale of personal property or services, the surcharges were not excluded from the sales price. The court granted the commissioner's request for summary judgment. ***Martin v. Comm'r***, No. 9499-S, 2022 WL 1262230 (Minn. Tax 4/25/2022).

■ **Property tax: Third-party operation of a cafeteria does not render campus "income-producing."** Like many corporate campuses, Medtronic offers employees on-site services like cafeterias and convenience stores. Medtronic contracts with third parties to provide these services. Medtronic challenged the assessment of its three-building office campus in Fridley, and the county moved to dismiss Medtronic's challenge. As the basis for its motion, the county alleged that Medtronic did not timely provide occupancy, income, and expense information as required by Minn. Stat. §278.05, subd. 6(a). Such disclosure is required only for "income-producing property." Medtronic argued first that its Fridley property is not an "income-producing" property within the statutory meaning and therefore no disclosure was required. In the alternative, Medtronic argued that the information provided to the county met the statutory requirements.

In a thorough analysis, the tax court held that the subject property was not income-producing. The court parsed the agreements between Medtronic and the third-party providers and concluded the properties were not income-producing. "Proper analysis," the court instructed, "begins by recognizing that real property has non-owner occupants, but then focuses on *whether* payments to the owner are for use of the property—by examining the substance of the parties' relationship. If payments are *not* compensation for the use of real property, then they do not render the property income-producing. The mere *existence* of payments from an occupant to an owner is not sufficient to show that *the property itself* produces income." Because payments between these parties were not compensation for the use of real property, the subject property was not income-producing and Medtronic was not obliged to disclose. The county's motion to dismiss was denied. ***Medtronic, Inc. v. Cnty.***

of Anoka, No. 02-CV-20-1935, 2022 WL 1233667 (Minn. Tax 4/19/2022).

Court concludes Allina Health System is interdependent with Abbott Northwestern and entitled to tax exemption. The parties disputed Allina's subject tax status. Beginning with the 2017 assessment, Washington County changed petitioner's tax status to commercial, "although it had previously treated the property as tax-exempt."

The current use of Allina's Stillwater location, the subject property, "provides a variety of rehabilitation and physical therapy services." A unique feature of the location includes a warm-water pool that provides treatments from a variety of patients with ailments; and provides swim lessons for children with disabilities. The location also "houses an accessible fitness center" to maintain physical fitness for patients in wheelchairs, or those suffering from Parkinson's or Parkinson's-like disorders.

To pay for services offered, Allina bills a patient's insurance, bills Medicare and Medicaid, or—if a patient is unable to afford services—offers to link the patient with a variety of assistance programs. "Because Allina does not collect enough money from billing... to cover its expenses, Courage Kenny Foundation, a non-profit that donates to several facilities focusing on health care, funds services at the subject property."

Allina asserted that the subject property is tax-exempt "as both a public hospital and an institution of purely public charity pursuant to both article X, section 1 of the Minnesota Constitution, and Minnesota Statute section 272.02." At trial, Allina bore the burden to overcome the *prima facie* validity of the County's commercial classification of the subject property, and to demonstrate that the subject property is exempt.

Minn. Const. art. X, §1 states that "Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes, but... public hospitals... shall be exempt from taxation..." Similarly, Minn. Stat. §272.02, subd. 4 provides "[a]ll public hospitals are exempt." Case law has determined that to be exempt, public hospitals should operate for the benefit of the public, rather than the benefit of private individuals. *See State v. Browning*, 192 Minn. 25, 29 (1934).

In this case, Allina did not contend that the subject property was a public hospital, but rather that it is an auxiliary property to a public hospital, Abbott Northwestern Hospital. For auxiliary properties such as the subject property, exemption applies "if the property is devoted to what the public hospital does and must be reasonably necessary for the accomplishment of the purposes of the institution seeking exemption." *State v. Fairview Hosp. Ass'n*, 262 Minn. 184, 187, 114 N.W.2d 568, 571 (1962). An auxiliary property does not need to be essential or indispensable, nor does it need to be "close to the public hospital itself." *Chisago Health Servs. v. Comm'r of Revenue*, 462 N.W.2d 386, 388-89 (Minn. 1990). The test essentially measures the degree in which the properties are functionally interdependent. *Id.* at 390.

Washington County asked the court to consider the subject property a "clinic" and argued that Allina's Stillwater location competes with other neighboring therapy facilities and, therefore, fails to be defined as a public hospital auxiliary. The county cautioned that allowing Allina this tax-exempt status would "open the door to large healthcare conglomerates to reclassify their clinics in order to evade property tax, giving them a further competitive advantage over independent healthcare competitors." Further, the county argued that the subject property is not "reasonably necessary to operate the hospital," citing specifically to the location's "warm water pool and the adaptive fitness center."

In its analysis, the court explained that it will not rely on the competitiveness test. Instead, the court found that the subject property's therapeutic and rehabilitative services supported the hospital's purpose to provide patient care. To further prove its interdependence, the subject property is functionally interdependent with Abbott Northwestern in that its patients are billed similarly, the facilities share staff, and the two facilities share a human resources department, director, and policies and procedures. The court found no evidence showing that Abbott Northwestern was being funded by revenue at the subject property, and "the organizations running the hospital and the subject property—Allina and Courage Kenny—are both non-profit organizations, thereby lacking a profit-driven motivation." Thus, the court determined that the subject property is an auxiliary facility and thereby entitled to the tax exemption. ***Allina Health System v. Washington Co.***, 2022 WL 1123239 (MN Tax Court 4/11/2022).

Morgan Holcomb
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu

Sheena Denny
Mitchell Hamline School of Law
sheena.denny@mitchellhamline.edu

Torts & Insurance

JUDICIAL LAW

Defense and indemnification; State Tort Claims Act. Plaintiffs, a county attorney and county sheriff, were named as defendants in a lawsuit. Plaintiffs sought a defense and indemnification for the suit from defendant, the state of Minnesota, under the State Tort Claims Act, Minn. Stat. §3.736, subd. 9. That statute provides in relevant part: "[t]he state shall defend, save harmless, and indemnify any employee of the state" who is subject to a claim "arising out of an alleged act or omission occurring during the period of employment... if the employee was acting within the scope of employment." Defendant denied the request, contending that plaintiffs were not "employee[s] of the state." After plaintiffs filed suit, the district court granted defendant's motion to dismiss. The court of appeal affirmed.

The Minnesota Supreme Court affirmed. The Court began by noting that the term "employee of the state" was defined by Minn. Stat. §3.732, subd. 1(2) to include "all present or former officers, members, directors, or employees of the state" and "persons acting on behalf of the state in an official capacity, temporarily or permanently, with or without compensation." Because plaintiffs were not officers or employees of the state, the only question was whether they qualified as "persons acting on behalf of the state in an official capacity." After finding the statutory definition to be ambiguous, the Court ultimately agreed with defendant's interpretation. In so holding, the Court relied heavily on the fact that plaintiffs were covered under the municipal tort claims act and entitled to a defense and indemnification from the county, stating, "the existence of one statute covering municipal employee indemnification and another statute covering state employee indemnification strongly suggests that the Legislature did not consider a county attorney or a county sheriff performing their ordinary duties, without something more, to be a person acting on behalf of the State such that they are entitled to indemnification by the State." ***Walsh v. State of Minnesota***, A20-1083 (Minn. 6/8/2022). *https://mn.gov/law-library-stat/archive/supct/2022/OPA200573-020222.pdf*

Jeff Mulder
Bassford Remele
jmulder@bassford.com

MEMBER NEWS

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

Madeleine F. Peake has joined Moss & Barnett's multifamily and commercial real estate finance team. Prior to joining Moss & Barnett, Peake clerked at a Twin Cities law firm handling research and due diligence for real estate and general business matters.

Arlo Allen-DiPasquale, **Charles Crawford**, and **Gerald T. Laurie** have joined Schindel Segal, PLLC. Allen-DiPasquale practices in the areas of business and employment. Crawford has joined the firm's business law and litigation teams, continuing his practice in business, real estate, and construction. Laurie's practice will continue in complex commercial and employment cases.

Drake T. Hagen has joined Fitch Johnson Larson, PA. He will be practicing in the areas of workers' compensation and insurance defense.

Charles Horowitz has joined Halunen Law's employment law practice group.

Susan A. King and **Caroline A. Simonson** have been appointment adjunct directors for Moss & Barnett's board of directors. The adjunct director program is intended to train future leaders of the firm. King's practice is focused on estate planning, probate and trust administration, and guardianship/conservatorship. Simonson's practice is in real estate finance transactions, primarily representing leaders who originate loans for multifamily housing projects.

Stephen Fiebiger was re-appointed to the Merit System Council by Gov. Tim Walz for a three-year term ending in 2025. Fiebiger works in Burnsville and practices civil litigation and appeals in state and federal courts.

In Memoriam

Jama M. Kriz
63, of Elmwood, passed away on February 19. Kriz achieved partner status at Leonard Street & Deinard, became regional counsel at SuperValu, and finished her career at Stinson LLP.

Cort C. Holten
of Minneapolis, passed away on April 8, 2022 at age 72. Holten was a partner at the Chestnut Cambronne Law Firm and also represented clients at Summit Government Affairs Consulting. He will be remembered for his deep love of his family and practicing law.

Douglas Hegg
of Alexandria, died unexpectedly on May 13 at age 50. Hegg was an attorney for over 20 years and was involved with the Lakes Area Humane Society.

Gregory A. Trost
of Lino Lakes, passed away on June 3, 2022, from cancer. He was 66.

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ASSISTANT CORPORATION COUNSEL

The purpose of the Assistant Corporation Counsel is to serve as civil legal counsel for Sauk County, pursuant to Wisconsin State Statute 59.42, as directed by the Corporation Counsel. The primary focus of this position will be Child in Need of Protection and Services cases, Termination of Parental Rights cases, Juvenile Guardianships and providing legal advice regarding other various legal issues involving the Department of Human Services. Essential Duties and Responsibilities • Provide legal counsel and represent the Sauk County Department of Human Services in all children in need of protective services proceeding, termination of parental rights proceedings, juvenile guardianship proceedings, and associated child abuse/neglect issues. • Advise law enforcement, medical professionals, mental health professionals, and social workers in handling and investigating social service matters. • Represent the interests of the public or the County in court, including probably cause hearings, plea hearings, fact-finding hearings, dispositional hearings, emergency hearings, court trials and jury trials. • Represent the interest of the Public or the County in appellate court proceedings including drafting appellate briefs, appellate motion practice and oral arguments when necessary. • Represent the County, plan for, conduct and direct proceedings in a variety of civil matters in representing the interest of the County in matters including mental commitments; protective placements, and guardianships. Review legal evidence provided by law enforcement and medical personnel to determine whether sufficient evidence exist to commence court proceedings. Draft pleadings and other court documents; prepare for trial by conferring with relevant parties; interviewing witnesses; negotiating possible resolutions.

Present evidence at trials, prepare court orders and oversee court actions until their conclusion. • Provide legal counsel and represent the Sauk County Child Support Agency by appearing on behalf of the Agency, preparing and reviewing related pleadings, stipulations, orders, warrants, petitions, summons, motions, and judgements, establishing paternity, establishing and enforcing child and medical support actions, handling interstate cases, negotiating settlement agreements, and obtaining State approval for expungement of balances. • Represent the County and State of Wisconsin in legal matters pertaining to the establishment of paternity of non-marital children and the establishment and collection of child support, medical support, or medical assistance. Facilitate resolution of these issues without litigation or presents evidence in court. Appear at divorce hearings or other court hearings, as needed. Additional Duties and Responsibilities • Prepare and file court documents such as petitions, subpoenas, motions, orders, stipulations, discovery requests, affidavits, and briefs. • Assist the Corporation Counsel with formation and review of ordinances, resolutions, contracts, and interpretation of statues, rules, regulations, and duties of County Board and County officials. • Other duties as assigned. Required Working Hours Standard working hours are Monday through Friday, 8:00 am until 4:30 pm. Please note these hours are subject to change and additional hours may be needed or required. Compensation for additional hours beyond normal working hours are subject to applicable state and federal regulations. Education and Experience Requirements Required: Juris Doctorate degree from an ABA accredited law school Admission to the Wisconsin Bar, with current active bar membership One (1) year government legal experience in cases involving Wis. Stat. Chs. 48, 51, 54 and 55. Student practice experience will be considered. Preferred: Two (2) or more years of experience in Wis. Stat. Chs. 48, 51, 54 and 55 cases. Any combination of education and experience that provides equivalent knowledge, skills and abilities may be considered. Contact Patricia Chagas at patricia.chagas@saukcountywi.gov https://tinyurl.com/2fr45fnu

MID-LEVEL REAL ESTATE ASSOCIATE ATTORNEY

Vantage Law Group PLLC seeks an Associate Attorney to perform exceptional work with a boutique commercial real estate team. Qualified candidates will have at least four years of experience in commercial real estate transactions including purchase and sale, financing and leasing. Work includes negotiating and drafting a variety of commercial contracts; title and survey review; handling commercial real estate transactions involving the acquisition, disposition, leasing, and financing of real property from inception to closing; and providing day-to-day advice to corporate clients. Candidates must possess excellent drafting, analytical and communication skills. Please send inquiries to Samantha Lutz, Office Manager via email only at legal.admin@vantage.law. Please include cover letter and resume. More information on the firm can be found at www.vantage.law

ASSOCIATE ATTORNEY

Holmstrom, Kvam, & Blackwelder, PLLP a three-attorney firm located in Granite Falls, MN, is seeking an attorney for the general practice of law, with potential concentration in the areas of criminal law, estate planning, real estate, civil litigation, family law, business law, and other areas of law. Contact: Holmstrom, Kvam, & Blackwelder, PLLP, Email: hklaw@mvtvwireless.com

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Litigation law firm in Woodbury/Lake Elmo area is seeking an Associate Attorney. Preferred candidate will have 1-5 years litigation/insurance defense experience with a Minnesota and Wisconsin license. Email resume to l.fritze@redingpilney.com

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