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VOLUME LXXVIII NUMBER X
NOVEMBER 2021
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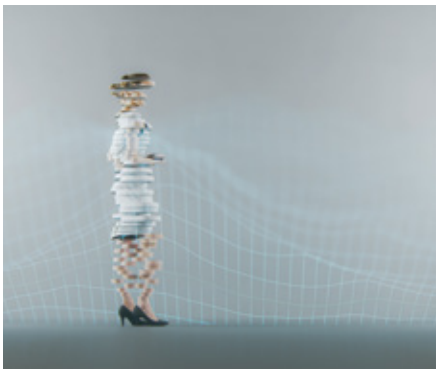
ON THE COVER: WELLNESS JOURNEYS



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Steve Perry
sperry@mnbars.org

Art Director
Jennifer Wallace

Advertising Sales
Pierre Production & Promotions, Inc.
(763) 497-1778

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Time to examine the bar exam

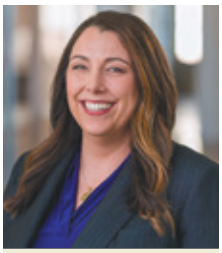
Like most of the world, for the past 18 months MSBA members have had to make choices in all parts of their lives.

- How do I expend my resources during the pandemic?
- What things are necessities?
- What things might not be necessities, but are still worth the money?
- What things are still worth the money even when I am unable to use or do not need to use some of the benefits?

Heading into the second year of the pandemic, I personally thought about the things on which I was still choosing to spend my money, including several groups and organizations that, throughout the pandemic, I derived very little benefit from because of shutdowns. Why was that? Two reasons, primarily: 1) because these groups spoke to important causes; and 2) because these groups were organizations that needed to exist post-pandemic. They stood for values and did work that the world needed to have in it.

I think that logic holds true for the MSBA also. Yes, the MSBA offers many tangible things—free or low-cost CLEs for members, a free legal research subscription, discounts with law practice partners—but the MSBA offers much more, and these other, less tangible things are perhaps the more important call to MSBA membership in the post-pandemic world. Case in point: The MSBA is engaging in strategic, innovative, and collaborative work on significant issues such as attorney licensing and the bar examination.

Last year, after a group of recent law school graduates requested that the MSBA Council examine the state of the bar exam and its role in the admission of new lawyers in Minnesota, it became clear to MSBA leadership that further efforts to study the issue were necessary. This is not an issue that Minnesota is alone in reviewing. There is a national movement to reconsider the bar exam itself, along with the greater question of how attorneys become licensed.



JENNIFER THOMPSON is a founding partner of the Edina construction law firm Thompson Tarasek Lee-O'Halloran PLLC. She has also served on the Minnesota Lawyers Mutual Insurance Company board of directors since 2019.

The MSBA Council and other leaders worked throughout the last bar year to identify the best process for undertaking a study of these issues. We heard repeatedly that an endeavor of this nature requires significant resources and would be best undertaken with multiple stakeholders at the table. As a result, the MSBA, through a resolution adopted by its Assembly in April 2021, determined that the best approach to fully study this topic would be to seek a court-appointed task force.

That same month, the MSBA was notified by the Board of Law Examiners (BLE) that it was also undertaking a study of the bar exam. It appears that the MSBA and the BLE share a belief that it's time for Minnesota to examine how lawyers in the state are admitted to the profession. The MSBA supports BLE's efforts and will continue to work with the BLE to help ensure that its study is successful. That said, however, the MSBA believes there remain certain critical distinctions between how the BLE proposes to conduct its examination and the MSBA's request for a task force. Other states have used broad-based task forces to conduct a comprehensive review of bar licensing alternatives and to include diverse and wide-ranging stakeholders in the decision-making process. We strongly believe Minnesota should follow a similar track.

The MSBA petition requests a separate task force to address these diversity and scope concerns. If the Supreme Court determines that a separate task force is not necessary because of the work it expects to be performed by the BLE, the petition requests that the Court address the task force request by temporarily expanding the membership of the BLE to increase its diversity and ensure representation of all stakeholders.

The MSBA is collaborating with numerous partners—affinity and district bar associations and law school representatives, to name a few—in its efforts relating to the petition. Notably, the MSBA's petition is joined and supported by:

Hennepin County Bar Association
Ramsey County Bar Association
Anthony Niedwiecki, President and Dean of Mitchell Hamline School of Law
Minnesota Women Lawyers
Minnesota Lavender Bar Association
Minnesota Association of Black Lawyers
Minnesota Asian Pacific American Bar Association
Minnesota American Indian Bar Association
Minnesota Hispanic Bar Association
Somali American Bar Association
Hmong American Bar Association

The petition was filed October 6, 2021, as I was writing this column. It is possible that by the time of publication, there will be further developments. The MSBA will use its weekly Legal News Digest and other channels to keep members apprised of any such developments.

The MSBA is finding strategic ways to innovate and think bigger than the box—to put a fresh lens on long-lasting issues. This is how the MSBA strives to lead. And, I believe, a sometimes-overlooked benefit of membership. This type of work is what makes membership in the MSBA at least as compelling as the more tangible benefits. As we all emerge from the pandemic with more focus on supporting the organizations whose work must persist, I hope the attorneys of Minnesota continue to appreciate that the MSBA is one of those organizations that our profession needs on the other side of the pandemic and long thereafter. ▲

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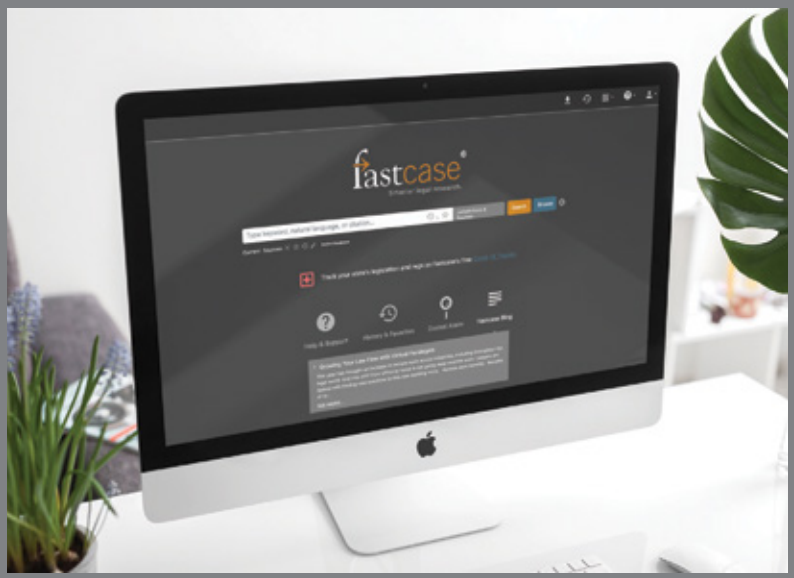

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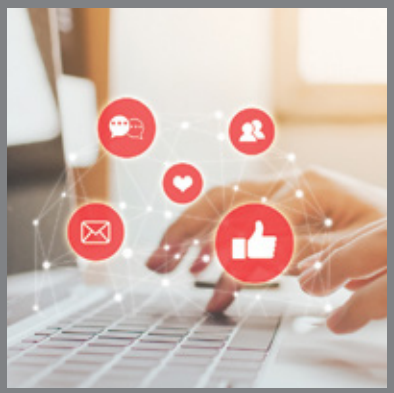

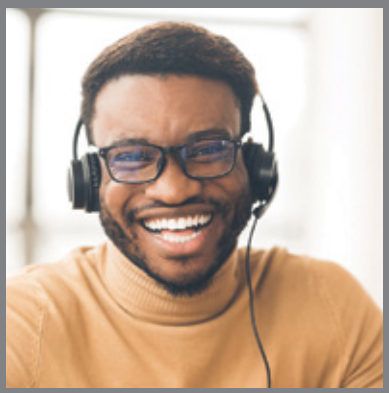

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Check the financial donation box for 2021

Last spring the Minnesota Supreme Court added Rule 25 to the Minnesota Rules of the Supreme Court on Lawyer Registration, requiring attorneys to report each year the approximate number of pro bono hours completed in the prior calendar year, and likewise to indicate by means of a check box whether they donated to legal services organizations that provide free services to low-income Minnesotans. Since then, the MSBA has been working to spread the word about the new requirements through its publications, events, and social media. The MSBA Access to Justice committee is also working on a CLE about the new rule.

We've also been working behind the scenes to make it easier for you to "check the box" when asked if you've donated to an organization that provides legal services to people of limited means in 2021. If you're already a regular legal services donor, thank you! You likely are aware of the urgent legal needs that face our low-income neighbors. If you haven't donated this year, here are some reasons why our spotlighted attorneys have chosen to give:

- Donating allows you to do your part to ensure that all individuals have access to quality legal services.
- Legal services organizations step up to help those who face barriers to justice, making the entire legal system work better and more efficiently.
- Legal aid is there all the time, doing the work other lawyers care about but often can't do themselves.
- If we as a legal community all do our part by giving what we can, we will bridge the justice gap and bring hope and justice to more people.

Many people with desperate legal needs are turned away from organizations across the state. Even if they are accepted, they often face wait lists that force them to sit in limbo while the backlog is processed. It isn't because their case lacks merit or they don't need help badly enough; it is simply that there aren't enough attorneys to represent everyone who needs the help. This is the reality of current funding.

If you're convinced that donating is a worthy idea, where to start? There are many organizations doing great work across the state. We encourage you to choose one in your area or one devoted to dealing with an issue you are passionate about. If you are unsure where to turn, that's where we come in. We've made it easy for you to donate to the Minnesota State Bar Foundation (MSBF) and designate your donation to go only to legal services organizations. The MSBF funds legal services organizations across the state and can give more with your support. Visit *www.mnbar.org/donateMSBF* to learn more and to give.

It's a win-win situation. Your donation will provide urgently needed funds to organizations serving those most vulnerable to injustice. You'll also get the satisfaction of being able to "check the box" when you renew your lawyer registration, telling the Supreme Court that you have contributed to a more just state. ▲

Pro bono opportunity: the eviction crunch

The MSBA is proud to partner with legal services organizations across Minnesota to encourage pro bono and to let you know about opportunities to volunteer your time. This month, we're highlighting Mid-Minnesota Legal Aid's (MMLA) Eviction Defense Screening Project.

If you've been thinking you'd like to help with the eviction crisis but aren't interested in or available to do litigation, this is the opportunity for you. Attorneys and law students screen eviction court case files prior to the first appearance in order to look for possible defenses. The screening tools are then used to help MMLA and VLN attorneys who are in court to represent tenants, allowing them to dedicate more time to representing clients and less time to case preparation. This project is purely remote and involves no client contact or court appearances. The time commitment is flexible and can be from a couple hours per month to more extensive involvement if you have the time. If you would like to volunteer or learn more, please email Colleen Daly at *cdaly@mylegalaid.org* .

This opportunity is the first of many that will be posted on the MSBA's recently introduced Pro Bono Spotlight page. You can read more about volunteering with the Eviction Defense Screening Project and see our Donor Spotlights and Pro Bono Attorney Profiles at *www.mnbar.org/pro-bono-spotlight*. ▲

Court orders comment period and public hearing on MSBA lawyer advertising petition

In late June the MSBA filed a petition (ADM10-8005) requesting changes that would bring Rule 7 of the Minnesota Rules of Professional Conduct (MRPC), which governs attorney advertising, into alignment with ABA Model Rule 7, which was revised in 2018. The MSBA's proposed amendments respond to trends in developing First Amendment law and antitrust law that favor deregulation of truthful communication about the availability of professional services. The federal courts have recognized that lawyer advertising is commercial speech protected by the First Amendment, and the MRPC should not unduly restrict the ability of lawyers to truthfully communicate information about their services.

The proposed amendments would continue to protect clients and the public from false and misleading advertising, but give lawyers freedom to use newer, more innovative technologies to communicate the availability of legal services while limiting bar discipline to truly harmful conduct. They would also increase consumer access to accurate information about the availability of legal services and thereby expand access to legal services. The proposed changes seek to:

(1) harmonize and simplify the advertising and client communication rules of many jurisdictions that have adopted complex, detailed, and inconsistent advertising rules that impede lawyers' ability to expand their practices and thwart clients' interests in obtaining needed services;

(2) acknowledge the advent of social media and the internet as vehicles that enable clients to search for information about lawyers and law firms and likewise enable lawyers and law firms to communicate efficiently with potential clients about their ability to provide legal services tailored to the needs of the clients; and

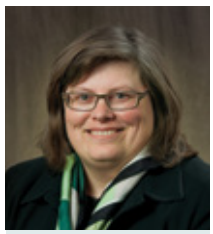
(3) preserve and foster Minnesota's certified specialist program, in recognition that recent decades have brought about a greater need and demand for attorney specialization.

The Lawyers Professional Responsibility Board (LPRB) and the Office of Lawyers Professional Responsibility (OLPR) filed a petition requesting amendments to Rule 7 identical to those proposed by the MSBA with one exception (pertaining to the language attorneys may use when holding themselves out as specialists).

The Court has set a deadline for comment of December 20, 2021, with a public hearing scheduled for January 26, 2022. The MSBA wishes to thank Fred Finch, the primary drafter of the MSBA petition, along with former MSBA President Mike Unger, who assisted in the drafting and will represent the MSBA at the hearing. ▲

Lawyer neutrals and other people's money

Last's month's column focused on trust accounts and overdrafts. One reader asked an excellent follow-up question: What about lawyers who serve as neutrals? What are they to do with other people's money that they hold? Many attorneys serve as parenting consultants, parenting time expeditors, special masters, custody evaluators, arbitrators, and mediators. Many receive retainers in advance and bill their services as a third-party neutral on an hourly basis over time. Where should the lawyer as neutral put those third-party funds, in their trust account or business account?



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.

SUSAN.HUMISTON@COURTS.STATE.MN.US

The rules

As always, it is helpful to start with the text of the rules. Rule 2.4(a), Minnesota Rules of Professional Conduct (MRPC), acknowledges this common role for lawyers:

> A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

Rule 1.15(a), MRPC, states the rule for safekeeping property: "All funds of clients or third persons held by a lawyer or law firm *in connection with a representation* shall be deposited in one or more identifiable trust accounts…." (emphasis added). When a lawyer serves as a neutral, the parties involved are not the neutral's clients. The lawyer is holding third-party funds but is not doing so "in connection with a representation." Therefore, Rule 1.15(a) does not require those funds to be placed in a trust account.

The rule continues: "No funds belonging to the lawyer or the law firm shall be deposited" in the trust account except monies to cover service charges or funds payable to both the client or third person and the lawyer or law firm. Based upon the language of Rule 1.15(a), MRPC, the OLPR has always advised lawyers that funds not held in connection with a representation, such as advance fees paid for neutral services, not legal services, should not be in your trust account. The Minnesota Supreme Court has interpreted Rule 1.15(a), MRPC, in this manner as well. (*In re Varriano*, 755 N.W.2d 282, 289 (Minn. 2008): "Rule 1.15(a) explicitly requires that funds held in connection with a representation be deposited into a trust account. Implicitly these are the only types of funds that belong in a trust account. Lawyers' personal funds or fees to which they are entitled must not remain in the trust account.")

What if you have this wrong?

To the extent that this surprises you, please don't panic. There is no duty to self-report a violation of the rules. This fact also surprises many people. The rules do require lawyers to report certain misconduct of others if they know of it (Rule 8.3(a), MRPC), but there is no duty to self-report. Now that you know, I recommend that you revise your business practices as soon as possible to hold advance third-party neutral fees in your business account, not your trust account. No doubt this

will be welcome news for many, as it might eliminate unnecessary trust account record-keeping. If you only do this type of third-party neutral work, you may find you do not need a trust account at all.

Remember, though, if you are holding third-party funds *in connection with a representation*, those must go into trust, and it is a violation of the ethics rules to hold them in a non-trust account. Take care, as well, if you choose to act as an escrow agent for third parties. Those funds should not be in your trust account either, since they are not held in connection with a client representation. These rules may seem overly cautious, but the point of the rules is to protect money placed in trust. Holding other funds not relating to client representations in your trust account may put those funds at risk of claims by third parties or improperly shelter funds from rightful claims of third parties.

Other tips for lawyers acting as neutrals

Another question I have received on the ethics line from lawyers acting as neutrals relates to the duty to report misconduct of lawyers that they learn of while acting as neutrals. Neutrals have strong confidentiality rules, as do lawyers. For those acting as neutrals subject to Rule 114 of the Minnesota Rules of Practice, there is a specific exception to confidentiality if disclosure is required by a professional code. Rule 114.08(e) provides the "[n]otes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes." Thus, if you are required to report lawyer misconduct you learn of while serving as a neutral, you may do so consistent with your neutral confidentiality obligations. You can always give us a call if you have questions about whether you would be required to report particular misconduct. Whether or not a duty to report exists is one of the most frequent questions on the ethics line.

Conclusion

While I understand the impulse of lawyers to treat the handling of other people's money the same in all circumstances—put it into trust for safekeeping—the rules are more precise than that. If you are holding other people's money for purposes other than in connection with a client representation, those funds do not belong in your trust account. Please call our ethics hotline (651-296-3952) if you have questions, and thanks to a thoughtful reader for this column suggestion. ▲

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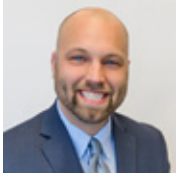

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Go fish? Proportionality revisited

A couple of years ago, I wrote in this space about issues of proportionality in cases involving electronically stored information ("Proportionality and Digital Evidence," Bench & Bar Dec. 2019). As stated in Federal Rule of Civil Procedure 26, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[1] This rule seeks to balance the costs and burdens of discovery with the benefits, but it goes on to say, "A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence…. The volume of—and the ability to search—much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs."

Given the complexity of digital evidence and the risk of its corruption, it is important to establish fair and workable discovery protocols from the outset. It's also critical that best practices in digital forensics and e-discovery be followed to ensure that relevant sources of electronically stored information (ESI) are properly collected and preserved. Unfortunately I have seen many instances in which digital forensic or e-discovery experts give misleading or inaccurate estimates to the court on behalf of their clients to skew the cost or burden that would ensue. In the event of a reasonable discovery request, verification may be necessary to accurately establish the accessibility of ESI.

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.

While these rules may assist in preventing parties from initiating costly, burdensome, and time-consuming fishing expeditions, estimates for digital forensic investigations may be inaccurately presented to the court to further individual party interests. In *Wolford v. Bayer Corporation*, a cost estimate of $38-$46 million, and a time estimate of two years, was provided to the court by Bayer's expert to review 10 TB of data. In spite of this massive estimate, the expert ultimately testified that it wasn't based on any known metrics or publications! Rather, the expert insisted, "data is data" and it doesn't matter what kind of data is in question. The court ultimately disagreed, finding that the type of data does matter, that technology-assisted review (TAR) would reduce Bayer's burden, and that the estimate provided was hypothetical and not based on fact.[2] This order demonstrates an all-too-frequent occurrence—mounting specious cost and burden objections as a means to keep relevant ESI out of court. Simple objections need to be substantiated and adequately explained by the opposing party. In this instance, a reasonable search protocol including TAR was an appropriate way to access and review the data.

Though there is a risk of unfairly inflating the costs and burdens of digital forensic or e-discovery investigations, the sheer amount of digital information available in the majority of cases nonetheless requires keeping discovery requests from becoming too broad. In *Toranto v. Jaffurs*,[3] the court concluded that a tailored discovery request was required after the plaintiff requested documents related to the defendant's organization that were not proportional to the needs of the case.[4] Inordinate discovery requests can be especially burdensome when they involve ESI, given the potential number of sources and amount of material to review. In addition to providing an accurate assessment of cost and burden to the court, crafting a balanced discovery protocol is essential for both parties. Furthermore, cost-reducing strategies and measures (such as TAR) should be considered before a final estimate is provided.

As I mentioned in my first article on proportionality, the judicial authority to appoint special masters may be the best route to obtain an unbiased assessment when dealing with the confusion that often surrounds electronically stored information. Verifying the information proffered by experts helps assure that proportionality issues are effectively addressed. Between unlimited fishing expeditions and the denial of reasonable discovery requests owing to inaccurate cost or burden estimates, there lies a happy medium. Consulting with uninvolved third-party experts can be helpful in determining the facts and developing a sound protocol that suits everyone. ▲

Notes

[1] *https://www.law.cornell.edu/rules/frcp/rule_26*

[2] Order, *Wolford v. Bayer Corporation, et al.*, No. 16-CI-00907 (Pike Cnty. Cir. Ct. 8/26/2020).

[3] *Toranto v. Jaffurs*, No. 16CV1709-JAH (NLS) (S.D. Cal. 9/13/2019).

[4] *https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2019/proportionality-has-some-bite/*

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Short, sweet, and specific

Effective openings and closings in oral argument

"The first impression is the last impression." It's a familiar phrase and one that underscores the importance of oral argument. Briefing is usually the first opportunity to make an impression, but appearing before judges in person is often more influential. The opening volley of your oral argument is crucial. But the last impression can be just as important as the first. As the saying goes, "You never win at oral argument, but you certainly can lose." Your closing lines are therefore mission-critical as well.

What are the hallmarks of a strong opening and closing in oral argument? Most scholarship about oral advocacy focuses on the middle of the argument—the substance. And there is little advice regarding how to make a powerful and persuasive beginning and end.

To address this information gap, this article surveys just some of the great oral advocates from Minnesota and elsewhere. A review of openings and closings from these greats reveals three key insights: keep it short, sweet, and specific.

KYLE R. KROLL is an adjunct professor at the University of Minnesota Law School and an attorney at Winthrop & Weinstine, P.A. in Minneapolis, where he practices business litigation at both the trial and appellate levels. The views expressed in this article are those of the author alone, and not of any other person or organization.
KKROLL@WINTHROP.COM

Openings: Theme and roadmap—briefly

Justice Ruth Bader Ginsberg led with the following piece of advice in remarking on advocacy: "Be brief, be pointed."[1] For openings, this typically means beginning with a thematic statement and a roadmap of your main points.[2]

The thematic statement should remind the court of the nature of the case and reiterate your client's story. And the roadmap should introduce no more than three key points you wish to make. As one practitioner put it: "Write out an introduction that, from the very first sentence, captures the panel's attention, frames the appeal and the issues, and presents a compelling narrative why your client should prevail…."[3] It's important that the theme not overshadow the roadmap, however.[4] Although some scholars suggest completing the roadmap in 30 seconds—because sometimes that's as much time as you will have before an interruption[5]—anything up to 60 seconds should suffice.

Take, for example, this effective opener in *Romag Fasteners, Inc. v. Fossil, Inc.*, from one of the most prolific appellate attorneys in U.S. Supreme Court history,[6] Lisa S. Blatt:

> The Lanham Act authorizes courts to remedy trademark violations by awarding infringers profits subject to the principles of equity. The question presented here is whether this phrase, "principles of equity," requires trademark owners to prove willfulness as an absolute precondition to profit awards. The answer is no for three reasons: First, the phrase "principles of equity" signifies a multifactor analysis where no one factor is controlling. Second, the statutory text and structure supersede any settled willfulness requirement. And, third, there was no such settled background willfulness requirement.[7]

To avoid an interruption and ensure you make your key points, consider former U.S. Solicitor General Paul D. Clement's succinct opening in *United States Forest Service v. Cowpasture River Preservation Association*:

> Respondents' effort to convert all of the land traversed by a Park Service-administered trail into lands in the National Park Service fails for reasons of text, context, and consequences.[8]

Clement's very short roadmap identifies three key points (text, context, and consequences), while promoting the narrative that the respondent is trying to convert private into public land.

Sometimes it is best to focus the inquiry on the single most dispositive and pressing issue, just as future Chief Judge John R. Tunheim (District of Minnesota) did in *Growe v. Emison*:

> Redistricting is a power and responsibility that is reserved to the states in the first instance. This case presents the Court with an opportunity to illuminate that important principle and clarify the apparent confusion in the lower federal courts. I intend to direct my argument this morning to the abstention issue: Did the federal court err by refusing to abstain to an ongoing state judicial proceeding? And the case presents perhaps one of the most stark examples of what can go wrong when there are jurisdictional disputes in the redistricting process.[9]

Nicole A. Saharsky (a University of Minnesota Law School graduate and also one of the most prolific attorneys to argue in front of the U.S. Supreme Court)[10] offered a shorter and sweeter opener on a key issue in *DePierre v. United States*:

> Whether you call it freebase, coca paste or crack, it's the same thing chemically. It is cocaine base, it is smokeable, it has the same effects on the user; and Congress did not limit the statute to one form of cocaine basis. This court should not do it, either.[11]

Aaron Van Oort focused the Court in on a dispositive issue after opening with a strong thematic point and summarizing the compelling facts:

> This case tests and exceeds the very outermost limits of what a person may be insured against under Nebraska law. In 2006, Commander David Kofoed of the Douglas County CSI unit commit-

> ted the reprehensible act of planting false blood evidence against two innocent men in a murder investigation. For this criminal misconduct he was both convicted of a class four felony and it resulted in the civil judgments that are underlying this proceeding. In this appeal, the plaintiffs are arguing on his behalf—Commander Kofoed—that he has insurance coverage for the damages arising out of his wrongdoing, even for the punitive damages that were awarded against him. That's incorrect under Nebraska law because Nebraska affirmatively forbids its political subdivisions like Douglas County, his employer, from paying civil judgments that arise out of criminal wrongdoing, whether they do it through insurance or otherwise.[12]

In each of these examples, the advocate's winning opening was short, sweet, and specific. The openings usually include one or more thematic sentences. Theme appeals to ethics and morality, while the roadmap that introduces the key points appeals to logic. These advocates strive not only to show the court that their positions are right, but also that their clients are *in the right*. Sometimes the advocates focus on one key issue, but where there is more than one, they often use signposts ("first," "second," "third") to provide verbal organization in their roadmap. The opening roadmaps are short, even though they often paint a clear picture with salient facts or legal principles. Notice also the use of vivid and concrete language—the "sweet" part of the opening that often grabs attention. Further, the openings either implicitly or explicitly call for the court to make a certain holding (reverse, remand, etc.). Short, sweet, and specific.

Closings: Make a compelling point, and tell the court what you want

Closings should also be short, sweet, and specific. Admittedly, advocates often have little—or no—time for a planned closing. Questions that arise during oral argument regularly fill up that space, and the lawyer runs out of time, only to offer a short "Thank you" at the end. But when time permits, the greats include closings that are short, sweet, and specific.

For example, in *Weinberger v. Wiesenfeld*, future Justice Ruth Bader Ginsburg offered this concise and compelling closing:

> In sum, appellee respectfully requests that the judgment below be affirmed, thereby establishing that under this nation's fundamental law, the woman worker's national social insurance is no less valuable to her family than is the social insurance of the working man.[13]

Justice Ginsburg's closing is a model of short, sweet, and specific. She concisely boils down the issue on appeal to a clear ultimatum. She asks for specific relief: that the judgment be affirmed. The Court agreed.

Appeals to bedrock principles—a version of "sweet"—are common among the greats. Eric J. Magnuson, in *Padden Law Firm, PLLC v. Bridget Trice,* appealed to core principles of client autonomy and choice:

> Mr. Padden got the case in the door, he got some lawyers to handle it, and then he disappeared. And at the end of the day, he wants to get his full 30 percent contract because, if you read their brief, a contract is a contract. It's not when it comes to attorneys' fees. Not under Minnesota law. Judge Montgomery did the right thing by honoring the client's wishes. This was a decision by Bridgett Trice and Quincy Adams, that they wanted the lawyers who really got them their recovery to be appropriately rewarded. They have the right as clients to do that, and if you're going to worry about public policy, the public policy should be in recognizing the client's interests and protecting those interests. Thank you.[14]

Like openings, the best closings share short, sweet, and specific qualities. Effective closings don't belabor points, but instead reiterate the key points in simple and motivational terms. Prolific advocates inject personal style into their delivery. They include strong themes and narratives that appeal to ethics, morality, and justice. And they implicitly or explicitly ask the court to take a certain action, leaving little room for ambiguity.

There is no one-size-fits-all approach to success in oral argument. But these winning examples provide useful guidance to practitioners. Keeping openings and closings brief, compelling, and on-point are key ingredients in making a lasting and persuasive impression. ▲

Notes

[1] Ruth Bader Ginsburg, *Remarks on Appellate Advocacy,* 50 S.C.L.R. 567, 571 (1999).

[2] *See* Stephanie A. Vaughan, Experiential Learning, Moving Forward in Teaching Oral Advocacy Skills by Looking Back at the Origins of Rhetoric, 59 S. Tex. L.R. 121 (2017); Sylvia H. Walbolt, Openings in Appellate Oral Arguments, Carlton Fields (3/22/2019). *https://www.carltonfields.com/insights/publications/2019/openings-in-appellate-oral-arguments*

[3] George W. Hicks, Jr. Oral Argument: A Guide to Preparation and Delivery for the First-Timer, KIRKLAND & ELLIS (8/16/2019). *https://www.kirkland.com/publications/article/2019/08/oral-argument_a-guide-to-preparation-and-delivery*

[4] Emily R. Bodtke, Arguing at the Appellate Level, Bench & Bar of Minn., April 2017, at 35 ("[I]t is far better to use the limited time available to explain why the law supports a desired outcome, rather than pontificate about the wrongs committed against a client.").

[5] *See* Hicks, Jr., *supra.*

[6] *See* Marlene Trestman, *Women Advocates Before the Supreme Court*, The Supreme Court Historical Society (5/21/2021). *https://supremecourthistory.org/women-advocates-beforethe-supreme-court/*

[7] *Romag Fasteners, Inc. v. Fossil, Inc.*, Oyez, *https://www.oyez.org/cases/2019/18-1233* (last visited 8/26/2021). For more information about this case, in which Ms. Blatt faced off against Mr. Katyal, see Kyle R. Kroll, *Lanham Act Disgorgement Just Go More Complicated,* Bench & Bar of Minn. (Dec. 2020), *https://www.mnbar.org/resources/publications/bench-bar/columns/2020/12/01/lanham-act-disgorgement-just-got-more-complicated.*

[8] *United states Forest Service v. Cowpasture River Preservation Association,* Oyez, *https://www.oyez.org/cases/2019/18-1584 (last visited 8/26/2021).*

[9] *Growe v. Emison,* Oyez, *https://www.oyez.org/cases/1992/91-1420* (last visited 8/26/2021).

[10] *See* Tresman, supra.

[11] *DePierre v. United States*, Oyez, *https://www.oyez.org/cases/2010/09-1533* (last visited 8/26/2021).

[12] *Sampson v. Lambert,* Nos. 17-1104, 17-1106, 17-1114, 17-1117 (8th Cir. 2018), *http://media-oa.ca8.uscourts.gov/OAaudio/2018/2/171104.MP3*

[13] *Weinberger v. Wiesenfeld*, Oyez, *https://www.oyez.org/cases/1974/73-1892* (last visited 8/26/2021).

[14] *Padden Law Firm, PLLC v. Trice*, Nos. 18-2451, 18-2576 (8th Cir. 2019). *http://media-oa.ca8.uscourts.gov/OAaudio/2019/10/182451.MP3*

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Q: What lessons have you learned during the course of the pandemic—professionally or personally—that made you a better lawyer?

EMILY COOPER, a 1996 honors graduate of the University of Minnesota Law School, is the founder of Cooper Law, a sliding-scale-fees law firm based in Minneapolis that practices in the areas of family law and Social Security-related matters.
EMILY@COOPERLAWMN.COM

ANNE HAALAND is a shareholder at Henson & Efron, P.A., where she practices exclusively in the area of family law. Minnesota Lawyer honored her as a 2020 Up & Coming Attorney, and she has been recognized as a Minnesota Super Lawyers--Rising Star (2017-2021) and Best Lawyers: Ones to Watch: Family Law (2021-2022).
AHAALAND@HENSONEFRON.COM

SUSIE NAOBLIAVANG THAO has worked as an immigration attorney with Southern Minnesota Regional Legal Services since 2012. Prior to law school at William Mitchell, Susie worked as a reporter for The Fresno Bee in Fresno, Calif. Susie loves spending time with her husband, two daughters, and dogs.
SUSIE.VANG@SMRLS.ORG

ADAM JOHNSON practices criminal defense at Lundgren & Johnson, PSC, in Minneapolis.
ADAM@LUNDGRENJOHNSON.COM

Emily Cooper, Cooper Law

First, all the ways that you thought things *had* to be done are not true. There are limitless ways to serve your clients and run your business well—to be creative and innovative with solutions. We serve lower- and middle-income clients in family law matters. Most have hourly wage jobs without paid time off. Being able to appear in hearings via Zoom has saved jobs, time, day care expenses, and undue stress. It proves that the old-school method of forcing everyone to appear in person in court is not required and is, in fact, an impediment to justice in some situations.

Second, your staff is not you and they all need different types and levels of support and communication. Listen to them and give them options. Like most firms, we went remote when covid hit. For me, it was great because I am an introvert and like being at home. On the other hand, for some of my staff, it was a nightmare and incredibly stressful. Making sure your team has the tools to be successful does not just mean giving them a laptop to work on. It means offering opportunities to connect in ways that provide them with the support they need.

Third, technology is essential and makes legal services more accessible. But people are still more successful with an attorney guiding them, so be sure to incorporate human interaction into your practice alongside technology. Everyone throws around the phrase "access to justice," and most concepts to help people participate in the legal system seem to focus on providing more technological avenues to courts for low-income people. Online forms, guided interviews, and the like are touted as the way to help the poor. In general, lower-income litigants are less educated and have access to less reliable technology (internet, computers, etc) than those who have more money. Yet if you have money, you get a human attorney to do the work, answer your questions, fill out the forms, and interpret the issues for you. Covid has demonstrated to me that technology is a great way to even the playing field, but that to really provide access to justice requires the same real human assistance regardless of income level.

Anne Haaland, Henson Efron

I believe the wisest investment you can make is to invest your time in people, and the pandemic only reinforced that—personally and professionally. As a family lawyer, the human element of understanding my client and their goals is critical, and to do so remotely has been challenging. During the pandemic, I have had to be very intentional about my conversations with clients by phone, Zoom, or in person to make sure I am understanding the full picture. An exchange of emails can never give me the same quality of information as a phone call, video call, or (best yet) meeting with my client. Taking the time to have deep conversations with clients builds trust and helps me build their case. Now that my colleagues and I are returning to the office, I have been reminded of how valuable in-person brainstorming is for complex legal issues, not to mention the camaraderie. When we remember the human element and take the

time to have the important conversations, we are all better for it, as humans and as attorneys.

Susie Vang, Southern Minnesota Regional Legal Services (SMRLS)

Like millions of Americans, I watched helplessly as the number of covid-19 cases spiraled out of control in March 2020. I had just returned to work from a leave when staff members were instructed to work from home. Working remotely and trying to balance being a wife and mom to two young children, including a medically fragile child, proved to be challenging. Oftentimes, I felt like I was just surviving, darting away from the cries of my children during virtual work meetings.

While it was natural catering to the needs of my children, fielding early morning client calls, and putting together care packages for people who had fallen on hard times during the pandemic, I had completely forgotten about my own needs. Despite the number of CLE trainings on wellness and self-care that I had attended over the years, a "successful" day merely meant completing routine tasks and managing to put another day behind me.

It wasn't until I had an unexpected, life-threatening medical emergency that I was forced to make myself a priority. Weeks after my hospitalization, my sister invited me to play pickleball, a growing racquet sport. I was hooked. Now, I power through my "to dos" trying to reward myself with a game of pickleball a few times a week. The warmth of the sun feels amazing. The drench of sweat is cleansing. I cherish the new friendships.

I emerged a better and more patient legal aid attorney because I learned to carve out time for myself amid chaos. Instead of rushing straight to routine legal questions, I simply start phone calls with: "Hi, how are you doing?" The responses have been overwhelming. Beyond their immigration cases, some clients were just surviving like me. Several lost jobs. Some contracted covid. Some were grappling with the loss of family members during the pandemic. The stories of struggle were humbling and forced me to view them not just as people who need legal assistance, but as human beings trying their best amid chaos.

Like the rest of the world, I hid from covid in fear of dying. But, as the pandemic begins to wind down, I am more than just surviving. My feet are planted. I am *alive*.

Adam Johnson, Lundgren Johnson

In his Devil's Dictionary, Ambrose Bierce states that "[t]he plague as we of today have the happiness to know it is merely Nature's fortuitous manifestation of her purposeless objectionableness." And that pretty much sums it up, doesn't it? There have been worse and more tumultuous precedents set in the course of human events, but with respect to my own existence, the trials imposed by the covid-19 pandemic were very much unprecedented. As a father of two during distance "learning," and a partner in a two-man firm, I found the pandemic experience to shift quickly from apparent novelty to real hardship. From my vantage, things were tough all over for a lot of people.

At the same time, I am fortunate to have the world's greatest business partner and fellow lawyer. We managed to survive, as we always have, and I credit the lion's share of our success in this regard to his wisdom and fortitude. Though I already knew it, the pandemic experience confirmed that our law firm partnership is really a great one. I like to think that my knowledge of this fact will continue to make me a better lawyer. ▲

5 TIPS

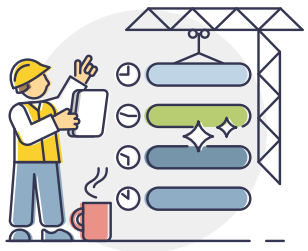
for settling disputes through early mediation

Throughout our legal careers, we've advised more than a few company leaders as they sat across the table from competitors, employees, or customers in thorny disputes. When disagreements can't be resolved, these companies may find themselves embroiled in prolonged and costly litigation—which can undermine business efficiency, damage reputations and relationships, disrupt operations, and increase risk.

Our experience has given us insight into how early mediation can play a powerful role in resolving disputes. Below are five tips for reaching agreement in tough disputes through early mediation.

By Terri Krivosha and Melissa Muro LaMere

1



SET UP EARLY DISPUTE RESOLUTION SYSTEMS

Making early assessment of a dispute part of your established, written approach to conflicts can help set expectations for company leaders and counsel. When your entire team knows that you will discuss settlement in every dispute, you avoid the argument that such discussions project weakness. It's helpful to consult advisors who have developed systems for dispute resolution and collect alternative dispute resolution clauses from other companies' contracts. Look at your current process for handling disputes and identify what needs to change.

2

TRY A PILOT

Setting up a new system for early assessment can be a lot of work. Change is hard, and there will likely be those who resist it. Initiating a pilot program can help achieve buy-in throughout the organization. Make the rewards clear. Then try it for one to six months and solicit feedback from participants about what they've done and how it should be changed. You might then broaden the group from one small set of individuals or one area of cases to something bigger. A pilot can help you evaluate and refine the dispute system without the risk of widespread pushback.

3

IDENTIFY YOUR GOALS

In any dispute, it is vital to ask what success looks like for the company. In-house and outside counsel should be aware of and focused on business priorities. Most business leaders want to pursue their objectives—not spend time and money on lawsuits. Some attorneys may default to litigation, since their job is to score a "win" for the company. We've heard clients say that bringing a dispute to their legal department is like jumping off a cliff toward litigation, but when strategic counsel is involved sooner, there is less chance of litigation down the line. Many companies would benefit from having a conversation about how litigation or avoiding litigation fits in with their broader goals.

MANY COMPANIES WOULD BENEFIT FROM HAVING A CONVERSATION ABOUT HOW LITIGATION OR AVOIDING LITIGATION FITS IN WITH THEIR BROADER GOALS.

While the tips we've described below can assist in early dispute resolution, attorneys can also help identify opportunities to head off conflict before it occurs. For example, outdated form documents like distribution or data processing agreements may fail to cover situations common today. Revising these forms—or creating new ones where none existed before—may prevent disputes from arising later.

Finally, though we believe early dispute resolution often yields the best outcomes for both parties, litigation is sometimes unavoidable. It can be very difficult to overcome a plaintiff's perception that they have been wronged—and that nothing but a complete win is acceptable. Some parties want retribution, or feel they need to defend their reputation in court. But when conflicts can be resolved before a lawsuit is filed, companies can save enormous amounts of time, energy, and money. ▲

4

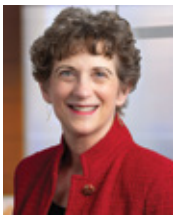
INSIST ON AN EARLY MEETING

Many matters can be settled through early dispute resolution. Provide such clauses in your contracts, which should have as the first step a negotiation between the parties who initially developed the contract or relationship. If the conflict is not resolved at this stage, the dispute resolution process in the applicable agreement should provide that the parties can escalate the issue to those with the power to make decisions. The more frequently executives are involved at this level, the more they can learn to resolve matters. The next step in a dispute resolution clause in an agreement would be a mandatory mediation. At the very least, mediation can help clarify the issues that end up being the focus of litigation. At this stage, we recommend having a clause in the applicable agreement that states all disclosure provided during mediation is for purposes of settlement only and that no evidence will later be used in court.

5

DEVELOP TRUST WITHIN YOUR TEAM

Companies have the best chance to resolve disputes early when they share all pertinent documents and background materials with in-house and/or outside counsel. This allows attorneys to fully understand the company's strengths and its potential exposure at the outset of a conflict—so that they can effectively advocate for the client. Their obligation, in turn, is to be forthright about the strength of the case. Even when outside counsel tells companies what they don't want to hear, they typically appreciate our transparency, and they are more likely to trust us to be straightforward when the next case arises.



***TERRI KRIVOSHA** specializes in helping businesses grow, succeed, and scale as a corporate & securities group partner at Maslon LLP. Terri is also a qualified Rule 114 mediator, bringing her transactional experience, creativity, and high energy to the mediation table.*

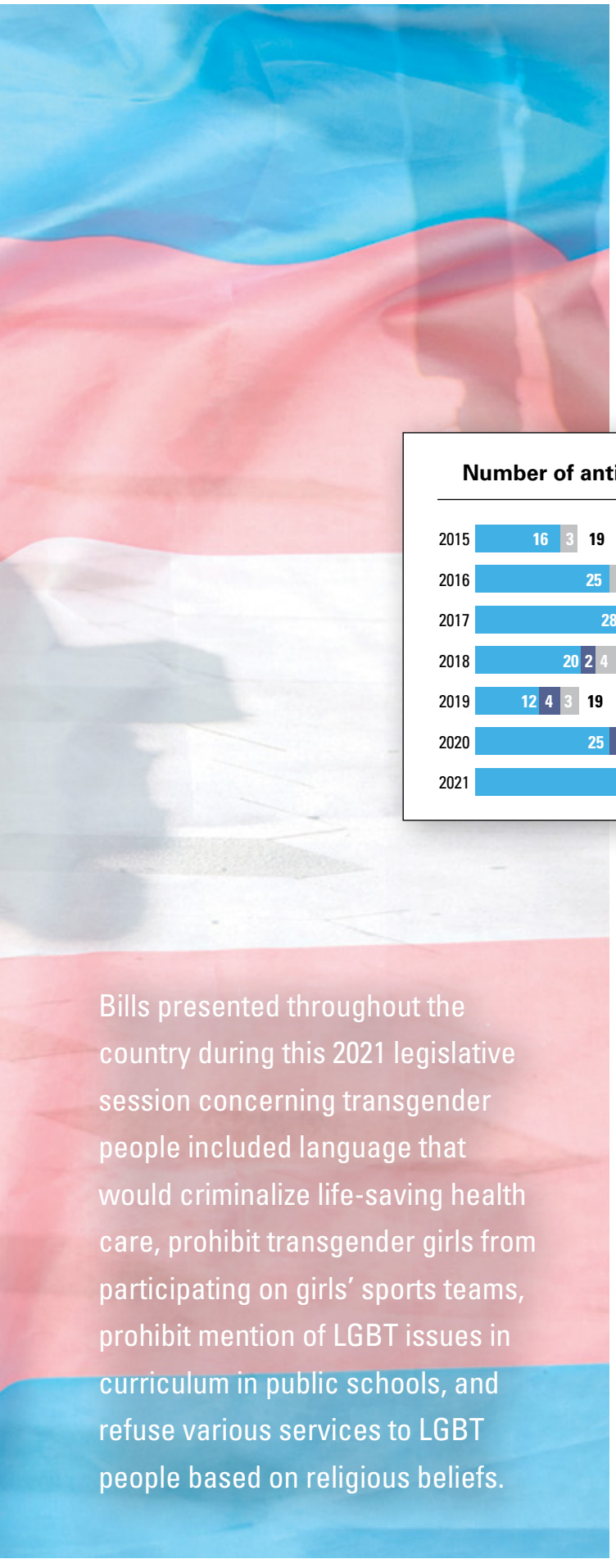
✉ TERRI.KRIVOSHA@MASLON.COM

***MELISSA MURO LAMERE** is a partner in the litigation and labor & employment groups at Maslon. She focuses on a broad range of employment counseling and litigation matters in addition to disputes involving non-competition agreements, trade secrets, and unfair competition.*

✉ MELISSA.MUROLAMERE@MASLON.COM

Transgender rights under siege in many state legislatures—including Minnesota's

By Daniel Choma, Tara Kalar, Ellen J. Kennedy, and Caitlin Schweiger

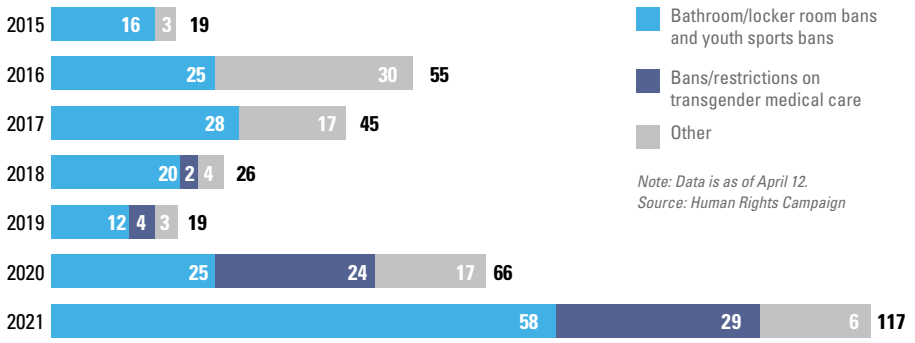


Bills presented throughout the country during this 2021 legislative session concerning transgender people included language that would criminalize life-saving health care, prohibit transgender girls from participating on girls' sports teams, prohibit mention of LGBT issues in curriculum in public schools, and refuse various services to LGBT people based on religious beliefs.

Across the U.S., the past year's state legislative sessions have brought forth an unprecedented amount of legislation addressing transgender rights, most of the bills seemingly in response to recent strides made for transgender people in both state and federal courts. Transgender athlete ban bills have been brought and hastily passed, influenced by special interests and with the ostensible purpose of protecting women. This is playing out in the Minnesota Legislature, too.

Bills presented throughout the country during this 2021 legislative session concerning transgender people included language that would criminalize life-saving health care, prohibit transgender girls from participating on girls' sports teams, prohibit mention of LGBT issues in curriculum in public schools, and refuse various services to LGBT people based on religious beliefs. Compared to past years' legislation, bills addressing transgender issues are at an all-time high.

Number of anti-transgender bills introduced in state legislatures



Note: Data is as of April 12.
Source: Human Rights Campaign

Given the small share of the population that is transgender, it is important to consider the extent of the laws affecting transgender people that will go into effect as a result of the 2021 legislative session. Following legislative action in Idaho, South Dakota, and Florida in 2020, Mississippi, Arkansas, Tennessee, West Virginia, and Alabama passed bills prohibiting transgender girls from participating on girls' sports teams, and similar bills were considered in Ohio, Oklahoma, Montana, and Missouri.[1] Louisiana's governor vetoed a bill to ban transgender girls from female sports, a veto subsequently challenged and nearly overridden by the Legislature in a rare special session devoted to that purpose. In total, 30 states passed or considered bills restricting trans girls' participation in high school girls' sports.

Idaho was the first state to pass a law prohibiting trans girls from playing high school sports. Idaho's law specifies that athletic teams "designated for females, women, or girls shall not be open to students of the male sex."[2] The law resolves disputes over gender identity by reference to "the student's internal and external reproductive anatomy; the student's normal endogenously produced levels of testosterone; and an analysis of the student's genetic makeup."[3] Medical experts agree that gender should be understood in terms of gender identity, that is, the personal conception of oneself as male or female, rather than anatomical sex.[4] Ultimately, a U.S. District Court judge issued an injunction preventing the law from taking effect, stating, "The State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics."[5] The case is currently before the 9th Circuit Court of Appeals.

Arkansas became the first state to prohibit gender-affirming care despite strong opposition from the American Academy of Pediatrics and a veto from the governor.[6] The law will subject transgender children in that state—against the recommendation of medical professionals—to irreversible dysphoric pain caused by undergoing the wrong puberty.[7] Studies support that when transgender youth receive gender-affirming care, the risk of suicide decreases by about 70 percent.[8] A judge in Arkansas granted a temporary injunction blocking the law from taking effect.

Texas considered a similar bill banning gender-affirming care, making it punishable by jail time or termination of parental rights for parents who are supportive of their transgender children. Tennessee passed a law requiring government buildings or businesses that are open to the public to post signs if they allow use of the facilities by gender identity rather than anatomy.

These bills are led, in part, by national advocacy groups on the far right, including the Alliance Defending Freedom (ADF)[9], which has been labeled as a hate group by the Southern Poverty Law Center (SPLC).[10] According to the SPLC, "The Alliance Defending Freedom is a legal advocacy and training group that has supported the recriminalization of sexual acts between consenting LGBTQ adults in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has contended that LGBTQ people are more likely to engage in pedophilia; and claims that a 'homosexual agenda' will destroy Christianity and society. ADF also works to develop 'religious liberty' legislation and case law that will allow the denial of goods and services to LGBTQ people on the basis of religion."

The ADF has made no secret of its objectives; in 2003 the ADF filed briefs in *Lawrence v. Texas* arguing for criminalizing gay sex through sodomy laws.[11] In contrast, a whole contingent of amici argued that anti-sodomy laws reinforce prejudice, discrimination, and violence against LGBT people.[12] In recent years, the ADF has pivoted to advancing legislation restricting transgender people's access to bathrooms, including an unsuccessful effort in Minnesota.[13]

More than 90 U.S. corporations (including Facebook, Pfizer, Altria, Peloton, Dell, Amazon, American Airlines, Apple, AT&T, AirBnB, Google, Hilton, IBM, Microsoft, Nike, Paypal, Uber, and Verizon) have opposed legislation limiting rights for LGBT people.

Minnesota legislation

Defining gender

Several bills addressing the rights of LGBTQ people in Minnesota were drafted and considered in the 2021 legislative session. Rep. Eric Lucero (R-Dayton) drafted three bills to regulate and criminalize a minor's participation in public school sporting events based upon sex. HF1657 would add a new definition of "sex" specific to Minn. Stat. §121A.04's provisions for equal opportunity in K-12 sporting events. Under the proposed new standard, *sex* would be defined by chromosomal make-up instead of the categorization listed on a birth certificate. The bill would criminalize children's noncompliance with this definition of sex.[14] Children who try out for a team while having a non-compliant chromosome as so defined would be found guilty of a petty misdemeanor, and children who utilize a locker room outside of their chromosomal makeup would be subject to misdemeanor charges and potential jail time. This was the only bill proposed in any U.S. state legislature with criminal penalties associated with a child's genetic make-up in school-sponsored sports.

Upon introduction, human rights groups labeled the bill "unconscionable under the Minnesota Constitution" and "one of the most extreme political attacks on trans youth… ever seen."[15] Erin May Quade of Gender Justice noted that suspected students may be subject to genetic testing. Since sex on a birth certificate is based upon a doctor's visual inspection rather than any genetic measurement, the bill's opponents argued that the bill requires invasive genetic testing merely upon accusation of being a transgender or gender non-binary athlete participating in children's sports.

HF1657 was proposed along with HF350 and HF352, which would limit participation of children to teams of the same sex according to the above-proposed standard. HF1657 was sent to the Education Policy Committee, where it did not receive a hearing and progressed no further.

Many of the bills proposed across the country share language with the Idaho legislation currently under injunction. Opponents of these bills to limit transgender access to activities, health care, etc., describe them as model bills designed for political theater.[16] Idaho newspaper reporters asked the Senate sponsor of the Idaho bill, Sen. Mary Souza, if she was worried that the bill was unconstitutional on its face. The newspaper reported that the Alliance Defending Freedom helped draft the bill and promised to pay for all legal fees relating to litigating the bill's constitutionality.[17]

When pressed by media, lawmakers are largely unable to present any local support necessitating these bills.[18] Rather, local school districts and state organizations have opposed bills like HF1657. The Ohio High School Athletic Association (OHSAA) noted that schools already have a robust community-drafted policy and do not support the proposed bill, which they describe as "not based on sound medical knowledge/scientific validity."[19] School administrators across the country worry that bills that they did not draft will become law and prevent national sporting organizations from choosing communities in their state for future events, with negative economic consequences.[20] As Missouri Republican Shamed Dogan said, "A lot is riding on this in terms of our state's reputation… across the country."[21]

Bills such as HF1657 would prevent transgender teenagers from participation in pro-social events such as high school sports.[22] Participants in sports often show better mental health and self-esteem than non-participants. Bills preventing transgender youths' sports participation have led to a decline in the mental health of trans teens, who are already at a higher risk for decreased mental health. Regardless of the intent of bills limiting transgender youths' access to sports and to health care, the result is clear: After the passage of an Arkansas bill limiting health care options for transgender minors, there was a significant increase in suicide attempts by trans teens living in Arkansas.

The proposed legislation also creates an environment of gender policing that is harmful to all girls, including intersex girls and girls who do not conform to stereotypical ideals of gender. HF1657 did not specify who would be tasked with determining gender, leaving the assumption that school officials would be the arbiter of gender in school sports.

'Gay and trans panic defense'

In an effort to eliminate legal discrimination against LGBTQ people, Rep. Athena Hollins (DFL-St. Paul) and Sen. Scott Dibble (DFL-Minneapolis) drafted bills in the House and Senate to ban the 'gay and trans panic defense.'[23]

Hollins says of the effort, "I was horrified to learn that the defense was still permitted in Minnesota, so in 2021, I introduced legislation to ban the gay/trans panic defense in our state."

HF1648 and SF1512 would ban the 'gay and trans panic defense' and modify Minn. Stat. §609.06's provisions on acceptable use of deadly force to clarify that the use of such force is not justified as "a reaction to victim's sexual orientation."[24] The bills further clarify that a victim's sexual orientation could not be used as a defense, but rather to determine the perpetrator's state of mind similar to the manner in which Minnesota statutes address voluntary intoxication (Minn. Stat. §609.075).[25] Finally, the bills would clarify that a victim's sexual orientation cannot be considered provocation for the purpose of establishing a "heat of passion" murder defense pursuant to Minn. Stat. §609.20.105Id.[26] The American Psychiatric Association ceased recognizing the validity of a "gay panic disorder" in 1973, but the defense remains available to defense attorneys in Minnesota today.[27]

HF1648 and SF1512 support and would implement the ABA's House of Delegates Resolution 113A, resolving that federal, state, local, and territorial governments "curtail the availability and effectiveness of the 'gay panic' and 'trans panic' defense..."[28] The proposed Minnesota bans follow the ABA's recommendation that discovery of a person's gender identity should not be considered legally adequate provocation to establish a "heat of passion" defense.[29] HF1648 was sent to the Public Safety and Criminal Justice Reform Finance and Policy Committee, where it had two readings but did not advance from committee. Hollins has said she will continue to "push for an end to this barbaric and cruel legal tactic. Nobody deserves to be hurt or injured for simply being themselves."

Conversion therapy

Bills to ban conversion therapy, that is, therapy to "convert" someone away from an LGBTQ identity, included HF12, SF80, and SF1374. HF21 also specifies that conversion therapy would not be covered by medical assistance and would ban advertising or promotional materials that indicate homosexuality is a disease, mental disorder, or illness, or that guarantee change in orientation. None of these bills advanced from committee. At present, conversion therapy is banned in 20 states and many municipalities, including Minneapolis and Duluth.[30]

Court decisions and transgender rights

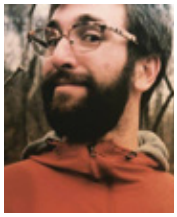
Proposed legislation limiting opportunities and access of transgender people conflicts with the sentiment expressed by the courts that have upheld rights for transgender people. In June 2021, the Supreme Court declined to review a decision of the 4th Circuit Court of Appeals, which held that a Virginia school district violated Title IX by instituting a policy prohibiting any student "with gender identity issues" from using the restroom consistent with their gender identity.[31]

In 2020, the Supreme Court held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because they are gay or transgender.[32] In Minnesota, the Minnesota Court of Appeals held in 2020 that it is a violation of both the Minnesota Human Rights Act and the Minnesota Constitution for school districts to segregate transgender students from their peers in locker room facilities.[33]

The Supreme Court in the summer of 2021 declined to hear *Grimm v. Gloucester County School Board*, letting stand a 4th Circuit decision that ruled that the school board violated Title IX by prohibiting a transgender student from using a restroom that aligned with his gender identity. *Gloucester School Board v. Grimm*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, __S.Ct.__(2021).

Conclusion

The struggles of transgender people are among many global, national, and state efforts to address self-determination and equality by various groups, not only those in the broader LGBTQ communities but by racial, religious, ethnic, and national minorities as well. The UN Basic Principles on the Role of Lawyers, adopted in 1980, states, "Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law."[34] Former UN Secretary-General Ban Ki-moon said, "Let there be no confusion: Where there is tension between cultural attitudes and universal human rights, rights must carry the day. Personal disapproval, even society's disapproval, is no excuse to arrest, detain, imprison, harass or torture anyone—ever."[35] The wave of anti-trans legislation circulating in legislatures throughout the United States threatens human rights protections for transgender individuals, implies acceptance of discrimination, and results in degradation of rights for all protected classes. ▲

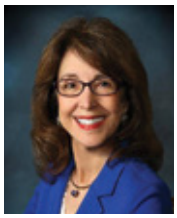


***DANIEL CHOMA** is a 2L at Mitchell Hamline School of Law. Prior to law school, he spent his time as a musician, artist, and community organizer. His interests in law are in human rights, equal protections, and community development. He lives with his wife Tessa in St. Paul in a small house with a big garden.*

DACHOMA@GMAIL.COM

***CAITLIN SCHWEIGER** is a graduate of Mitchell Hamline School of Law and a public defender in the third district. She formerly clerked for the Honorable Christian Sande in Hennepin County. She is a recipient of the 2021 Benjamin B. Ferencz Fellowship in Human Rights and Law. She continues to advocate for human rights issues locally and internationally.*

CAITLINSCHWEIGER@GMAIL.COM



***ELLEN J. KENNEDY** is the founder and executive director of World Without Genocide, a human rights organization located at Mitchell Hamline School of Law, where she is also an adjunct professor. She has received many awards for her work, including the Outstanding Citizen award from the Anne Frank Center in New York.*

EJKENNEDY@WORLDWITHOUTGENOCIDE.ORG

***TARA KALAR** is a government attorney. She has dedicated her pro bono practice to human rights issues in Minnesota. She is an adjunct professor at Mitchell Hamline School of Law and in her spare time she coaches the Southwest High School mock trial team.*

TARA.KALAR@MITCHELLHAMLINE.EDU

Notes

[1] Note: The endnote accompanying the online version of this article, available at *www.mnbar.org/bench-bar*, includes an extensive listing of bill introductions in legislatures around the United States in 2020-21.

[2] §33-6203.

[3] Katelyn Burns, *While the country deals with the coronavirus, Idaho state legislators prioritize banning trans athletes*, Vox.com, (3/17/2020), *https://www.vox.com/identities/2020/3/17/21183305/idaho-legislature-bans-trans-athletes.*

[4] Denise Grady, *Anatomy Does Not Determine Gender, Experts Say*, N.Y. Times (10/22/2018), *https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html.*

[5] Hecox v. Little, 479 F. Supp. 3d 930, 984-85 (D. Idaho 2020).

[6] H.B. 1570, 93rd Gen. Assemb., (Ark. 2021), *https://legiscan.com/AR/text/HB1570/2021*; *See* Vanessa Romo, *Arkansas Governor Vetoes Ban on Gender-Affirming Care for Trans Youth*, NPR.org, (4/5/2021), *https://www.npr.org/2021/04/05/984555637/arkansas-governor-vetoes-anti-transgender-treatment-ban-for-minors*; Jo Yurcaba, *Arkansas passes bill to ban gender-affirming care for trans youth*, NBCNews.com, (3/29/2021) *https://www.nbcnews.com/feature/nbc-out/arkansas-passes-bill-ban-gender-affirming-care-trans-youth-n1262412.*

[7] *See* David A. Klein and Emily T. Goodwin, *Caring for Transgender and Gender-Diverse Persons: What Clinicians Should Know*, Am. Fam. Physician, 12/1/2018, 645 at 645, *https://www.aafp.org/afp/2018/1201/p645.html* (advising physicians against stopping gender-affirming care as doing so creates significant health risks for patients).

[8] *See* Jack L. Turban, Dana King, Jeremi M. Carswell and Alex S. Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, Pediatrics, Feb. 2020 at 145, *https://doi.org/10.1542/peds.2019-1725. See generally* Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, Pediatrics, Oct. 2018 at 142, *https://doi.org/10.1542/peds.2018-2162* (outlining American Academy of Pediatrics model care recommendations which recommend gender-affirming medical care).

[9] *See* Samantha Michaels, *We Tracked Down the Lawyers Behind the Recent Wave of Anti-Trans Bathroom Bills*, Motherjones.com, (4/25/2016), *https://www.motherjones.com/politics/2016/04/alliance-defending-freedom-lobbies-anti-lgbt-bathroom-bills/* (reporting that many recent bathroom bills are very similar to model legislation promoted by Alliance Defending Freedom).

[10] Alliance Defending Freedom, *Southern Poverty Law Center Hate Map*, SPLCenter.org, (last visited 7/2/2021), *https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom* .

[11] Alliance Defending Freedom was known as Alliance Defense Fund in 2003. While the organizations name has changed, the lawyers representing the interests of the organization largely have not. In *Lawrence*, Jordan W. Lorence and Joshua W. Carden of ADF collaborated with Michael P. Farris of Center for the Original Intent of the Constitution to draft an amicus brief. *See* Brief *Amicus Curiae* of the Center for the Original Intent of the Constitution in Support of Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), *https://www.splcenter.org/sites/default/files/adf-lawrence_v_texas_brief-farris-2003.pdf* .

[12] *E.g.* Brief of the CATO Institute as *Amicus Curiae* in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); *See also* Neil Margolies, *The Unbearable "Lite"ness of History: American Sodomy Laws from Bowers to Lawrence and the Ramifications of Announcing a New Past*, 32 Fordham Urb. L.J. 355, 357 (2005), *https://ir.lawnet.fordham.edu/ulj/vol32/iss2/4* (arguing *Lawrence* is an example of parties using revisionist history with "two contrasting stories grounded in only one set of facts."). *See also* Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 Am. Med. Ass'n J. of Ethics 916, 916-17 (2014) *https://journalofethics.ama-assn.org/article/decriminalization-sodomy-united-states/2014-11* (arguing American social norms changed regarding homosexuality at law, causing the American Law Institute to vote to decriminalize consensual sodomy in 1955). *But see* Brief for Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (arguing that criminalizing homosexual intercourse is part of American tradition).

[13] *See* Mary Emily O'Hara, *This Law Firm Is Linked to Anti-Transgender Bathroom Bills Across the Country*, NBCNews.com, (4/8/2017), *https://www.nbcnews.com/feature/nbc-out/law-firm-linked-anti-transgender-bathroom-bills-across-country-n741106.*

[14] Minn. H.F. 1657 (2021), online. Accessed 6/15/2021, Minn. H.F. 350 (2021), online. Accessed 6/15/2021, Minn. H.F. 352 (2021), online. Accessed 6/15/2021.Notably, the rules governing birth certificates in Minnesota say nothing about chromosomal make-up. Minnesota Rules, part 4601.0600.0100, subpart 4 (2013).

[15] John Riley, Minnesota bill would impose criminal penalties on transgender athletes, Metroweekly, (3/1/2021), *https://www.metroweekly.com/2021/03/minnesota-bill-would-impose-criminal-penalties-on-transgender-athletes/* .

[16] See Suntrup, *supra* note 1, for description of local Missouri opposition to bills; See also Guerrero and Winchester, *supra* note 1, for analysis on lack of local support for bills in Florida.

[17] *See* Nathan Brown and Betsy Z. Russell, *Idaho Senate passes controversial transgender athletes bill, amid rush to adjourn*, IdahoPress.com, (3/16/2020), *https://www.idahopress.com/news/local/idaho-senate-passes-controversial-transgender-athletes-bill-amid-rush-to-adjourn/article_bc4825fc-c588-524b-8128-68ba57d8c00d.html.*

[18] David Crary and Lindsay Whitehurst, *Lawmakers can't cite local examples of trans girls in sports*, Associated Press (3/3/2021), *https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7.*

[19] *See* Hancock, *supra* note 1.

[20] *See* Hancock, *supra* note 1.

[21] *Id.*

[22] T.J. Jourian, *How Anti-Trans Legislation Affects College Students*, BestColleges.com, (6/15/2021), *https://www.bestcolleges.com/blog/anti-trans-legislation-college-students/.*

[23] Minn. H.F. 1648(2021), online. Accessed 6/15/2021, Minn. S.F. 1512 (2021), online. Accessed 6/15/2021.

[24] *Cf.* Minn. Stat.§609.06 (2020).

[25] *Cf.* Minn. Stat. §609.075 (2020).

[26] *Cf.* Minn. Stat. §609.20 (2020).

[27] Scott Dibble, Athena Hollins, Ellen J. Kennedy, Minnesota must ban the 'gay panic' defense, Star Trib., (3/3/2021), *https://www.startribune.com/minnesota-must-ban-the-gay-panic-defense/600029939/* .

[28] ABA House Res.113A, Aug. 12-13 (2013), *https://lgbtbar.org/wp-content/uploads/sites/6/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf* .

[29] *Ibid.*

[30] Movement Advancement Project. July 2017 (April 2015). *LGBT Policy Spotlight: Conversion Therapy Bans*. https://www.lgbtmap.org/policy-spotlight-conversion-therapy-bans (last accessed 7/7/2021).

[31] John Fritze, *Supreme Court declines to hear Virginia school board's transgender bathroom case*, USA Today, (6/28/2021), *https://www.usatoday.com/story/news/politics/2021/06/28/supreme-court-wont-decide-trans-bathroom-case-involving-gavin-grimm/5318886001/* .

[32] Bostock v. Clayton Cnty., 590 U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

[33] N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020).

[34] *https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx*

[35] *https://news.un.org/en/story/2010/12/361672*

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This moment and this breath

A public defender writes about loss, survival, and extreme sports

By Shauna Faye Kieffer

I was in the middle of a 200-mile relay running race when my 34-year-old brother died in August 2019. His wife kept calling me. I answered about four miles deep into the race and I knew by her voice he was dead. My 29-year-old brother had died two months before. I lost a baby two years before that. Everyone has their suffering. It's no secret that people who are drawn to sports that require total focus on that one moment—be it yoga breathing, skiing cliffs, or running until your legs could fall off—are all seeking to be present in the moment and not lost in their despair. As a trial lawyer, specifically a public defender in Hennepin County, Minnesota, channeling these outlets is more important to me now than ever.

My office had a shake-up. Our longtime chief was removed during covid-19, and some months earlier George Floyd was murdered in our city, exposing the racial injustice public defenders see and battle every day. We remained in court and kept going to the jails while most judges and prosecutors appeared remotely. I volunteered to cover the calendar when covid first hit—and learned in court on the record that a client I had met with had active covid. We got covid, we tried cases during covid, we marched with protestors, one of my colleagues asking a young woman who was being peppered-sprayed, "Can I put $78 in your pocket for bail?" as she was being arrested.

When I read about the death of George Floyd I knew the city would burn, but when I drove on the empty roads and saw the dark clouds of smoke billowing on my way to work the next day, I cried for it all anyhow. We volunteered to answer legal phone calls on a secret line for those arrested for protesting. "I hope you die, you Commie bitch!" one man kept calling to say, having hacked the secret line to yell at whoever answered. It was three in the morning and my kids, who I would not see before work, slept silently upstairs. Clients would plead with me that they were elderly, had asthma, or any other condition that made them fear their pre-trial detainment would lead to their death of covid. Didn't I care?! Of course I did.

I stayed up late writing motions about covid and bail that were unsuccessful. I could picture my own brother (who spent some time in prison) on the other side of the plexiglass, scared that he would die behind bars or miss the funeral of a loved one outside. Our caseloads on the "person-felony" team (for the most serious crimes charged in Hennepin County) increased despite the overall decline in court activity because they were cases that would not be deemed less important during a crisis. We all averaged over one hundred open cases, most of them serious felonies, on any given day. Most of us had two open murders included in that case load at any given time, along with many shootings and rapes. We watched each other break down as relationships ended and people drank too much, ate too much, or simply withdrew. I'd like to say I was different, and stress doesn't affect me, but it sure does. Despite hardship, I have survived and sometimes even thrived in moments of extreme pain and pressure because I've learned to care for myself.

Whether it's skiing or endurance running, extreme sports provide an immediate release of all that is toxic. In 2017, I lost a baby. I had finished a three-week-long murder trial with co-defendants where six lawyers were in the courtroom on any given day. One day, the judge locked the courtroom because people came in to threaten a witness as he was testifying, hand-gesturing slicing across the neck. My co-counsel and I tried that case like brain surgeons. It was an unwinnable mission, but I'm confident no other attorneys would have litigated it better. The stress that such a trial places on the body and the mind is real, and I put my health second for the client and job.

After our guilty verdict, I was at a friend's baby shower in a beautiful downtown condo in Minneapolis when my water broke. I was standing, eating a quiche, when I popped like a balloon. I didn't understand what had happened. "Oh my god I've never—I've never peed on the floor," I stammered, feeling embarrassed and lightheaded. Three people followed me to the bathroom, knowing that at 16 weeks pregnant this wasn't going to end well. They watched me, just as shocked as I was at the blood, and took me to the hospital. Her heart was still beating on the ultrasound. I begged them to fill me back up with water, but of course, that's not something that can be done.

I got to hold that little baby. The hormonal imbalance created by that loss was unfathomable. It was the closest I've ever come to understanding mental illness…. at that point I had lost a boyfriend to suicide, and helped a younger brother battle years of chemotherapy, but during any other traumas I had at least a brain that sought a stable baseline. When baby Edith died, I kept thinking I should take her body and start walking from the hospital (in downtown Minneapolis) to the sea. I did not want to leave the hospital without her, but the hospital required that I give her to them for an autopsy. I would not be able to keep her ashes.

The autopsy later revealed no health issues with the baby. Two other women on my work team also lost babies that year. I went back to the office, where at least I had the ability to alleviate the suffering of others. A judge ordered me over to her courtroom over my protests, in an exchange that ended with her yelling, "I've had three miscarriages, Ms. Kieffer!" By the time I got back to my desk, she had sent an apology to my personal email that to this day, I've never read. I accepted it in heart because hurt people hurt people. Luckily, a boss in our office, Jeanette Boerner, told me to take as much time off as I needed. My job was safe, but something had to change.

Within a week I was on a backcountry ski trip. We boot-packed into one hike. I sweat more hiking Aspen's back bowls than when I'd run a marathon. I was drenched, releasing all the hormones and drugs that go with pregnancy loss when we summited the back bowl of Aspen proper, offering runs up to 48 degrees in pitch. Physical pain was about the only thing that I could feel. I enjoyed burning my legs on the hike up and skiing the downhill.

At one point we traversed, skiing along a narrow path horizontally across the mountain seeking a perfect line to drop in on, until soon we were on a knife blade edge cliff and out of options. One side was sheer rock: if I fell backwards, I would be shredded. The other side of the mountain edge on which we sat was a 45-degree pitch narrow chute that required navigation around a boulder, trees on each side. My ski edges kept me from plummeting. I shook with fear. My husband knew I was scared. "Can I help you?" he yelled over the wind. "How? A helicopter?" I yelled back, with some other choice words. We were at a place you could not hike out of, where there was only one way down. I kept telling myself, "You can't do this, you simply cannot do this, if you miss this turn you die." Until my mind finally quieted. You must.

Facing a chute with a boulder that you have to clear is just like being faced with insurmountable loss: You go forward even if you're scared as f--k, even if you think you can't, because you must. I cleared the boulder even though the route was steep and if I caught an edge, I'd roll and die. I ski places people have died, as recently as this year. I know my skill set and am not doing it to risk my life. I'm pushing myself to find peace. The rest of the run was powder and trees with enjoyable, easy-to-manage routes. I skied in for a beer. Hubby went to hit it again. A guy at the bar bought a round. He was hamming it up with everyone, bragging about his mogul run and putting his friends in playful headlocks and what-not. I was surprised when he got up to use the restroom and had no legs. That weekend Aspen hosted an annual event for combat-wounded veterans. I wound up getting his number to give to my single friend Jenn. Studies show PTSD can be cured by microdosing mushrooms or by doing extreme sports. My good friend Larry, a retired Navy SEAL, and I often talk about the parallels in job stress and battle as a public defender versus a SEAL: Both require focus and deal out constant trauma. Extreme sports reset the mind.

To focus solely on the moment at hand is a gift—I'd go so far as to say maybe even the goal of this life. I met a Buddhist monk at the airport in New Delhi, India in 2006. His name was Nyandak. He had a hard time with my name, Shauna. "If it helps, call me Shauna Faye," I said. "They misprinted my ticket to read Shunyata." "Do you know what that means?" he said. "Total emptiness." "Is that a dumb blonde joke?" I asked. He looked confused. "It's the goal of what I teach," he explained. Nyandak has stayed with me twice in Minnesota through the years. We're still good friends today. Total emptiness: How do you achieve that when there is so much suffering to carry with you? If you can't leave it at work, you can't watch your kids at swimming lessons or be there for your loved one's last breath.

The week of the most recent presidential election, I tried a police assault case. My Black client was charged with spitting at the White police officers, a felony. Helicopters circled the city lest chaos break out as election results emerged. Police four-wheel vehicles filled with armed cops made the city feel militarized, under siege. In court the rules were different because of covid. When speaking to the jury, I could remove my face mask. The jury was brought into the court room for *voir dire* questioning in smaller panels, seated far apart from one another. A self-described CEO from a rich western suburb removed his mask entirely when the judge inquired if the jurors would be comfortable sitting on a trial in the middle of covid. Assuming this was because he didn't believe in covid, and perhaps thought himself a conservative, I asked if he could follow the law like Justice Scalia prescribed, to the letter? Of course, he responded. "Let's say you learn my client is a jerk to law enforcement, maybe even an asshole, and you feel very sympathetic to these cops. Can you still follow the law even if you don't like it?" He shifted in his seat, and said the question made him very uncomfortable, but he would. I struck him, but the almost all-White jury had been put on notice.

Every day during that trial, I ran the same loop I have run since 2006 in downtown Minneapolis. It has come to mean more since my brother Shane was murdered along that very river. Shortly after my second brother died, I sought mental health help—I was hoping the doctor would give me some drugs, some therapy or diagnosis. (I believe very much in science and support anyone taking drugs that help their brain find balance and peace.) But he said I should keep running that same loop. Looking the scary thing in its face takes the trauma away. I have come to run no matter what. I will tell the judges in trial that I have a standing lunch engagement, once passing the judge presiding on my case on *his* usual run, as the jury read questionnaires. He gave me a knowing look. Usually I can only get away for a half hour, but for that half hour my mind spins and releases anything that does not serve me. While on autopilot, that detail I forgot about the body-worn camera footage rises to the top, and the snide remark the prosecutor made drifts deep into the Mississippi mud. If I carried these things home to my family, I would not be able to do the work that I do.

The officer testified that my client looked him in the eye and spat in his face. My client did not testify. I pointed out the discrepancies in the evidence, and how my client had been brutally assaulted before the officers arrived. The officers did not investigate that assault. Even if I worked late, I found time to get outside for a short jog. If time was dwindling, I'd run two miles as fast as I could, and use wet-wipes to shower, slicking my hair back with a headband and hoping I looked more chic than gross when I returned to trial in the afternoon. The whole country felt unsettled with the election. The whole city felt unsettled because of George Floyd's murder. It was all too much. Every time I ran, I felt calm and focused, my blood pressure lowered, and details of the case connected. My client was found not guilty.

The memories I have can be graphic and traumatic. My brother on a gurney under the humming light of his garage, his wife weeping and falling at my feet. I don't live in these dark places because of running, skiing, and surfing. So many of my friends can barely get through the week if something goes awry. A friend who wasn't warm enough, mounting debt, being stuck inside because of covid—these things can cripple them in work productivity and their ability to be there for their friends and family. I get it, I get it majorly. But the reason I was able to pull through and win almost all of my jury trials as a defense attorney following the horrific loss of my brothers, the reason I am able to be present to raise two lovely kids, is because my "me-time" creates power and self-worth. My legs can run full throttle; my mind can quiet to the point that the only thing in front of me is the moment and my breath.

There's a level of camaraderie I feel with my colleagues because we are the frontline workers combating injustices and serving the underdog. We all come into the job wanting to make the world better, but ironically, true believers are the most likely to burn out. If you are empathetic toward the crying mother, toward the mentally ill client who keeps trying to kill themselves in jail, toward the baby taken from the arms of a parent hauled away on a non-violent offense, and you don't have an outlet for these traumas, this job is a slow death sentence. You cannot do it all, and the trauma of these real-life humans will haunt you. If you want to continue to do your part, you must make time to care for yourself.

As a profession in general, we are the worst at showing weakness. Public defenders are at the top of that list. To be able to say, "Hey, I need caseload relief!" or admit to your boss that a case has a trauma too close to your own for you to handle it, should be seen as strength. Yet we fear showing our vulnerabilities lest our colleagues think we can't handle the work, or we aren't down for the cause. I have seen far too many public defenders whose attitude is, "Not me, I can handle anything! Give me 80-hour weeks, low pay, and I will love it because I care the most!" Not surprisingly, these people burn out. Employers that understand supporting their line attorneys is an open dialogue about meeting their needs—be that flexing time, or making time for physical health—create loyalty and longevity.

Racial injustice, covid, politics, global warming, divorce, death: None of us are going to make it out alive, but how do we make it through the day? Put on some sneakers and let your legs loose like a six-year-old on a summer day. Run around the block, do yoga in your backyard. Play with your dog, call your dad. You don't have to go far, you don't have to ski a cliff, but you have to do something to save yourself. ▲

SHAUNA FAYE KIEFFER is a 2008 graduate of UST Law. She was the first person in the state to uncover an electronic surveillance warrant filed in secret in another county. Court File No. 27-CR-19-24532. She has won 7 of her 9 most recent jury trials.
✉ SHAUNA.KIEFFER@HENNEPIN.US

Well-being is always a work in progress

By Rachell Henning

A career in the legal profession is not for the faint of heart. After working in the field for over 12 years, first in a human resources-administrative capacity and now as an attorney, I can attest that our profession is no walk in the park. Yet if you are like me and the countless attorneys with whom I have had the pleasure to work over the years, you could not imagine doing anything else. So how can we handle the stressors of the job while enjoying the fruits of our hard work?

Enter the world of wellness. A quick scroll through Twitter, Facebook, TikTok, or any other platform out there will suffice to inundate you with wellness hacks or people pushing supplements, workouts, clothing, etc. The wellness industry is quite lucrative, but attorneys' well-being should be about more than just our physical state. With our job comes a lot of stress, anxiety, demands on our time, work-life balance challenges, and dare I say, ethical quandaries. I found that when I am not taking care of all elements of my wellness, I am not able to give my all to the different facets of my life. I'm sure many can relate to this predicament and the question, how do I balance it all? My answer to myself has been that I simply cannot do it all *and* lead a perfectly healthy life of uninterrupted serenity, but I can do what I can. My journey is not a pretty one, but I hope it is one many people can relate to.

Sleep

During my first year as an associate office administrator handling human resources, staffing, phone systems, and pretty much any other random task that the office administrator wanted to pass off, I rarely got a decent night's sleep. My husband and I moved into an apartment while we were building our home. We had a perfect almost two-year old daughter, Kenna, who would put herself to sleep each night by the time she was able to walk. She would say, "I go bed now" and grab her blanket and we would follow her into her room and tuck her in.

This all changed when we moved into the apartment. Around the same time, I discovered I was pregnant with our second child, Isi. What started as a struggle with Kenna's adjusting to a new place to live transitioned to a colicky little sister and a nearly seven-year struggle with getting a decent night's rest. During that time we purchased every swing, wrap, bed, comforter, and sleep guide out there. Unfortunately, this also meant that I did not sleep much. Between the constant worries that come with the legal profession and the drive to be perfect and a child who could not sleep, I was definitely not the picture of health and wellness. It was not until my second semester of law school that we were able to get Isi, then almost seven years old, to a sleep specialist who diagnosed her with restless leg syndrome. With the right combination of medications and sessions with a sleep psychologist, she finally became able to sleep through the night without issue.

Finally, it was my turn to deal with my own sleep, which was so off-kilter after years of neglect that I too sought the assistance of specialists to address sleep apnea and sleep hygiene. I worked with a counselor to learn how to process the events of the day and then let them go so that I could get a decent night's sleep. The weirdest ritual, and one I use to this day, was to have a specific place on the headboard of my bed that I place my hand each night to leave my worries and stress from the day. This helps me to transition from the day and into rest.

As law students, parents, and professionals, we have all known the difficulties of functioning after a night (or consecutive nights) of little to no sleep. We like to believe we are invincible and can power through the next day, but eventually it does catch up—with harmful effects on your overall well-being and your ability to perform at your best. Making quality sleep a priority is one of the first steps to achieving physical and mental well-being.

Work-life balance

One of the biggest challenges I have faced during my time in the legal profession has been disconnecting from work. As an elder law practitioner, this has proven even more challenging, since my practice is very hands-on. I treat my clients as if they were family and try to provide around-the-clock availability to help address crisis situations. This approach has helped me to grow my practice quickly, but it has come at the price of blurring the lines between when I am at work and when I am home. I know this is not an uncommon theme among attorneys. As an office administrator, I worked with many attorneys who had the same tenacity and dedication to their clients. As practitioners, we need to recognize that this level of service is not sustainable if there is not some way to disconnect.

Disconnecting can take many different forms. For some, it is planning a two-week long annual golfing trip to some exotic destination. For others, it is simply taking a weekend off without going into the office or doing work at home. But in our profession, the reality of taking time off involves a lost income cost-benefit analysis. My experience on the administrative side of a law firm helped me to see how important it is to be able to take a break, relax, and do some self-care. When I tried to run non-stop for days on end, I would get tired and run down and experience health issues. In the long run, it was not worth it to try to keep pushing—I would end up sick and have to take off more time than had I just taken a day off here and there to settle the fight-or-flight reflexes that are ever present in our practice.

When I went to law school, my first year was beyond stressful between working full-time and attending law school part-time. I was never really disconnected from either world. I missed first days of school for my kids as well as birthdays and other milestones while I was busy either working, studying, or attending class. The hybrid program at Mitchell Hamline allowed me the flexibility to do law school on my own schedule while working full-time to support my family. I was able to be there for basketball games and events, but I always had a textbook or laptop along to help me stay on top of work and school. This approach helped me prepare for practice as well.

I have worked hard to be more conscientious about the boundary between work and personal life. I advise my clients that I typically review and respond to emails promptly after hours and on weekends, except for when I am at my children's activities. I have yet to experience clients pushing back against this. It also affords me time to be guilt-free and in the moment with my kids and enjoy them while they are young.

While I enjoy a level of autonomy and flexibility in the firm where I practice, I know others in the profession are not so lucky. For those whose practices are more demanding or whose firms have high expectations about accessibility for clients and colleagues, I still urge people to try to find a way to get some balance. Even if you are turning off your email notifications when you are on vacation and looking at your work email once every few hours instead, you are creating a boundary. It will help you relax and recharge so you can return to work refreshed. You won't be as overwhelmed by a slew of emails because you will have kept up with them, but you will also have allowed yourself some time to disconnect.

Priorities

Let's face it: We are torn in multiple directions all day every day in all facets of our lives. I am torn between work, home, kids' activities, volunteer activities, and trying to grow my practice. At work, I am torn between current client needs, prospective client needs, and administrative responsibilities. Like many of you, there are days I finally get to sit down and breathe at 3 p.m. and realize I have yet to eat lunch or use the bathroom. Continuing at a break-neck pace is not sustainable, and triaging crisis after crisis can take its toll.

I often rely on advice that I received as a 15-year-old disc jockey at a small radio station in the middle of South Dakota: "What's up next comes first." It sounds like the most obvious statement, but all too often we get overwhelmed by the various demands placed on us and may procrastinate or choose to work on easier projects first. Over my career, I have observed firsthand that such tactics rarely result in superior work product or less stress. Instead, they have the exact opposite effect on attorneys and support staff alike. To combat the long nights and last-minute, barely met deadlines, the simple concept of doing what is up first helps to prioritize my time. It helps me when I am facing two clients with emergencies. I need to evaluate the urgency of the matters and prioritize accordingly. For larger projects, breaking them out into smaller parts and assigning intermediate deadlines helps ensure that projects with deadlines far off in the future do not get put off in order to address immediate fires.

Another helpful tool is to have detailed procedures lists to keep you and your support staff on track with projects. This is easier to develop for some practice areas than others. The time spent developing such tools may be tedious on the front end, but the peace of mind and order they bring are invaluable. It keeps all project team members on the same page concerning the status of the project, next steps, deadlines, etc. This can also be accomplished through task or project management tools.

When you have tools to manage the workload, managing your priorities outside of work becomes more doable too. Knowing that I can look at my files and see where they stand and what needs to be done allows me the peace of mind to go home at night knowing I have things covered and can switch off. If I need to leave to take kids to appointments or to address personal matters, I can plan so that I have things covered ahead of time instead of trying to work from the sidelines of a basketball game. There will always be those emergencies that develop as I walk out the door, but being organized and prioritizing my to-do list reduces the chaos and allows me to have a better separation between the demands of work and home.

Support system

Having a solid support system at work and at home has been essential to my ability to cultivate a sense of well-being. Building a solid group of people to whom I can turn when things get chaotic or to bounce ideas off of has been incredibly helpful in maintaining balance.

Like my colleagues before me, I formed bonds with the law school classmates who were in the trenches with me. As a student in Mitchell Hamline's hybrid program, I was fortunate enough to be surrounded by fellow second-career professionals who were enduring the same challenges of balancing work, school, and family commitments. We learned how to lean on one another and share ideas and frustrations with each other. The core group of classmates with whom I connected regularly were located throughout the United States during law school, so we learned how to stay connected and support one another digitally. Thankfully, that support system has stayed in place even after graduation.

I have also been fortunate enough to have mentors throughout my journey who helped me learn how to navigate a legal career. From my early days working on the administrative end of the profession to law school, clerkships, and now practice, I have been guided by those who came before me and were willing to be a sounding board for a nervous newbie. By recognizing the limitations of my knowledge and experience, I have been able to learn more in a shorter time. My support system has enabled me to learn more about the practice of law than some of my colleagues and to feel confident in how I practice and how I prioritize work-life balance—to consciously invest in my well-being.

Conclusion

The practice of law is not easy. In a profession filled with stress and deadlines, it is easy to ignore the fact that our bodies and minds have limitations. Failure to recognize our own humanity can result in consequences both personally and professionally. Conversely, taking time to accomplish some work-life balance and to focus on one's well-being can help prevent a disastrous burnout or major health issues. Whether it be prioritizing quality sleep, learning to disconnect, or better organizing our workload, little efforts can make a positive difference in our well-being. My journey has not been an easy one, and I have encountered numerous obstacles along the way, but I feel that I have the tools to sustain a successful elder law practice over the long haul. I encourage others to find one or two things they can do for themselves to improve their well-being now, even if it feels too overwhelming to try to do a complete overhaul. Minor changes can have a positive impact. ▲

RACHELL L. HENNING is an elder law attorney at Henningson & Snoxell, Ltd. in Maple Grove. She advises elderly individuals and their families on a wide range of issues including guardianships and conservatorships, long-term care planning, and navigating the chaos that comes with aging.

✉ RHENNING@HENNSNOXLAW.COM

Minnesota American Indian Bar Association

25TH ANNUAL SCHOLARSHIP GOLF TOURNAMENT

The tournament was held on July 15, 2021 at The Meadows at Mystic Lake. All proceeds went to the MAIBA Scholarship Fund, which funds scholarships to American Indian law students attending law school in Minnesota.

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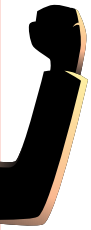
THE LIFELONG IMPACT OF LAW SCHOOL MENTORING

By Uyen Campbell and Judith Rush



Mentors help students learn what it means to be an attorney. Students learn about all the different roles attorneys take on—trusted advisers, advocates, business owners, co-workers, or employees.

Are there things you wish you had known about being a lawyer or about yourself before you jumped into practice? Are there skills you didn't learn in law school but found you had to quickly learn when you started your job?

Each year, over 470 Minnesota lawyers and judges provide students at the University of St. Thomas School of Law opportunities to answer these and many other important questions. These mentors, and other informal mentors, play a crucial role in helping students define their professional identities and learn vital skills *before* they become lawyers.

How do mentors help?

Mentors help students understand what it means to be an attorney. By watching their mentors interact with clients, opposing counsel, judges, support staff, partners, associates, and others, students learn about all the different roles that attorneys take on—trusted advisers, advocates, business owners, co-workers, or employees. Mentors can also talk with students about what it means to be an attorney with a young family, an attorney deeply involved in the community, or an attorney who has passions and interests outside of practicing law.

Mentors help their students learn the important skills they need in addition to knowing the law. Mentors show students how they communicate with different people, in different contexts, for different purposes. They model for their students the importance of preparation, organization, and time management.

Mentors help students figure out what they want to do and sometimes, they can help students figure out what they *don't* want to do. One 1L student shared with her mentor her concerns about practicing immigration law after attending hearings with her mentor. She saw the emotional toll it could take and didn't know if she wanted that type of practice. The student's mentor encouraged her to think beyond immigration practice. Just because the student is Latina and an immigrant herself doesn't mean she automatically had to be an immigration lawyer, the student's mentor told her. The student switched her interest area for her 2L year to be paired with a mentor in real estate law because she had always been interested in property development.

How do students learn from mentors?

Students learn from every opportunity they get to see their mentors in action. From meetings with clients, co-workers, or colleagues, to court hearings, board meetings, or CLE presentations, students watch and learn from their mentors' interactions.

Students also learn from doing what their mentors do. Reviewing documents like commercial leases, appellate briefs, or marital termination agreements with their mentors brings to life the legal concepts that students learn in the classroom. When mentors allow students to try drafting trademark license agreements, asylum applications, or criminal motions, they give students a chance to apply what they have learned to real cases, issues, and clients.

St. Thomas Law's mentor externship program provides mentors and students with a list of over 600 different types of experiences to help spark ideas. Despite the pandemic and social distancing requirements this past school year, the law school's mentors spent over 3,300 hours shepherding over 1,600 experiences with their students.[1] The mentors provided their students opportunities to engage in almost 300 different types of experiences from the list and came up with 200 additional distinct experiences on their own.[2]

Most importantly, students learn from talking to their mentors. Students in St. Thomas Law's mentor program begin their year by talking with their mentors about the students' guiding principles, core values, why they came to law school, and what kind of lawyer they want to be. Students also plan with their mentors what they want to learn and do with their mentors.

But it's the conversations throughout the mentor-student relationship that have the most lasting impact. Debriefing conversations with mentors after experiences give students opportunities to ask questions about the particular legal issue or case they just observed. Listening to mentors explain the preparation that goes into a particular experience helps students better understand and retain what they observed or did. In addition to conversations about legal issues and processes, St. Thomas Law's mentor program provides mentors and students with debrief templates to help facilitate conversations about other topics related to life as an attorney, such as life balance, billing, file management, networking, and pro bono work.

How much time does it take to mentor a student?

Lawyers and judges naturally seek to improve the profession and our system of justice, often serving as role models and playing a mentoring role without realizing the positive and important effect they have. Formal mentoring can take as little or as much time as mentors have available to invest.[3] Even one interaction with a student can guide them in ways that make a significant impact on their professional identity with little time investment.

For example, when mentor and St. Thomas Law alum Carrie Osowski didn't have a student mentee, she offered to give a student an opportunity to work on a research and writing project on a case she was working on. The mentor program connected Osowski with a student and afterward, the student noted in her log how much the experience with Osowski affected her: "When the creative argument hit me, it felt like a light bulb going off in my head." The student also gained confidence from her conversation about the memo with Osowski afterward and it cemented her interest in family law.

What role do mentors play in getting students jobs?

Mentors guide students' professional development but are not expected to find jobs for the students. Instead, by helping students learn how to form and maintain professional relationships and by providing learning experiences and guidance, mentors help students increase their opportunities for employment and success in future employment. Students who embrace the chance to learn all they can

from their mentors and show their mentors their skills will often hear from their mentors about opportunities their mentors are aware of. Their mentors will also offer to serve as references or sometimes hire them for summer or other positions.

As 2L Mollie Buelow puts it, students get to decide how much they want to do—they can "meet the hours and call it good" or they can embrace the opportunities for self-direction with the attitude, "I'm doing this—and oh yeah, I can log it."[4]

As a 1L, Buelow often heard the ubiquitous phrase "it's who you know," which can be stressful for a law student who doesn't know any lawyers. It made Buelow realize that she needed to start networking and getting to know lawyers. So she jumped in, reaching out to faculty and staff for suggestions and connections for talking to lawyers. Buelow says she learns something from every conversation, no matter how short, and takes advantage of any experience that gives her an opportunity to learn. One of Buelow's conversations not only landed an amazing mentor in Assistant U.S. Attorney Benjamin Bejar, but also led to a summer internship with the U.S. Attorney's office.

What impact does mentoring have on students?

Bejar took the time to talk with Buelow over Zoom and learn about her career interests. When Buelow asked Bejar if he had a hearing she could observe, he arranged for her to join a telephone hearing and sent her publicly filed documents to review in advance of the hearing. After Buelow attended the telephone hearing, they talked about the hearing, how Bejar prepared for it, and how he viewed his role in the process. Bejar later shared a generic preparation checklist for another hearing Buelow attended, which they also discussed in depth. Bejar offered to check into law clerk positions and sent Buelow the application for an open position. He was encouraging, gave great advice, and to Buelow's relief, would reach out to her. Buelow applied, interviewed, and is now a summer intern at the U.S. Attorney's Office helping with preparation for an upcoming trial. The impact of Bejar's investment in Buelow's professional development has been a game changer for a first-generation law student.

When mentors Gloria Myre[5] and Thomas Tuft, fellows in the Minnesota Chapter of the American Academy of Matrimonial Lawyers, recommended their students for positions as Divorce Camp interns, they opened up a world of opportunity for the students. Georgie Brattland and another St. Thomas student worked hard to be part of the camp planning committee during the spring and summer, and then also attended the annual camp in the fall during the years they were involved. The opportunity gave both students a phenomenal chance to work alongside an outstanding group of lawyers, be involved in the educational programming, learn about what it means to be involved in a professional organization with peers, and become a part of a practice community—all while still in law school. According to Brattland, an attorney at Heimerl & Lammers, the many experiences and opportunities that Myre provided (including Divorce Camp) gave her confidence that family law was the practice area she was truly passionate about—which is so important for long-term success in family law.

David Kempston, an attorney at Mottaz & Sisk Injury Law, has been a St. Thomas Law mentor for over 14 years. His former student, Andy Moeller of Farrish Johnson Law Office in Mankato, recently reached out for Kempston's advice on diving into a new area of practice. According to Moeller, Kempston is the "walking embodiment of what St. Thomas is all about" and that he "not only gained a mentor but a friend." Other Kempston students have said that "his attentiveness and responsiveness really set him apart from other attorneys" and that they learned lessons about being an attorney that will stay with them for the rest of their careers.

These mentor-student relationships illustrate just a few ways in which mentoring can have an impact on students. What students learn from watching, talking to, and doing experiences with their mentors not only helps them in their professional development; it also begins preparing them to become the next generation of mentors. ▲

***JUDITH RUSH** is a director of mentor externship at University of St. Thomas School of Law and earned her J.D. magna cum laude from William Mitchell College of Law. **UYEN CAMPBELL** joined Judie as a director of mentor externship at the University of St. Thomas School of Law in 2019, after teaching in the program for 10 years. Uyen earned her J.D. cum laude from the University of Minnesota Law School.*

JMRUSH@STTHOMAS.EDU
UCAMPBELL@STTHOMAS.EDU

***Authors' note:** If you or a colleague would like to learn more about serving as a mentor in St. Thomas Law's Mentor Externship Program, please contact us. We would love to tell you more about the impact you can have as a mentor.*

Notes

[1] Experiences with mentors during 2020-2021 school year could be done in person (under social distancing guidelines), via video conference, phone, or email.

[2] Students are required to do a minimum number distinct experiences during the school year (1Ls – four distinct experiences; 2Ls and 3Ls – five distinct experiences) to ensure breadth in what they observe and learn. Distinct experiences with mentors that are not in the program list are categorized as "wild card experiences."

[3] St. Thomas Law mentors generally spend 15-18 hours with their students during the nine-month school year.

[4] Students in St. Thomas Law's mentor program contemporaneously record their fieldwork hours and reflect in a written log what they are seeing, doing, and learning in the field. Their logs demonstrate not only that they met the minimum requirements—they reflect the initiative, communication, and other professional skills they have developed in the process.

[5] Myre currently serves as director of alumni engagement and student life at St. Thomas Law and was a partner at Barnes & Thornburg LLP when she mentored student Georgie Brattland from 2017-2018.

Mitchell Hamline School of Law president and dean calls for bar exam reform, announces new scholarship at installation ceremony

BY TOM WEBER

As a gay, first-generation college student from modest means, Anthony Niedwiecki would not have been able to attend law school back in the 1800s, when it was only available to the elite and those with the money and time to attend law school.

But the law affects everyone, which is why a select few shouldn't shape it, he noted during his installation speech in September. It should reflect the diversity of experiences across the country.

"That's why my focus as president and dean is to build upon and expand Mitchell Hamline's tradition of providing access and opportunity to those who otherwise would not have been able to attend law school—not because they are incapable of succeeding there but because of who they are, their wealth or standing in the community, or their life circumstances."

Niedwiecki started in July 2020, but COVID protocols had delayed until now the event to formally marked the start of his tenure.

"There are so many reasons I came to here," he said. "Most important is I wanted to be at a school that committed itself to providing access and opportunity to those who otherwise would not have gotten a degree.

"That is part of its founding, and it's been part of its mission from the very beginning."

Niedwiecki singled out structures within the law and at law schools that still prevent people from becoming attorneys—including calling for reform to the bar exam.

"Whether the bar exam is a good predictor of a law student's abilities is not as important of a question as why was the bar created in the first place," he said. "It was built to keep certain people out of the profession.

"But even today, it doesn't test the skills needed to be a successful lawyer, and there are other ways to license lawyers that are more reliable and equitable."

Within law schools, Niedwiecki said, the way scholarships are awarded should change. "It's counter-intuitive, but only a small percentage of law school scholarships in this country are based on financial need."

Many times, he noted, students with the highest LSAT scores get the most financial aid. "This is backwards to me. Law schools need to put as much effort into providing need-based scholarships as they do scholarships based on an LSAT score."

As part of that effort, Niedwiecki announced the creation of a new scholarship for students with financial need who want to use their law degree to make positive community changes or do public interest work. It will be named for Lena Olive Smith, the first Black woman to be licensed to practice law in Minnesota. She graduated from a Mitchell Hamline predecessor school 100 years ago.

Niedwiecki is the second president and dean at Mitchell Hamline School of Law and the first openly LGBTQ+ president and dean in its history or of any of its legacy schools.

A longtime legal educator and activist on behalf of LGBTQ+ rights and other social justice causes, Niedwiecki has been a law school associate dean or dean since 2010.

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.

*** MORE ONLINE**
The online version of this section contains additional case note content: www.mnbar.org/bench-bar

CRIMINAL LAW

JUDICIAL LAW

■ **Controlled substances: Presence of greater than 0.3 percent concentration of delta-9 tetrahydrocannabinol (THC) is an essential element of unlawful possession of marijuana.** After obtaining a search warrant for a home where appellant was staying, police located the key for a locked plastic tote on appellant's key ring, opened the tote, and found three pounds of leafy plant material. In the same bedroom, police also found 89 vaporizer cartridges filled with an amber-colored liquid, two guns, ammunition, and drug paraphernalia. A jury found appellant guilty of possession of marijuana, and possession of a mixture containing marijuana or tetrahydrocannabinols (THC). He argues on appeal that the state did not prove the substances he possessed are controlled substances.

First, the court of appeals finds that the 2019 amendments to the statutory definition of "marijuana" apply to appellant's case, under the amelioration doctrine, holding that a statutory amendment "mitigates punishment" if it decriminalizes conduct that previously was deemed criminal.

Second, the court finds that the evidence was insufficient to prove that the leafy plant material was a controlled substance but was sufficient to prove the liquid in the vaporizer cartridges was a controlled substance. Marijuana is a Schedule I controlled substance under Minn. Stat. §152.02, subd. 2(h). "Marijuana" is defined to mean all parts of a Cannabis plant, except "industrial hemp," Minn. Stat. §152.01, subd. 9, which is defined as any part of the "Cannabis sativa L." plant "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Minn. Stat. §18K.02, subd. 3. Thus, the plant material found in the plastic tote in this case could be marijuana or hemp. Given the changes to the definition of marijuana, the court holds that "the presence of delta-9 tetrahydrocannabinol in a concentration greater than 0.3 percent is an essential element of the offense of unlawful possession of marijuana." This element can be proved with scientific evidence, non-scientific circumstantial evidence, or both.

Here, the state presented testimony from a BCA scientist regarding various tests she performed on the leafy plant material, but none revealed the concentration of delta-9 tetrahydrocannabinol. There was also limited circumstantial evidence as to the identity of the plant material, only that it was found in a locked tote near drug paraphernalia and vaporizer cartridges, but not its origin or intended purpose. This evidence did not negate the rational hypothesis that the plant material had a concentration of less than the required 0.3 percent of delta-9 tetrahydrocannabinol.

However, the evidence was sufficient to prove the vaporizer cartridges contained a controlled substance. Appellant was charged with possessing one or more mixtures containing tetrahydrocannabinols, which is a Schedule I controlled substance. Unlike the definition for marijuana, however, there is no exception for hemp or a substance or mixture containing less than a 0.3 percent concentration of delta-9 tetrahydrocannabinol. The state presented testimony from a BCA scientist that THC was identified in two vaporizer cartridges. This evidence was sufficient.

Appellant's conviction for possession of marijuana is reversed, but his conviction for possession of tetrahydrocannabinols is affirmed. ***State v. Loveless***, A20-1254, 2021 WL 4143321 (Minn. Ct. App. 9/13/2021).

■ **Criminal sexual conduct: Modified plain error standard is not met where the state shows no substantial prejudice to the defendant.** A jury found appellant guilty of first-degree criminal sexual conduct, noting in response to special verdict questions that they found he used force, coercion, and both force and coercion in the commission of the offense. The state told the jury in its closing argument that

the offense required that appellant used force or coercion and stated that the jurors did not "need to agree that there was either force or coercion." Appellant did not object but argues on appeal that the state's comments violated his right to a unanimous verdict, as the jury was required to unanimously agree whether the intentional act of sexual penetration was committed by force, committed by coercion, or committed by both force and coercion. The Minnesota Court of Appeals found that the term "force or coercion" in Minn. Stat. 609.342, subd. 1(e)(i), sets forth alternative means for completing the sexual penetration element, so a unanimous verdict on that issue was not required.

A modified plain error analysis applies to unobjected-to claims of prosecutorial error or misconduct: The defendant must establish the existence of an error that was plain, then the state must show the plain error did not affect the defendant's substantial rights. Here, the Supreme Court finds that the state established that appellant's substantial rights were not affected. Appellant was not prejudiced because all jurors did, in fact, unanimously find that appellant used both force and coercion. The state also presented evidence at trial that strongly undermined appellant's defense, and the allegedly erroneous statement made during closing argument was brief and not repeated. The court of appeals is affirmed. ***State v. Epps***, A19-1626, 964 N.W.2d 419 (Minn. 9/15/2021).

■ **Homicide: Depraved mind murder does not include conduct directed with particularity at the victim.** Appellant, a police officer, was convicted of third-degree depraved mind murder and second-degree manslaughter following the shooting of a woman outside the squad car in which appellant was the passenger. Appellant and his partner were responding to a call from the victim, who called 911 after hearing screaming in the alley behind her home. While they were driving their squad car through the alley, the victim "bang[ed]" into the driver side of the squad, and appellant fired one shot at her. Appellant appealed his conviction, arguing the evidence was insufficient to support his conviction for depraved-mind murder, because his conduct was specifically directed at the person killed. The court of appeals affirmed his conviction.

The Supreme Court first addresses what the third-degree depraved mind murder statute means when it requires that the defendant act with a "depraved mind, without regard for human life." Case law makes clear that depraved mind murder is a crime of general malice. The Court reaffirms this precedent, declaring "that the mental state required for depraved-mind murder cannot exist when the defendant's actions are directed with particularity at the person who is killed." The circumstances proved in this case support a reasonable inference that appellant fired his gun with particularity at the person who startled him outside the squad car. The state failed to identify any circumstance proved that would support a reasonable inference that appellant's conduct was indiscriminate. Therefore, the Court reverses appellant's conviction for depraved-mind murder and remands for resentencing on appellant's second-degree manslaughter conviction. ***State v. Noor***, A19-1089, 964 N.W.2d 424 (Minn. 9/15/2021).

SAMANTHA FOERTSCH
Bruno Law PLLC
samantha@brunolaw.com

STEPHEN FOERTSCH
Bruno Law PLLC
stephen@brunolaw.com

EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Salary discrimination; tenured professor loses claim.** A Nigerian-born African American tenured professor at St. Cloud State University lost his claim for race and national origin discrimination and retaliation related to his claimed salary deficiencies. The 8th Circuit Court of Appeals, upholding a decision of U.S. District Court Judge Michael J. Davis of Minnesota, held that the claims of racial discrimination under 42 U.S. §§1981 and 1983 were not actionable against state officials, and there was insufficient proof of causation to support a retaliation claim. ***Onyiah v. St. Cloud State University***, 5 F.4th 926 (8th Cir. 07/22/2021).

■ **Lawsuit against army employer; remanded on retaliation claim.** A woman suing her army employer for sexual harassment based on a hostile environment lost her case. The 8th Circuit held that the employee did not show that the three incidents she described so "permeated" or "poisoned" the environment to make it hostile. There was, however, sufficient evidence to raise a triable issue as to the stated reason for her termination, which warranted remand on the retaliation claim. ***Hairston v. Wormuth***, 6 F.4th 8434 (8th Cir. 07/29/2021).

■ **Denial of scheduling change; disability, race claims rejected.** An employee whose request for a modified schedule was denied lost her claims for disability and race-based discrimination. The 8th Circuit ruled that the employer's refusal to accede to her scheduling request was not actionable because the claimant did not show that she was able to perform the essential functions of her job, with or without an accommodation, and failed to identify a similarly situated employee who received more favorable treatment in support of her racial discrimination claim. ***Lane v. Ball***, 2021 WL 3136899 (8th Cir. 07/26/2021) (unpublished).

■ **Failure to accommodate; inability to perform job functions.** Another employee failed in her claim of failure to accommodate a disability and a discriminatory discharge. The 8th Circuit affirmed a lower court ruling of U.S. District Court Judge Susan R. Nelson of Minnesota, holding that the employer had a legitimate, non-discriminatory reason for the termination and that the claimant did not show the reason was pretextual, and also rejected the failure-to-accommodate claim because the employee did not show that he was able to perform the essential functions of the job. ***Vinh v. Express Scripts Services Company***, 7 F.4th 720 (8th Cir. 08/03/2021).

■ **Fringe benefits; contributions required for non-union employees.** Trustees of five multi-employer fringe benefit funds were entitled to contributions from an employer on behalf of non-union employees. The 8th Circuit affirmed a ruling of U.S. District Court Judge Eric Tostrud in Minnesota, holding that contributions were unambiguously required by the collective bargaining agreement, and the obligation was not relieved by direct payments for fringe benefits to the non-union employees by the employer. ***Nesse v. Green Nature-Cycle, LLC.***, 2021 WL 3918886 (Minn. Ct. App. 09/02/2021) (unpublished).

■ **Gender discrimination; paid differential claim rejected**. A woman's claim for sex discrimination on grounds that she was paid less than her male counterparts was rejected. The 8th Circuit, affirming summary judgment for the employer, held that the uncontroverted evidence showed that the pay differential was due to factors other than gender. ***Perry v. Zoetis, LLC***, 2021 WL 3435535 (Minn. Ct. App. 08/06/2021) (unpublished).

■ **County sheriff salary; trial court decision upheld.** A longstanding dispute between the Freeborn County sheriff and the county board regarding the sheriff's salary was resolved in favor of the sheriff following two trial court decisions, a decision by the court of appeals, remand by the Supreme Court, and a follow-up decision by the appellate court, which ruled that the lower court properly based its decision granting a salary increase on appropriate grounds (under Minn. Stat. §387.20, sub. 7 and other factors) at a rate of $113,952, which did not constitute an abuse of discretion. ***In re 2019 salary of Freeborn County Sheriff***, 2021 WL 3027656 (8th Cir. 07/19/2021) (unpublished).

■ **Age discrimination; adverse action found.** An employee successfully challenged summary judgment dismissing her age discrimination claim under the Minnesota Human Rights Act. The appellate court, overruling the district court, held that an employee can establish an adverse employment action by presenting evidence of circumstances that, when considered cumulatively, could lead a reasonable jury to conclude the employee experienced an unfavorable change in working conditions. ***Henry v. Independent School District #625***, 2021 WL 3136521 (Minn. App. 7/26/212021) (unpublished).

■ **Unemployment compensation; relocation mover deemed employee.** An individual owner and operator of a company that provided relocation support services for another company was deemed an employee rather than an independent contractor for eligibility for unemployment compensation benefits. The Minnesota Court of Appeals, affirming a decision of the Department of Employment & Economic Development (DEED), held that the relevant factors, considered in totality, reflected an employer-employee arrangement that entitled the mover to benefits. ***Loftus v. Manning***, 2021 WL 3277227 (8th Cir. 08/02/2021) (unpublished).

■ **Rent credit for caretaker; split ruling.** A trio of claims by an onsite residential caretaker at an apartment building led to a split decision by the Minnesota Supreme Court on three issues: whether using rent credits to pay wages violates the Minnesota mini-Fair Labor Standards Act and the Minnesota overtime law; whether doing so violates the Minnesota overtime law, Minn. Stat. §181.79; and whether the employer failed to pay the employee for all of the hours she worked while on on-call shifts. Because rent credits qualify as wages under Minnesota law, as long as the employer is in compliance with the "lodging allowance" Rule 5200.0070 promulgated by the Minnesota Department of Labor and Industry, the employer was entitled to summary judgment on the first two claims. But because there was a fact dispute regarding whether the employee could effectively use her time while on call for her own purposes, summary judgment by the lower courts was inappropriate and that matter was reversed and remanded. ***Hagen v. Steven Scott Management, Inc.***, 2021 WL 3522236 (8th Cir. 08/11/2021) (unpublished).

MARSHALL H. TANICK
Meyer, Njus & Tanick
mtanick@meyernjus.com

FEDERAL PRACTICE

JUDICIAL LAW

■ **Arbitration; participation in litigation; waiver; multiple cases.** Where the plaintiffs filed a putative class action and one defendant "fully participated" in the litigation for almost a year, including joining in a motion to dismiss or transfer, negotiating a proposed scheduling order, answering the complaint, and responding to written discovery before moving to compel arbitration, the 8th Circuit determined that it was for the court, and not the arbitrator, to determine whether the defendant had waived its right to arbitrate, and found that the defendant had waived its right to arbitrate by "actively litigating" the case in federal court for more than 10 months. ***Sitzer v. Nat'l Ass'n of Realtors***, ___ F.4th ___ (8th Cir. 2021).

Similarly, where the defendants removed the case to federal court, filed multiple motions to dismiss, disputed personal jurisdiction, participated in jurisdictional discovery, negotiated a proposed scheduling order, and waited 15 months before moving to compel arbitration, the 8th Circuit affirmed the district court's determination that that defendant had waived its right to arbitrate. ***McCoy v. Walmart, Inc.***, ___ F.4th ___ (8th Cir. 2021).

■ **Arbitration; "browsewrap;" adequate notice; assent; 9 U.S.C. §4.** The 8th Circuit reversed a district court's dismissal of the defendant's motion to compel arbitration, determining that material issues of fact relating to the plaintiffs' assent to a "browsewrap" agreement were in dispute, and that, pursuant to 9 U.S.C. §4, a trial was necessary to resolve those issues. ***Foster v. Walmart, Inc.***, ___ F.4th ___ (8th Cir. 2021).

■ **Sealing of documents; no abuse of discretion; unsealing also denied on appeal.** Giving "deference" to the trial court instead of applying a "strong presumption favoring access," the 8th Circuit found no abuse of discretion in Judge Ericksen's decision to maintain certain documents under seal where those documents played a "negligible role" in her *Daubert* decision, and "countervailing reasons… trump[ed] the right of access." The 8th Circuit also denied a related request to unseal the same documents on appeal. ***In Re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.***, 9 F.4th 768 (8th Cir. 2021).

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■ **Attorney's fees; failure to challenge amount of award in district court; waiver.** Where the losing copyright plaintiff disputed defendants' right to recover attorney's fees in the district court, but did not question any of the specific items in the fee request before the district court, the 8th Circuit found no abuse of discretion by the district court in its award of attorney's fees, and found that the plaintiff could not object to portions of the request for the first time on appeal. ***Designworks Homes, Inc. v. Thomson Sailors Homes, L.L.C.***, 9 F.4th 961 (8th Cir. 2021).

■ **Standing; lack of injury.** The 8th Circuit affirmed Judge Wright's dismissal of certain claims arising out of plaintiffs' ATVs' alleged propensity to catch fire, agreeing with her that those plaintiffs whose ATVs had not caught fire "failed to allege an injury sufficient to confer standing." ***In Re: Polaris Mktg. Sales Pracs. & Prods. Liab. Litig.***, 9 F.3d 793 (8th Cir. 2021).

■ **Denial of class certification affirmed.** In another ATV fire-related decision decided four days later, the 8th Circuit affirmed Judge Brasel's denial of class certification, agreeing that individual issues predominated for at least a portion of the proposed class, and that members of the proposed class whose ATVs had not caught fire lacked standing. ***Johannessohn v. Polaris Indus., Inc.***, 9 F.4th 981 (8th Cir. 2021).

■ **CAFA; amount in controversy; standing.** In March 2020 this column noted Judge Tostrud's dismissal of plaintiffs' putative class action brought under CAFA, finding that many of the proposed plaintiffs lacked standing and that there was an insufficient amount in controversy.

The 8th Circuit recently affirmed that order, agreeing with Judge Tostrud that most of the proposed members of the class lacked standing because they "did not suffer any cognizable injury or damages," meaning that the amount in controversy fell far short of the required $5 million CAFA threshold. ***Penrod v. K&N Eng'g, Inc.***, ___ F.4th ___ (8th Cir. 2021).

■ **Motion for preliminary injunction; irreparable harm; *Dataphase* factors.** Denying an employer's motion for a preliminary injunction against a former employee, Judge Schiltz found that the inference of irreparable harm arising out of the breach of a restrictive covenant is a Minnesota procedural doctrine that does not apply in federal court, and that a party seeking a preliminary injunction in the federal courts must "actually establish" irreparable harm. ***Moeschler v. Honkamp Krueger Fin. Servs., Inc.***, 2021 WL 4273481 (D. Minn. 9/21/2021).

■ **Appeal from grant of motion to amend; standard of review.** Affirming an order by Magistrate Judge Wright that granted in part a motion for leave to file a second amended complaint, Judge Wright found that "when a defendant appeals that magistrate judge's decision to grant leave [to amend] because the proposed amendment is *not* futile," the standard of review is *de novo*. ***Wright v. Capella Univ., Inc.***, 2021 WL 4305236 (D. Minn. 9/22/2021).

■ **Fraudulent joinder/misjoinder; multiple cases.** Finding that the plaintiff had failed to allege "colorable" claims against a non-diverse defendant, meaning that the defendant had been fraudulently joined, Judge Davis denied the plaintiff's motion to remand an action that had been removed on the basis of fraudulent joinder. ***Longnecker v. Wells Fargo Bank, N.A.***, 2021 WL 4290878 (D. Minn. 9/21/2021).

Assuming, without deciding, that the doctrine of fraudulent misjoinder could apply, Judge Wright found that the plaintiffs' claims against each of the defendants were "logically related," arose out of the same "transaction or occurrence," and involved "common questions of both fact and law," and granted plaintiffs' motion to remand. ***Health Care Serv. Corp. v. Albertsons Cos.***, 2021 WL 4273020 (D. Minn. 9/21/2021).

■ **Doe defendant; request for early discovery granted.** In a CFAA action against a Doe defendant, Magistrate Judge Bowbeer granted the plaintiffs' motion for leave to take discovery prior to the Fed. R. Civ. P. 26(f) conference, finding "good cause" for the plaintiffs to take "limited" discovery in an attempt to identify the defendant's name and physical address. ***Morbitzer v. Doe***, 2021 WL 4273019 (D. Minn. 9/21/2021).

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

INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Trademark: Civil contempt of injunction order by non-party.** Judge Wright recently granted plaintiff Powerlift Door Consultant, Inc.'s motion finding defendants in contempt of the court's preliminary injunction order. Powerlift sued Lynn Shepard, an individual, Rearden Steel Manufacturing LLC (doing business as Powerlift Hydraulic Doors of Florida), and Rearden Steel Inc. for trademark infringement and moved for a preliminary injunction, which was granted on 7/12/2021. The injunction stated: "[A]ll other officers, directors, members, shareholders, agents, employees and persons acting in concert with them, who receive actual notice of this Order, are hereby ENJOINED from using Powerlift's trademarks, including the trademarks registered as numbers 3994263 and 5612680 with the United States Patent and Trademark Office." Powerlift moved for a finding of civil contempt against defendants

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and PowerTek Doors, LLC, a non-party to the lawsuit. A non-party may be sanctioned for civil contempt to remedy noncompliance with a court order if the non-party has notice of the court's order and the responsibility to comply with it. The court found PowerTek was formed by defendants, that defendant Rearden was PowerTek's registered agent and shared an address, and that defendant Shepard was PowerTek's representative. Thus, PowerTek had notice of the injunction through the other defendants. The court further found that Powerlift proved by clear and convincing evidence that PowerTek used Powerlift's trademarks after the injunction order. The court provided defendants 14 days to purge their contempt, and if defendants failed, the court ordered a daily fine of $1,000 payable to the court. ***Powerlift Door Consultants, Inc. v. Shepard***, No. 21-cv-1316 (WMW/ECW), 2021 U.S. Dist. LEXIS 178608 (D. Minn. 9/20/2021).

■ **Patent: Stay not extended for IPR appeal.** Judge Schiltz recently denied plaintiff QXMédical, LLC's motion to continue a stay pending an *inter partes* review by the Patent Trial and Appeal Board (PTAB). In December 2019, the court instituted a stay of the proceedings pending petitions for *inter partes* review that had been filed by non-party Medtronic, Inc. When the PTAB instituted review on the petitions, the stay was extended. The PTAB recently issued decisions on most of the disputed claims and signaled how it was likely to rule on the remaining claims. A number of claims at issue in this case survived *inter partes* review, including claims that the court found QXMédical to be infringing. QXMédical moved to maintain the stay in light of Medtronic's decision to appeal the PTAB's adverse decision. In deciding whether to grant a stay, courts consider such factors as whether a stay would prejudice the nonmoving party, whether a stay will simplify the issues, and whether discovery is complete and a trial date is set. The court found the balance of the factors favored dissolving the stay. The court found the case had been trial-ready since before the stay was implemented and that QXMédical had already been found to infringe some of the claims. The court declined to maintain the stay while QXMédical remained enjoined from U.S. sales, finding that the patent owner was entitled to attempt to recover their damages. The court gave the patent owner's preference substantial weight. Thus, QXMédical's motion to extend the stay was denied and the stay and injunction previously entered by the court were dissolved. ***QXMédical, LLC v. Vascular Sols., LLC***, No. 17-CV-1969 (PJS/TNL), 2021 U.S. Dist. LEXIS 191965 (D. Minn. 10/5/2021).

JOE DUBIS
Merchant & Gould
jdubis@merchantgould.com

REAL PROPERTY

JUDICIAL LAW

■ **Commercial tenant may not defend against an eviction action due to impossibility or frustration of purpose or based upon landlord's alleged breach.** When a fitness center failed to pay rent under its commercial lease for four months and did not cure its default, its landlord filed for eviction. The tenant's defense consisted of two arguments: First, the tenant argued its performance under the lease was excused by the common law doctrines of impossibility and/or frustration of purpose because it was forced to close for approximately three months as a result of executive orders issued in March 2020; and second, the tenant argued its landlord breached what it alleged was an obligation to permit tenant to operate a fitness center in the premises during the shutdown.

On the first issue, the Minnesota Court of Appeals held that "[t]he eviction statute expressly provides for only one affirmative defense in an eviction action based solely on non-payment of rent," which requires a showing that the landlord increased rent or decreased services in retaliation against a tenant for a good faith attempt at enforcement of its rights. The court further held that the only common law defenses to eviction recognized by the Minnesota Supreme Court do not apply to commercial leases. On the second issue, the court held that the landlord did not breach the lease because the lease neither obligated the landlord to ensure the tenant could operate its business nor to bear responsibility for changes in law affecting such business. Even where a landlord has breached a lease, the tenant may sue for damages or termination but it is not excused from paying rent. The court emphasized that defenses in eviction actions are necessarily limited because the proceedings are to be summary in nature, but provided in a footnote that "nothing in this opinion would prevent [tenant] from asserting impossibility or frustration of purpose in another type of action, such as an action by [landlord] to recover damages for… unpaid rent, an action by [tenant] for reformation or rescission, or an action by [tenant] alleging ejectment," none of which are barred by a judgment entered in an eviction action. ***SVAP III Riverdale Commons LLC v. Coon Rapids Gyms, LLC***, No. ___ N.W.2d ___, 2021 WL 4398765 (Minn. Ct. App. 9/27/2021).

■ **MN Court of Appeals adopts a four-part test for a factfinder to distinguish fixtures from personal property; holds that a mechanic's lien claimant must strictly perform all service requirements and that the "same ownership" exception to pre-lien notice is a fact question not appropriate for resolution by summary judgment.** Multiple secured parties contested the nature of certain grain bins installed on real property used in connection with a family farming operation. Following a sale free and clear of the real property and equipment, certain parties claimed the bins were fixtures covered by their mortgages or mechanic's liens while another party asserted the grain bins were personal property subject to its perfected security interest. The court of appeals compiled several Minnesota Supreme Court precedents to adopt a four-factor test to be applied on a case-by-case basis to reach the appropriate finding, reversing the district court's order for summary judgment due to the existence of genuine issues of material fact as to:

(1) whether the [item] can be removed without leaving the real property in a substantially worse condition than before;
(2) whether the [item] can be removed without breaking it into pieces and damaging the [item] itself;
(3) whether the [item] has any independent value once removed from the real property; and
(4) the intent of the parties.

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Turning to the mechanic's lien issues, the court held the district court erred by concluding that a "defect" in service of its mechanic's lien statement was "not material" when the claimant did not serve its mechanic's lien statement "personally or by certified mail" as required by statute. The court then held that a determination of whether the requirement for pre-lien notice is excused under the "same ownership" exception, where "the contractor is managed or controlled by substantially the same persons who manage or control the owner of the improved real estate," is a question of fact and the district court therefore erred in resolving disputed facts regarding the extent of control exerted by the property owners over the work. ***Lighthouse Mgmt. Inc. v. Oberg Fam. Farms***, ___ N.W.2d ___, 2021 WL 3852279 (Minn. Ct. App. 8/30/2021).

MATT DREWES
DeWitt LLP
mad@dewittllp.com

TAX LAW

JUDICIAL LAW

Tax court permits "double-dipping" on health insurance-alimony payment. Prior to the Tax Cuts and Jobs Act of 2017, alimony was deductible to the payor and included in the income of the recipient. This regime applied not only to payments incident to divorce, but also to payments made to and from spouses under separation agreements. The taxpayer in this dispute was separated from his wife and paid for her health insurance through a "cafeteria plan" provided by his employer. The payments constituted alimony under then-federal law, and the taxpayer-husband deducted the payments. At the same time, the taxpayer-husband excluded from his gross income the total amount of health care premiums. In other words, the taxpayer-husband got a double-benefit—he did not include the health insurance premiums in his income and he also deducted that same value as alimony. In contrast, the taxpayer-wife, whose receipt of the health insurance would not have been included in income absent the separation agreement, was required to include the health insurance premiums as income in her return.

In an issue of first impression, Judge Greaves held that "neither the double deduction common law principle nor section 265 applies to prevent the deduction of alimony where a separated couple pending a final decree of divorce create an alimony *pende lite* agreement that includes continued health care coverage as provided by the payor spouse's employer, premiums for which are property excluded from the payor's gross income and included in the recipient spouse's gross income." This holding provides the payor-husband a windfall, ensures the government is even-steven, and requires the payee wife to include in her income amounts that she otherwise would not have to include. ***Leyh v. Comm'r***, No. 20533-18, 2021 WL 4520671 (T.C. 10/4/2021).

Pandemic statutory filing deadlines provide for different interpretations. Petitioner WMH filed a property tax petition for the 2019 assessment of its Minneapolis property, but petitioner inadvertently attached the property tax statement of its Bloomington property. Petitioner sent the county the correct statement, seeking its consent to amend the petition. After receiving no response, petitioner filed the amended petition. The county immediately responded to the petitioner, noting its concern that the amended filing was untimely, and "amounted to the filing of a new and untimely petition."

At the start of the pandemic, the Legislature passed several laws extending statutory filing deadlines. The parties here "differ in their interpretations of whether those laws extended to the deadlines" for property tax petitions. When petitioner filed its motion for leave to amend in the tax court, approximately nine months after discovery of the error, the county did not oppose petitioner's motion to amend the petition, indicating only that there may be jurisdictional concerns based on the untimely filing.

Chapter 278 of Minnesota statutes allows taxpayers to elect either the district court of the county in which the tax is levied or the tax court to determine the validity of their claim. *See* Minn. Stat. §278.01, subd. 1(a). However, chapter 278 has a strict time limit regarding petitions, requiring that they be filed on or before April 30 of the tax payable year. Minn. Stat. §278.01, subd. 1(c). Additionally, the chapter requires that the property in question be clearly identified. Minn. Stat. §278.02.

Amending pleadings in the tax court is governed by Minn. R. Civ. P. 15 and leave to amend pleadings is generally given freely. *Marlow Timberland, LLC v. Cnty. of Lake*, 800 N.W.2d 637, 639-40 (Minn. 2011). But the time limitation for filing a petition under chapter 278 has led the court to hold that it does not

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have jurisdiction to hear amended claims that seek to add new or different parcels when the amendments are made after the filing deadline. *Jim Bern Co. v. Cnty. of Ramsey*, No. 62-CV-17-2723, 2018 WL 911206, at *5 (Minn. T.C. 1/9/2018).

The covid-19 pandemic led the governor and Legislature to extend deadlines for both the district court and the tax court. Having enacted several laws extending filing deadlines, the Legislature finally declared that "deadlines imposed by statutes governing proceedings in the district and appellate courts, including any statutes of limitations or other time periods prescribed by statute, shall not expire from the beginning of the peacetime emergency declared on March 13, 2020, in governor's Executive Order 20-01 through April 15, 2021." *See* Act of Feb. 12, 2021, ch. 3, §1 (Session Law 3).

At issue here were the differing interpretations of whether petitioner filed its amended petition after the statutory deadline. To resolve the dispute, the court first sought to determine whether petitioner "filed the present case in district court or tax court and, second, the effect on the controlling statutory filing deadline of the previously noted legislative responses to the COVID-19 pandemic."

In a lengthy analysis, the tax court concluded first that petitioner filed the case in the tax court. When filing a petition, the taxpayer must indicate which forum they have elected. Using Minnesota Tax Court Form 7 indicates a tax court election. *See Johnson v. Cnty. of Hennepin*, No. 27-CV-14-7031, 2015 WL 2329349, at *2 (Minn. T.C. 5/12/2015). This Form 7 was used by petitioner when filing its petition. Second, the tax court identified three interpretations of Session Law 74 that extended the deadline for chapter 278 proceedings in the district court. But the tax court found no need to discuss the second and third interpretations because petitioner previously and simultaneously filed "two separate documents intended to correct its misidentification of the subject property in its original petition: (1) a motion in [the tax] court to amend the original petition to pertain to the Minneapolis Property; and (2) an independent petition in district court pertaining to the Minneapolis Property." The latter petition was transferred to the tax court, and, by filing the district court action, petitioner "successfully availed itself of Session Law 74's deadline extension for district court proceedings." Therefore, the tax court had jurisdiction over petitioner's challenge to the 2019 tax assessment of the Minneapolis property. ***WMH Property Owner LLC v. Hennepin Co.***, 2021 WL 4312988 (MN Tax Court 9/9/21).

■ **Childcare center fails to prove essential elements for property tax exemption.** Petitioner Under the Rainbow is licensed as a childcare center by the Minnesota Department of Human Services. In 2019, petitioner applied to the county assessor's office for an exemption from property taxes on the ground that it is an educational institution. The county denied the application and petitioner filed a petition with the tax court seeking an exemption for property tax pursuant to Minn. Stat. §272.02, subd. 5 (2020).

In its cross motions for summary judgement, petitioner contended that "DHS-licensed childcare facilities that have attained a four-star rating under the state's Parent Aware program are *per se* qualified as educational institutions and therefore exempt from property tax." Further, petitioner asserts that it uses lessons plans for different age groups and performs evaluations of each student several times a year. In support of its motion, petitioner submitted an affidavit from Connie Welch, a coach at Families First Minnesota (FFM). FFM administers the Parent Aware program in southern Minnesota. To receive a star rating, early childcare educators "must meet specific qualifications to 'document educational achievements and professional development activities.'" An applicant meeting a three- or four-star rating is also required to have a representative from the University of Minnesota Center for Early Education Development observe classes. Petitioner maintains that it has received a four-star rating since 2017.

The county did not stipulate to any of the facts outlined in petitioner's motion. Instead, the county maintains that petitioner is not exempt from property tax because it is not a "seminary of learning." Petitioner provided no evidence to the county of "its curriculum or any testimony from the Red Wing Public School District that suggests that [petitioner's] educational program reduces the public burden." The county acknowledges that petitioner responded to discovery requests but asserts that the information was not sufficient to grant an exception. When approving an exemption application, the county considers: "1) [t]hat the mission of the organization be fundamentally educational in nature, 2) [t]he facility is providing educational training that would otherwise have to be provided by a publicly supported institution, and 3) [t]he public school would give credit for educational programs at the facility." To fully satisfy parts two and three, the local public school district would need to attest to the requirements.

"'All academies, colleges, and universities, and all seminaries of learning are exempt' from property taxation under chapter 272," but an institution may teach a variety of instruction and yet not be equivalent to an above-named institution. Minn. Stat. §272.02, subd. 5 (2020); *see State v. Nw. Preparatory* Sch., 249 Minn. 552, 556, 83 N.W.2d 242, 245 (1957). "Instead, '[t]he basis of all tax exemption—and this includes seminaries of learning—is the accomplishment of public purposes.'" *Id.* at 557, 83 N.W.2d at 246.

To grant a tax exemption, the court must first determine whether the institution performs in the field of public education, and the purpose of the education program. *Id.* at 556. Second, the court must determine that the institution provides some part of educational training that would otherwise be offered by publicly supported schools, thereby

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lessening the tax burden imposed upon citizens as the result of our public educational system. *Id.* at 557-58, 83 N.W.2d at 246. Finally, the court must determine whether the petitioner's "regular curriculum of instruction is a reasonable substitute for the usual program of courses pursued by a student enrolled at a comparative educational level in the public system." *Id.* To be reasonable, the required curriculum must embrace a sufficient variety of academic subjects to provide the student with a general education, and the educational training must be taught in such a comprehensive manner that if a student were to transfer to the same level of instruction in the public system, the student would receive full credit for their work in that subject. *Id.* at 246-47. The problem here is, neither the Supreme Court nor the tax court has "articulated specific criteria in the preschool context" for determining whether the program lessens the educational burden on taxpayers, or whether the training would allow the student to sufficiently assimilate into the public school system.

Petitioner asserts that "[a] childcare facility that attains a four-star rating should be considered *per se* qualified as an educational institution" because "Parent Aware's four-star rating is assurance to any potential parent and for DHS itself that the childcare center will prepare the children for integration into the public school system and life itself." The county argues that petitioner is a childcare center and "the fact that a substantial part of this business is for daycare detracts from any claim of exemption as a school."

In a lengthy analysis, the court discussed the necessary criteria to determine whether to grant a tax exemption to the petitioner. The court stated that petitioner's tax exemption eligibility requires more than just a determination that it is an educational institution. The petitioner here "bears the ultimate burden of proof concerning entitlement" to the tax exemption and "must make a factual showing sufficient to establish" the essential elements. The tax court determined that petitioner did not meet the burden of showing that it either alleviated the public burden, or prepared students to assimilate into public school curriculum. ***Under the Rainbow Early Education Center v. Goodhue Co.***, 2021 WL 4313124, (MN Tax Court 9/15/2021).

■ Court will allow petitioner to try case 10 years after the property assessment.

Petitioner Tahir Hassan originally agreed to a voluntary dismissal of his petition in November 2013. In 2015, however, he contacted the county and indicated he no longer wanted to dismiss his case. The county contends that the long passage of time will prejudice the county and it would be impossible to reach an accurate determination of the value of property 10 years after the filing date. As such, the county moved the tax court to dismiss the petition for failure to prosecute. *See* Rule 41.02(a). In a hearing, Mr. Hassan asserted that he did not receive notices from the court or county and contends that he is able to demonstrate the value of the subject property. The tax court denied the county's motion to dismiss and ordered the parties to stipulate to next steps in resolving the case. ***Hassan v. Hennepin Co.***, 2021 WL 4572056 (MN Tax Court 10/1/2021).

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

■ Preverdict interest; notice of claim. Decedent fell down concrete stairs, which were attached to the main building at defendant resort. After decedent died one week later due to injuries suffered in the fall, plaintiff filed a wrongful death lawsuit against defendant resort. The complaint alleged that defendant failed to maintain the stair in a safe condition, that decedent and her husband had complained about the stair, and it proximately caused decedent's fall. While several witnesses were present at the time of the fall, none of them saw what caused decedent to fall down the stairs. As a result, the district court granted summary judgment to defendants for failure to establish causation. The court of appeals affirmed.

The Minnesota Supreme Court reversed and remanded. While there was no evidence in the record as to what occurred immediately prior the fall, the Court held, "A plaintiff need not introduce eyewitness evidence to prove her claim or to elevate her theory above mere speculation to the point where it preponderates over competing inconsistent theories." Because there was evidence that the condition of the stairs was defective—the same stairs that decedent fell down—the Court reasoned that a jury could reasonably find that it was a substantial factor in causing decedent to fall that preponderates over other theories. As a result, the case was remanded for trial.

Justice Anderson filed a dissenting opinion, which was joined by Chief Justice Gildea. The dissent would have held that summary judgment was appropriate because plaintiff "has produced no evidence, eyewitness or otherwise, showing that the defects in the stair was the reason that [decedent] fell." The dissent continued: "At most, [plaintiff] has shown that those defects were one of several possible causes. Consequently, any verdict in favor of [plaintiff] would be speculative, and summary judgment is appropriate." ***Staub v. Myrtle Lake Resort, LLC***, A20-0267 (Minn. 9/22/2021). *https://mn.gov/law-library-stat/archive/supct/2021/OPA200267-091521.pdf*

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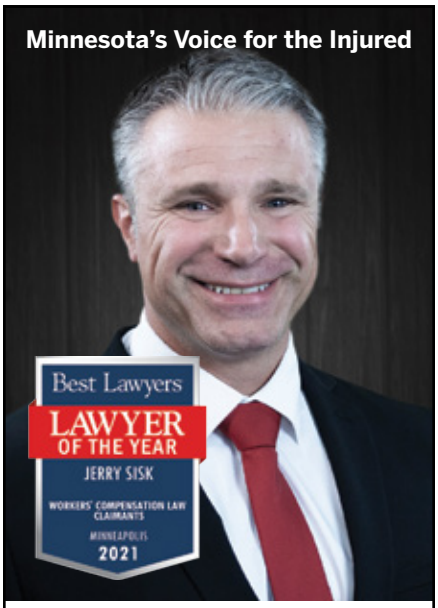

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CONNERS

James Carey was recently elected to the board of directors of the American College of Trial Lawyers. Carey has been a fellow of this elite organization since 2014. Carey is president of SiebenCarey.

DITTBERNER

Michael D. Dittberner was elected to serve as co-chair of the Minnesota Lavender Bar Association. Dittberner is a family law attorney at Linder, Dittberner, Winter & McSweeney, Ltd.

ENSLIN

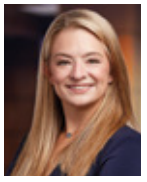
Robb P. Enslin has joined Trial Group North, PLLP, and brings with him 12 years of experience in the fields of workers' compensation, Social Security disability, long-term disability plans, personal injury law, and regulatory compliance.

WOLTER

Leatha Wolter has been selected as a fellow of the Litigation Counsel of America. Wolter is a partner at Meagher + Geer and chairs the Anti-Fraud Counseling & Litigation practice group.

HOWE

YASIS



JOHNSON

RAMIREZ-HERNANDEZ

Maslon LLP announced the addition of attorneys Nathan Howe and Alina Yasis to the firm's corporate and securities group and attorneys Carly Johnson and Gabriel Ramirez-Hernandez to the firm's litigation group.

MARA

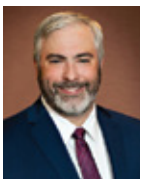
Kristy Mara was elected president of the Minnesota Chapter of the American Academy of Matrimonial Lawyers. Mara is shareholder at Honsa & Mara, practicing family law.

WEBBER

Robert P. Webber has established a new law firm. Webber Law Firm 2.0 offers practical advice to employers and individuals on U.S. visas, green card processing, and U.S. citizenship issues. More details can be found at *www.webberimmigration.com*.

SCHWEIGER

Caitlin Schweiger was awarded a Benjamin B. Ferencz Fellowship in Human Rights and Law by World Without Genocide, a human rights organization at Mitchell Hamline School of Law. She currently serves as assistant public defender in Minnesota's 3rd District.



ABELLEIRA

MOHS

OVERLID

Arthur, Chapman, Kettering, Smetak & Pikala, PA announced the addition of Aaron C. Abelleira, Hannah J. Mohs, and Erik R. Overlid. Abelleira's practice focuses primarily on construction law. Mohs's practice focuses on workers compensation claims. Overlid's focus is on the auto and commercial transportation practice groups.

DRESSEN

BOYLAN

Anthony Ostlund Louwagie Dressen & Boylan PA announced its new firm name. The name change reflects the addition of Janel Dressen and Arthur Boylan as named partners. Dressen and Boylan are accomplished trial lawyers. In addition, Dressen, who has been a partner with the firm since 2008, has been selected to serve as the firm's CEO.

TIBOR

Alexander "Zander" Tibor has joined Meagher + Geer, with the insurance and professional liability practice groups, as an associate.


LONDON


BULLARD

Meagher + Geer announced that Ron London and Susan Bullard have joined the firm. Both come to the firm after nearly two decades leading London & Bullard, which they founded in 2004.


ZUMBACH

Eric H. Zumbach has become an associate of Bassford Remele. Zumbach practices in the areas of bankruptcy/creditors' remedies and commercial litigation.


HELGESON

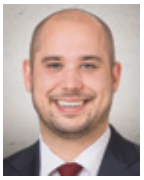
Gov. Walz appointed Keith Helgeson as district court judge in Minnesota's 8th Judicial District. Helgeson will be replacing Hon. Dwayne N. Knutsen and will be chambered in the City of Granite Falls in Yellow Medicine County. Mr. Helgeson is currently the Yellow Medicine County attorney.


LIESER

Gov. Walz appointed Andrea Lieser as district court judge in Minnesota's 5th Judicial District. Lieser will be filling the newly created district court judgeship vacancy in Blue Earth County. This seat will be chambered in Mankato. Lieser was a deputy county attorney in the Brown County Attorney's Office.

Maureen Lodoen and Greg Otsuka joined Larkin Hoffman. Lodoen focuses on resolving construction and real estate disputes. Otsuka focuses his practice on bankruptcy and business litigation.


SNOOK


MOCHORUK


SHEAHAN

Fredrikson & Byron has added three attorneys in the firm's mergers & acquisitions group, including of counsel Thomas C. Snook, associate Brendan Mochoruk, and associate Zachary M. Sheahan.

In Memoriam

Attorney ***Harland L. Thomesen*** of Shoreview passed away at age 88 on May 25, 2021.

Audrey Jean Babcock passed away on September 11, 2021 at age 46, after a seven-year battle with cancer. She graduated from the University of Minnesota Law School. She was employed by Taft Law as an intellectual property attorney at the time of her death.

Albert Levin, age 93, of Edina, died unexpectedly on September 29, 2021. Levin graduated from the St. Paul College of Law and practiced law in St. Paul with his father until his father's death and then with his law partner, Kenneth Rohleder.

Elizabeth J. Carlson, age 61 of St. Paul, formerly of Detroit Lakes, died on October 3, 2021. She was an attorney and an accomplished researcher, scholar, and advocate. She was an alumna of William Mitchell College of Law.

Civil Trial Law

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Cousineau, Van Bergen, McNee, & Malone

Criminal Law

Bruce Ringstrom
Ringstrom Law Office

Jack Rice
Rice Law Office PA

Labor & Employment Law

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ancillary documents for both sellers and buyers in commercial real estate transactions; representing developers in negotiating and drafting various agreements for real estate developments; representing borrowers in mortgage loan transactions; managing real estate due diligence for sale and purchase and financing transactions and for corporate transactions involving real estate; and managing the closing of real estate sale and purchase and financing transactions. Applications will only be accepted online at www.fredlaw.com/careers, and applicants will be asked to submit a cover letter and resume. For assistance with the application process, or for accommodations, please contact: lawrecruiting@fredlaw.com. Diversity and inclusion are core values of Fredrikson & Byron. To best serve our clients, we provide innovative solutions to legal needs by cultivating a diverse workforce. We offer highly competitive salaries and comprehensive benefits in a collaborative work environment. With a reputation as the firm "where law and business meet," our attorneys and staff bring business acumen and entrepreneurial thinking to operate as business advisors, strategic partners, and legal counselors to our clients. The firm's 300+ attorneys serve clients through our eight locations around the world: Minneapolis, Saint Paul, and Mankato, MN; Bismarck and Fargo, ND, Des Moines, IA, Saltillo, Mexico, and Shanghai, China. Visit www.fredlaw.com for more information. Fredrikson & Byron, PA is an Equal Employment Opportunity and Affirmative Action employer.

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WELL-ESTABLISHED law firm in northeastern Minnesota seeks associate attorney. Duties will include general practice work and working with local government units. Depending on experience, a fast partnership track is available. Please contact Joseph Leoni at: jleoni@trentilaw.com if interested.

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analytical and writing skills, critical thinking ability, excellent verbal and written communication skills, the ability to organize, prioritize and multitask, and a commitment to quality client service. Requirements for consideration: Five years or more of civil litigation and experience in representing at court proceedings. Licensed to practice law in North Dakota and Minnesota. Email: jdownes@fisherbren.com.

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PUBLIC FINANCE Attorney — AV-rated mid-sized Minneapolis law firm is seeking a highly motivated partner-level attorney to practice in the area of public finance and municipal bonds. Ideal candidates will possess excellent critical thinking, analytical and writing skills and sophisticated transactional experience, with some portable business. A background in public finance and municipal bond law, including relevant federal tax, securities, nonprofit and municipal law, would be highly desirable but not required. The successful candidate will work with the head of our public finance and municipal bond practice to transition that practice, while augmenting the firm's other transactional work. The firm was established over 30 years ago and provides a full range of legal services, with the personal attention and adaptability that are the hallmarks of smaller firms. In our public finance and municipal bond work we represent state and municipal governments and special authorities, underwriters, banks and nonprofits in complex financing transactions, as well as more traditional redevelopment and infrastructure projects. The work is challenging, and impactful in local communities, the Twin Cities region and the state. We offer a collegial atmosphere, competitive compensation and an excellent benefits program. Compensation is negotiable based upon qualifications, experience and portable business. Please send resume and cover letter to: Office Manager, McGrann Shea Carnival Straughn & Lamb, Chartered, 800 Nicollet Mall, Suite 2600, Minneapolis, MN 55402 or employment@mcgrannshea.com.

FOR SALE

ESTABLISHED OFFICE Location for Sale. Established law practice location for sale in thriving historic North St. Paul, approx. 1200 sf includes back lot and parking on street on main drag. 2557 7th Ave. E, North St. Paul, email: yourattorneys@msn.com.

PRACTICE FOR SALE. The partners in a general practice with an emphasis in family law and estate planning are retiring after a combined 70 plus years of practice. Anyone interested in stepping into the existing operation and office space with equipment and furnishings in a north suburban area is invited to call: 763-780-8262. Serious inquiries only please.

OFFICE SPACE

FLOUR EXCHANGE BUILDING office in Minneapolis for rent with six other lawyers. On skyway with phone, internet, copier, fax, reception area, conference room and kitchen. Good source of referrals. Ideal for younger lawyer. Contact Rod Hale: rod121451@yahoo.com.

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MINNETONKA SUITES and Individual Offices for Rent. Professional office buildings by Highways 7 & 101. Conference rooms and secretarial support. Furnishings also available. Perfect for a law firm or a solo practitioner. Office with 10 independent attorneys. Call: 952-474-4406. minnetonka-offices.com.

POSITION AVAILABLE

HIRING: VP TRUST Manager, WNB Financial, Winona, MN. The Vice President Trust Manager is responsible for the management of the trust department supervising the coworkers in the areas of personal and corporate trust, estate and financial planning, retirement plan services, trust administration and operations. Develops, manages and administers accounts as assigned. Ensures that department goals are met, and trust business is conducted according to bank policy and federal law. For more information and to apply please visit our website at: https://recruiting.paylocity.com/recruiting/jobs/Details/736253/WNB-Financial-NA/VP-Trust-Manager or email Human Resources at HumanResources@WNBFinancial.com, EEO/AA Employer/Vets/Disability

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REPORTING TO THE general counsel and secretary, the paralegal and administrative manager is an integral member of a small law office that manages all legal affairs for St. Thomas. As the sole paralegal and administrative support staff for the Office of General Counsel (OGC), the incumbent performs high-quality, comprehensive paralegal and administrative duties that enable OGC to deploy its limited resources strategically and efficiently. Exercising considerable independence and initiative, the incumbent provides legal support across the full range of matters that arise at a comprehensive university. The incumbent also serves as OGC's office and budget manager, has primary responsibility for OGC document management, supports board governance, corporate secretary functions, and the university's policy management program, and performs administrative and other duties to support the effective delivery of complex legal services. The incumbent works in an environment requiring the highest levels of confidentiality, discretion, and sensitivity, with a heavy and varied workload, pressing deadlines, and shifting priorities. Work must be completed timely and efficiently, with excellent judgment and a high degree of accuracy, without close supervision. The incumbent is expected to be a self-starter and problem-solver who identifies issues and needs and undertakes or proposes a course of action as appropriate. The ability to adapt and triage to meet strict and sometimes competing deadlines and unexpected urgent situations is critical. This position is eligible for hybrid in-person and remote work. Minimum Qualifications: Associate degree. Five to seven years of paralegal experience supporting multiple attorneys. Notary public license or willingness to obtain within first year of employment. For a full job description and to apply please go to: https://www.stthomas.edu/jobs/.

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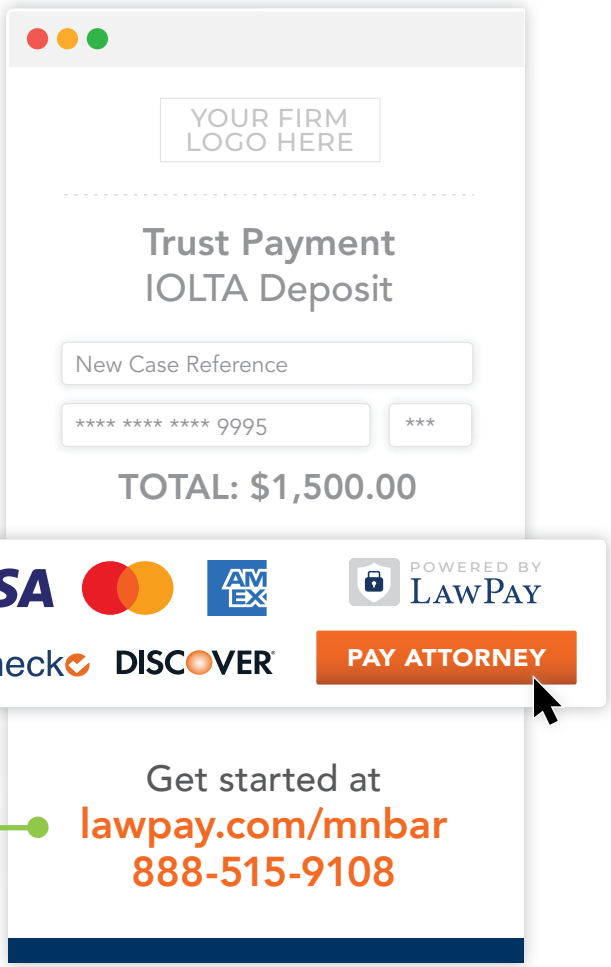

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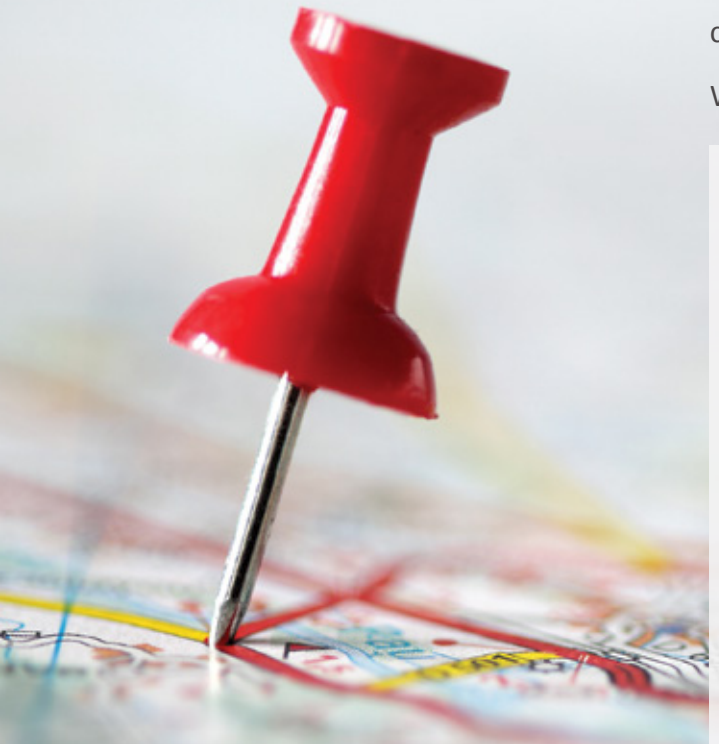

Where you practice impacts how you practice.

With that in mind, MSBA designed its One Profession programs to reach lawyers, judges, and other legal pros from all walks of the profession—working throughout Minnesota. We're reaching out district-by-district in greater Minnesota—to support your work and discuss the issues and opportunities affecting your local legal community.

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Upcoming Events

DECEMBER 10, 2021
Eighth Judicial District: Remote participation only.
(Big Stone, Chippewa, Grant, Kandiyohi, Lac qui Parle, Meeker, Pope, Renville, Stevens, Swift, Traverse, Wilkin, and Yellow Medicine counties.)

JANUARY 27, 2022
Sixth Judicial District: Seminar location, to be determined.
(Carlton, Cook, Lake, and St. Louis counties.)

MARCH 25, 2022
Ninth Judicial District: Seminar location, to be determined.
(Aitkin, Beltrami, Cass, Clearwater, Crow Wing, Hubbard, Itasca, Kittson, Koochiching, Lake of the Woods, Mahnomen, Marshall, Norman, Pennington, Polk, Red Lake, and Roseau counties.)

APRIL 29, 2022
Third Judicial District: Seminar location, to be determined.
(Houston, Olmsted, Wabasha, and Winona counties.)

CLE credits are available. For more information visit: www.mnbar.org/one-profession