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On the Cover:

16 How to Leave Your Law Firm and Live to Tell the Tale

Lawyer mobility is a commonplace in the modern legal economy. And while some partings are bound to be emotionally fraught, careful adherence to best practices can minimize any legal or ethical jeopardy. Here’s how.

BY CHARLES E. LUNDBERG AND ARAM V. DESTEIAN


Over time, lawyering has only grown more specialized; our courts remain committed to a generalist, jack-of-all-trades approach. Should it remain so? No, argues one longtime central Minnesota attorney: Progress ought to mean more specialization on the bench, too.

BY KEVIN S. CARPENTER

Page Closes Another Chapter in His Storied Career

Associate Justice Alan Page’s 22-year tenure on the Minnesota Supreme Court made him the seventh-longest serving member in that body’s history. On the occasion of Page’s retirement, Marshall Tanick takes a look back at the mark Page made as a jurist, discussing a few of the important opinions—and dissents—he authored during that time.

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September 2015 Bench&Bar of Minnesota
KATRINA 10TH ANNIVERSARY: A THANK YOU NOTE

On behalf of the Mississippi Bar, and particularly those attorneys who practiced on the Mississippi Gulf Coast 10 years ago, I want to say THANK YOU. It is hard to believe that we are marking the 10 year anniversary of Hurricane Katrina making landfall on the Mississippi Coast. I was president of the Mississippi Bar at the time and I will never forget the outpouring of support we got from a number of state bars and bar foundations—including states like Minnesota with whom we had no prior connection. Donations of money, furniture, clothes, gift cards, computers all poured in to help attorneys who lost homes, offices and in many cases both. You housed displaced attorneys in your offices and your homes and you sent attorneys to man FEMA centers. You sent speakers to give seminars on starting your practice over and some speakers touched on mental health issues—knowing the scars would be with us for a long time. Most attorneys have come back, reopened their offices and returned to some sense of normalcy, but for some it was just too much.

As a legal community we lost courthouses, offices, homes, cars and clothes but we gained a renewed appreciation for our caring and selfless profession. So on behalf of all of us here in Mississippi, thank you. We will never forget what you did for us.

Forever grateful,

Joy Lambert Phillips
Mississippi Bar President, 2005-2006
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Jest is For All By Arnie Glick

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Improving Our Values Proposition

When I first began attending national conferences of bar leaders, I was surprised to learn that many, if not most, states have a mandatory bar association. If we followed that model here, we would have thousands of additional members. We could lower our dues, expand our member services, or opt for a little of both. But we would also have less incentive to really find out what our members need. The bar association would be at greater risk of taking its members for granted. We would also lose our independent voice and be unable to address needed changes in the law since the mandatory bar association becomes an instrument of the courts.

Relevance and Focus

For several years, we have been discussing how to make the bar association more relevant and improve our “value proposition.” Many of these discussions are spurred by concerns that our future membership base is at risk of receding due to demographic changes and the economic pressure our members face. We have also talked about the need to prioritize our efforts. I am persuaded by these notions of relevance and focus. But I also must confess to a concern that we not go overboard with a simple economic “return on investment” analysis.

When we are faced with the question of whether to join or renew the bar, merely asking “what’s in it for me?” is seriously misguided. Much of what we are called to do as a profession involves important values beyond our self-interest. If we define our “value proposition” or “return on investment” strictly in terms of economic success, then we risk losing some things that are essential to our profession.

We certainly do pursue our profession as a livelihood. Naturally, much of the value of the bar association is in the way it helps us to make a better living. But part of our job is to be about much more than that. We are fiduciaries charged with a duty to place the interests of our clients ahead of our own. We are also public servants, expected to conduct ourselves with due regard for the public interest. Our Rules of Professional Conduct are mostly about protecting the interests of our clients and the public.

In our quest for greater economic return and focus, do these other values get left behind?

If our bar association is to be about our profession and not just our livelihood, then we must foster a “complete lawyer” approach to thinking about what we hope for from the bar. Each of us should do that when we decide to join, renew and participate in the bar. This is a common profession we share, with common values and responsibilities. None of us has the right to expect that everybody else in our profession will pick up our slack. In considering how the bar is relevant, we should include the full vision of what is “relevant” to our profession. Not only should we find new and better ways to help our members earn their living, but we also need to be about promoting policies, programs and practices that serve our clients and the public.

Rules of Professional Conduct

This is not a novel view of what it means to be a lawyer. It reflects a longstanding consensus held within the profession. It is well described in the Preamble to our Rules of Professional Conduct, entitled “A Lawyer’s Responsibilities.” If you haven’t read this lately, I recommend you do so as a refresher.

Among the ideas you will find there are these: “A lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system. . . . A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”

Collective Strength

These things are a tall order. Individually, we can only do so much. Together, however, we can do much more. That is where the bar association comes in. Our collective strength is much greater than our individual effort. Our collective efforts make possible things like our excellent Mock Trial program, our promotion of pro bono service, and our advocacy to the legislative and judicial branches to promote better laws and a better judicial system. All of these efforts are central to the notion of our professional responsibilities as recounted in the preamble quoted above. Yet very few of these and other activities of the bar would come to mind if we think the only rationale for bar membership is to ask ourselves “what’s in it for me?”

The notion that we should pursue our professional responsibilities as a collective in the organized bar is also one long recognized by our profession, and that too has been articulated in the Preamble when it states “a lawyer should aid the legal profession in pursuing these objectives.”

As we continue to seek to be relevant to our members, and to return value for their dues investment, we need to remember that our “value proposition” includes many “values,” in addition to monetary return.
MSBA to comment on no-fault insurance arbitration rules

The MSBA is submitting comments to the Minnesota Supreme Court regarding proposed amendments to the Minnesota No-Fault Insurance Arbitration Rules. The MSBA thanks the Court Rules and Administration Committee for reviewing the proposed amendments and drafting comments. A brief summary follows, but the text of the report from the Court Rules Committee, on which the MSBA comments to the court will be based, can be found at http://bit.ly/1NxfjgQ

- The MSBA expressed concern regarding changes that would allow for expanded discovery under Rule 12. The concern is that expanded discovery in collision and comprehensive cases could be contrary to traditional, low-cost no-fault procedures and significantly burden the parties and the arbitrator. The comments suggest a way to address this issue.
- Regarding representation under Rule 16, the MSBA is concerned that a case could be dismissed in a situation where a lawyer withdraws and the client either doesn’t know about the withdrawal or isn’t advised of the new requirement to obtain counsel or proceed pro se within 30 days. The MSBA suggests alternative language to address this concern.
- Proposed changes to Rule 18 provide that interpreters must be independent of the parties, counsel and named representatives. While the MSBA supports that goal, the bar is concerned about the high cost of independent interpreters and whether parties will be able to afford them. The MSBA recommends that language be added providing for interpreters to be paid by the state, similar to Rule 43.07 of the Minnesota Rules of Civil Procedure.
- Changes proposed to arbitrator’s fees under Rule 40 provide for increased fees in a consolidated glass case, but not other types of cases that may allow for expanded discovery. The comments recommend that this be remedied.
- The MSBA is concerned that proposed changes to Rule 41, dealing with rescheduling or cancellation fees, may penalize parties who settle. The comments propose clarifying that the request to reschedule or cancel a hearing does not fall within Rule 40.b.

Obergefell CLE on demand

Check out this new on-demand CLE offering: On August 13, the MSBA and the Lavender Bar co-sponsored a CLE about the collateral consequences in employment and human rights law of the historic SCOTUS marriage equality decision, Obergefell v. Hodges. Stinson Leonard Street, P.A. hosted the event. Over 70 attorneys and law students attended. Panelists included Dale Carpenter, University of Minnesota law professor and nationally renowned expert in marriage equality issues, and Carpenter’s former student Joshua Newville, who has quickly made a name for himself in this area. The pair discussed issues ranging from appropriate levels of scrutiny to the status of civil unions and domestic partnerships. Visit the MSBA website to purchase and view the program.
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Case for Personal Wellness Symposium: Making the Case for Personal Wellness

This forum focuses on the importance of wellness and the practice of healthy lifestyles in the legal profession. Too often, the demands of the legal profession take a toll on personal health and wellness. But the practice of law and healthy lifestyle practices don’t have to be mutually exclusive. Join colleagues in the legal profession and a panel of experts in taking a closer look at making health and wellness a greater priority. The discussion will explore how making this shift can significantly impact your personal and professional success. Co-sponsored by the Hennepin County Bar Association, Lawyers Concerned for Lawyers, and the University of Minnesota Law School.

**Date:** September 30, 2015  
**Location:** Minneapolis Club  
**Website:** www.mnbar.org

**Regional Conference**

The Central Regional Conference is a unique opportunity for Midwest legal professionals to obtain CLE credit while building regional connections through networking. Featured events include a reenactment of the landmark case Korematsu v. United States; all day CLE programming addressing issues facing public, private and in-house attorneys; a pre-gala networking reception with in-house and general counsel; and the annual MNAPABA Gala highlighting Jenny Yang, EEOC Chairperson, as the keynote speaker.

**Date:** September 18–20, 2015  
**Location:** Minneapolis  
**Register:** mnapaba.org/CRC

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In eight weeks, learn to create a mindfulness practice that can help reduce stress, improve well-being, and recognize the importance of being present. MBSR combines meditation and yoga to help you learn to make each moment count, and is supported by significant clinical and academic research. Typical class sessions include light yoga, gentle movement, guided meditation, and other experiences in mindful activities, such as mindful eating and mindful communication.

**Date:** Thursdays, Sept. 17 – Nov. 5  
**Time:** 6:30–9:00 p.m.  
**Location:** University of Minnesota, Medical Center  
**Contact:** Judge Susan Miles at Susan.Miles@courts.state.mn.us  
**Website:** www.csh.umn.edu

**Women in Business Law Networking Event**

The MSBA Business Law Section invites you to join them for appetizers and drinks. The purpose of this event is to encourage men and women in business law to join together to further communication and collaboration between different sectors of the business community. Julie Hagen Showers will lead a discussion on the state of Women in the Law. This event is free for MSBA members and law students.

**Date:** September 23, 2015  
**Time:** 5:30–7:30 p.m.  
**Location:** The Woman’s Club of Minneapolis  
**Register:** www.mnbar.org

**Mindfulness-Based Stress Reduction**

This mindfulness series is tailored to attorneys. Through breathing exercises, gentle yoga practice, and specific mindfulness activities, the practitioner learns to be more present in their moment to moment experience. The course is approximately seven weeks.  
**Early Fall Series:** Sep. 8 – Oct.17  
**Late Fall Series:** Oct. 20 – Dec. 5  
**Time:** 7:00–9:00 p.m.  
**Location:** St. Louis Park  
**CLE Credit:** 6.5 credits approved

**Thank you, partners at work**

Thank you to all volunteers, organizations, and firms that participated in the eighth annual Partners at Work challenge, which ended on June 30, 2015. Overall, 62% of alumni at 36 organizations made a gift to the Law School. This year, 7 participants achieved 100% alumni giving.

The Partners at Work challenge is a friendly competition to increase alumni giving participation at organizations that employ University of Minnesota Law School alumni.

A special thank you to those organizations that finished at the top of each respective group:

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- Kaplan, Strangis and Kaplan, PA, 100%  
- Schwebel, Goetz & Sieben, PA, 100%  
- Zimmerman Reed, 100%  
- Monroe Moxness Berg PA, 88%

**GROUP 2 (10-24 ALUMNI)**

- Bassford Remle, 100%  
- Lind, Jensen, Sullivan & Peterson, PA, 100%  
- Fish & Richardson, 94%  
- Nilan Johnson Lewis PA, 93%  
- Henson & Efron, PA, 88%

**GROUP 3 (25+ ALUMNI)**

- Masion LLP, 100%  
- Winthrop & Weinstine, PA, 92%  
- Stinson Leonard Street LLP, 74%  
- Dorsey & Whitney LLP, 66%  
- Faegre Baker Daniels LLP, 65%

For the full results of Partners@Work go to: www.law.umn.edu/generations/partners-at-work.html

**Contact:** Robin Doroshow at (612) 804-1178  
**Website:** mbsrosfthebar.com

**UofM Center for Spirituality & Healing**

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**CLE Credit:** 6.5 credits approved
Client Files:
The ABA Weighs In

What took them so long? The issue of returning client files—or, more technically, what constitutes the papers and property to which a former client is entitled upon termination of representation—is a common source of advisory opinion requests, complaints and even discipline. It is a topic on which not all scholars and ethics experts agree. Yet the American Bar Association has not issued an opinion on this topic since 1977, and that was an informal opinion based upon a set of rules (the former Code of Professional Responsibility) that was abandoned over 30 years ago. Now the ABA has finally weighed in with the issuance of ABA Formal Opinion 471 (7/1/2015), entitled “Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client in Entitled.”

(Note that the Rules of Professional Conduct do not discuss a client’s “file,” even though that is the usual shorthand term most lawyers and clients use.)

The ABA’s discussion is premised upon a fact pattern in which a lawyer has represented a municipality for several years pursuant to a contract that has now expired. The city requests that the lawyer provide its new attorney with any papers and property for which the client has paid as yet; to do otherwise would prejudice the client (even if the lawyer has already paid the lawyer’s costs). The lawyer has represented the municipality and has served as its counsel for the past 25 years. The city notes that the lawyer has now abandoned the case and the municipality wants to be assured that its files will be returned in full, so there are no lien issues presented. The question, then, is what must be provided to the former client (or its new counsel)?

The ABA’s analysis of this question is, of course, based upon the ABA Model Rules of Professional Conduct, specifically Rules 1.15 and 1.16. Under these rules, the ABA Committee determined that the materials an attorney must provide include all materials given to the attorney by the client, any documents filed with a tribunal on the client’s behalf (or those completed and ready to be filed), executed instruments such as contracts, correspondence connected to the representation (including emails retained pursuant to the lawyer’s document retention policy), discovery or evidentiary exhibits, and legal opinions and evaluations paid for by the client. All of these seem quite reasonable for a client to expect.

The ABA determined that the lawyer need not return drafts of documents, internal research memos and materials, personal notes, billing statements and most other internal firm materials. The opinion did note, however, that internal notes and memos that might otherwise not be needed may have to be if the materials should be disclosed to avoid harming the municipality’s interests, using the example of the most recent draft of and the supporting research for a document to be filed to meet a pending filing deadline.

The ABA noted that many states have adopted rules or issued opinions dealing with this subject in the absence of a formal ABA opinion. Oftentimes an ABA formal opinion forms an important basis upon which states expand. Thus, the ABA’s analysis may yet be helpful to some jurisdictions.

Detailed

The Model Rules’ versions of Rules 1.15 (Safekeeping Property) and 1.16 (Declining or Terminating Representation) differ in many aspects from the version the Minnesota Supreme Court has adopted. The newly identified ABA standard remains more generic than Minnesota’s rules, and lawyers in Minnesota will always need to refer to our state’s versions of these rules when trying to determine what a client is entitled to.

Minnesota’s Lawyers Board Board recognized early on that issues involving a lawyer’s return of a client file, and thus implicitly what constitutes client papers and property, were a common source of dispute and inquiry. In 1989, Lawyers Board Opinion No. 13 was adopted to deal specifically with the issue of charging for copying client files. In doing so, the board also attempted to define and clarify what items an attorney must return to a client upon termination of representation. The Code of Professional Responsibility in effect prior to 1985 had not defined what the phrase “client papers and property” means, just as the superseding and then-current Rules of Professional Conduct did not. The Lawyers Board opinion attempted to fill that void and for many years succeeded in substantially reducing complaints on these topics.

Although Opinion No. 13 has never been repealed, much of the content of the board opinion was codified in 2005 into Minnesota’s Rules 1.16(e) – (g). Rule 1.16(e) clearly states that, “Papers and property to which the client is entitled [upon termination of representation] include the following, whether stored electronically or otherwise. . . .” The rule then sets out a detailed list of what does and does not constitute client papers and property in various situations. Like the ABA, Minnesota’s rule states that papers and property delivered to the lawyer by the client must be returned to the client. Minnesota’s Lawyers Board opinion was codified in 2005 into Minnesota’s Rules 1.16(e) – (g). Rule 1.16(e) clearly states that, “Papers and property to which the client is entitled [upon termination of representation] include the following, whether stored electronically or otherwise. . . .” The rule then sets out a detailed list of what does and does not constitute client papers and property in various situations. Like the ABA, Minnesota’s rule states that papers and property delivered to the lawyer by the client must be returned to the client. Minnesota’s Lawyers Board opinion was codified in 2005 into Minnesota’s Rules 1.16(e) – (g). Rule 1.16(e) clearly states that, “Papers and property to which the client is entitled [upon termination of representation] include the following, whether stored electronically or otherwise. . . .” The rule then sets out a detailed list of what does and does not constitute client papers and property in various situations. Like the ABA, Minnesota’s rule states that papers and property delivered to the lawyer by the client must be returned to the client. Minnesota’s Lawyers Board opinion was codified in 2005 into Minnesota’s Rules 1.16(e) – (g). Rule 1.16(e) clearly states that, “Papers and property to which the client is entitled [upon termination of representation] include the following, whether stored electronically or otherwise. . . .” The rule then sets out a detailed list of what does and does not constitute client papers and property in various situations. Like the ABA, Minnesota’s rule states that papers and property delivered to the lawyer by the client must be returned to the client.

Bifurcated

Minnesota’s approach then bifurcates litigation matters from transactional matters in dealing with return of client files/papers. In litigation, the dividing line for returning documents is principally if pleadings, discovery, etc., have been served and filed. If so, then all such items must be released even if the client has not paid as yet; to do otherwise would prejudice the client (even if the client could possibly recover most filed documents from the court). If such documents have been drafted but not yet served or filed and are not yet paid for, then they may be withheld.

This seems a fair balancing of the interests of the client and the lawyer.

Next, items for which the lawyer has agreed to advance costs—such as depositions, other transcripts or any item of

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**MARTIN COLE**

is director of the Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 25 years.
Professional Responsibility

evidentiary value—must be provided, again without regard to whether the client has reimbursed the lawyer. As with those items above that must be returned regardless of payment, the lawyer, of course, retains whatever billing and collection rights she has.

In transactional representations, the rule provides a slightly broader ability to withhold documents. Again, all work already paid for must be returned, but documents such as drafted but unexecuted estate plans, title opinions, articles of incorporation, or contracts (which presumably do not yet have any legal effect) may be withheld if the client has not paid for the work.6

Minnesota does not in its rule otherwise distinguish intermediate drafts of documents from final products, as the ABA opinion spends time doing. Minnesota has not stated that such drafts are somehow documents to which a client is not entitled, so it would seem that they may be. Many lawyers may not historically have retained drafts of pleadings, research memos, etc., but in today’s electronic world, perhaps they are retained and may contain valuable tracking information about changes made. Maybe this will be an area in which the new ABA opinion can influence Minnesota’s rules.

Then, in Rule 1.16(f) and (g), the Minnesota rule addresses two final points relating to return of client files: the issue of requiring the client to pay for copying charges of their file (which originally triggered LPRB Opinion No. 13), which an attorney is allowed to do only if the client has, prior to the termination of the lawyer’s services, agreed to such an arrangement in writing. Otherwise, the lawyer must provide all required items to be returned without cost. Finally, the lawyer cannot condition return of client papers upon payment of the lawyer’s fee or copying charges. This may seem inconsistent with some of the items noted above, but, in fact, is different. If an item can be withheld pursuant to the rule, so be it, but if it must be returned (even if unpaid for), then it cannot be “held hostage” while awaiting a payment.

Conclusion

ABA formal opinions have long held an important place in the formation of ethical standards nationally. Minnesota traditionally will follow their guidance absent good cause.7 In this instance, Minnesota has a long-developed rule on what constitutes client papers and property, so it seems unlikely that any differences that exist with the ABA opinion will result in change.

Notes

2 A copy is available at http://bit.ly/1fsDriP
3 See Jorgensen, “Is a Client Entitled to the Lawyer’s ‘Notes’?” Minnesota Lawyer, August 23, 1999. Another interesting aspect of the ABA opinion is that it noted that providing copies of documents to a client during the representation may satisfy an attorney’s obligation to communicate with a client under Rule 1.4, but did not mean that the client was not entitled to a copy of the same documents as part of the file upon termination of representation. The Director’s Office many years ago took the same position. See, Cole, “You Can’t Make Clients Keep Their Own Files,” Minnesota Lawyer, January 8, 2001.
4 Rule 1.16(e)(1), MRPC.
5 Rule 1.16(e)(2), MRPC.
6 Rule 1.16(e)(3), MRPC.
Drive clients and referrals your way with MSBA Directories.

Chris Head, Minneapolis
The directories have been great since they were introduced a short time ago. In the last few months, I’ve had attorneys contact me to collaborate and partner on cases and new clients that otherwise would have never found my name, expertise and contact info. The market exposure for professionals and potential clients has been great and I strongly recommend the free service to all members of the bar.

Sherri Krueger, Minnetonka
The new MN Find a Lawyer and MSBA Colleague directories are a great benefit to bar members. Within days of completing my profile, I had a client contact me. The process for signing up is so easy, I registered using my smartphone while on a car trip one weekend.

Paul Carlson, Wadena
I use MN Find a Lawyer because it allows me to introduce myself to potential clients at their convenience. It also gives people looking for a lawyer as much information as they could want about me. This directory is as essential to my practice as my computer and smart phone. I won’t practice without the three of them.

David Anderson, Eden Prairie
For over 30 years, the Colleague Program has been a valuable resource for my practice. Now online in an easy to complete profile, I get quick answers and direction in areas of law outside my primary practice. By serving as a Colleague panelist, I have received referrals from other attorneys when they get in over their heads.

Find out the directory details at www.mnbar.org/directories
Meet Johanna Clyborne

‘In our third year we thought, why not?’

JOHANNA CLYBORNE is a partner and shareholder at Brekke, Clyborne & Ribich, LLC, where she practices in family, criminal, and military family law. She regularly advises on military benefits and Military Pension Division issues. When not practicing law, Johanna actively serves in the Minnesota Army National Guard as a brigade commander, holding the rank colonel.

How would you describe your practice?

I focus on family law, criminal defense, and legal issues particular to the United States Armed Forces. I do a lot of military family law. I also handle military pension division cases either as a neutral for attorneys and their clients or as an expert for one side.

Lawyers are more than legal technicians. My partners and I view ourselves as advocates and counselors, not just in law but in life. We help obtain justice through honesty, commitment, and genuine compassion.

What led you to choose a small firm practice?

I met my law partners, Rebecca Ribich and Barbara Brekke, on my first day of law school at the University of St. Thomas. We were a little older than most of our classmates. We each had families and previously successful careers, as well as similar values.

After my first year of law school, I clerked for the 10th Judicial District Public Defender office. Later, I interviewed with a large law firm where an associate excitedly told me that she was finally getting to work with a client and would be helping prepare for an upcoming deposition. Naïvely, I asked how long she had been with the firm. “Five years.” I had just spent the summer appearing in court and interacting with clients, and I was enrolled in the law school’s family law clinic, where I handled cases. I did not want to wait years before doing those things again.

By this time, my law partners and I were sitting together in all of our classes and folks were referring to us as “the firm.” In our third year we thought, why not? It took a lot of risk and brazenness, and the learning curve was steep. But for the last 10 years it has been the ideal fit.

What do you value in your practice?

Flexibility. The ability to leave at 3:00, work from home and choose projects and clients means a lot to me. I value the ability to get business done as I schedule it.

What aspects of your practice are particularly challenging?

I have two professions, one on the legal side and one on the military side. Being in the military has served my practice well, but it can be hard to balance the two. Currently I am serving as a brigade commander, and it takes a lot of time. Deploying or leaving for extended military duty and handling off files can be challenging.

Additionally, our firm doesn’t have support staff. I set my appointments, call clients, receive last-minute motions, and handle administrative support functions. Each partner also has her own firm-related responsibilities. My assignment is technology, which includes software, hardware, and server issues. One of my partners has billing, the other office management. We do a lot behind the scenes that does not necessarily involve practicing law.

When you face a challenge, what resources are helpful to you?

My law partners are my first stop. They are my best friends and confidants. I also have a couple of mentors I turn to. The worst thing solo or small firm practitioners can do is isolate themselves from the community, legal or civic. Being able to bounce issues off someone else helps me keep within ethical boundaries and strive for a higher standard in my work.

How is being a bar association member worthwhile?

I believe there is an obligation as part of a profession to support those organizations that support you. The bar association does that for me. The MSBA listserves are an incredible resource. I am a member of four: solo/small, family law, criminal law, and the military and veterans section. I learn a lot by scanning the messages and, when needed, I can post a question or concern. The support and guidance is overwhelming.

What activities do you enjoy away from work?

I don’t have a lot of down time right now. When I do have time and the weather is nice, I love to run. I enjoy reading but seem to have forgotten what it is like to read a non-professional book. My husband and daughter are Disney World addicts. Okay—I might be, too. When we are at Disney, we all can be kids again.

Where do you see the practice of law heading in the future, particularly for the small firm practitioner?

I see movement toward virtual offices and the increased use of technology in order to compete with increased demand for cost-effective legal services and to create more work/life balance for attorneys. I also think there will be more need for unbundled legal services.
Lawyer mobility is a commonplace in the modern legal economy. And while some partings are bound to be emotionally fraught, careful adherence to best practices can minimize any legal or ethical jeopardy. Here’s how.

BY CHARLES E. LUNDBERG AND ARAM V. DESTEIAN
In today’s legal market, the idea of an associate or a partner leaving their firm to join another has become almost routine. Largely gone are the days when an attorney spent her entire career with a single law firm. But the mere fact that something has become routine does not mean it is not potentially dangerous. A lawyer’s decision to leave her firm to join another, often termed “lawyer mobility,” is fraught with potential legal and ethical pitfalls.

Whether you are the “leaving lawyer,” the “departed firm,” or the lawyer’s “new firm,” there are legal and ethical ramifications for the decisions you make in this situation. Accordingly, this article seeks to provide a background of the issues that arise from an attorney’s decision to change firms, as well as a summary of “best practices” that minimize the potential problems arising from this situation.

CHALLENGES FOR THE LEAVING LAWYER AND THE DEPARTED FIRM

Each of the parties involved in a lawyer’s decision to leave a law firm is faced with potential challenges. And as one can imagine, the unique professional and emotional issues conjured by this inherently uncomfortable situation can lead to questionable decision-making. It’s a lot like going through a divorce.

Whose Clients Are They?

Characteristically, a lawyer is hired by a new firm with the belief that the attorney has a “book of business” that will follow the attorney to the new firm. In reality, that phrase is misleading. To be sure, lawyers have clients. But it is entirely up to those clients to decide whether they will follow the attorney to her new firm or continue to be represented by attorneys at the departed firm. And lawyers who seek to ensure their clients will “stick with them” at their new firm by discussing their planned departure prior to informing their current firm do so at their own peril.

Significantly, the Minnesota Rules of Professional Conduct (MRPC) do not recognize the concept of “firm clients” or “institutional clients.” Rather, the MRPC recognize only a lawyer-client relationship. In any event, it is essential that the leaving lawyer and the departed firm both recognize that it is ultimately the clients’ choice as to who will continue to represent them, and that the process of informing those clients of the lawyer’s departure and discussing future representation must be carefully considered in order to avoid potential pitfalls.

Notifying Current Clients: How and When?

The process of informing the client of the lawyer’s departure can implicate numerous ethical rules and legal considerations relating to solicitation of clients, fiduciary duties, conflicts of interest, and unfair competition. It is universally recognized that at some point after an attorney has made the decision to join a new law firm, the lawyer is under an ethical obligation to inform her current clients of the departure. Under the MRPC, this obligation is derived from Rule 1.4, which requires a lawyer to communicate information to the client that may affect the status of that client’s matter. Similarly, ABA Formal Opinion No. 99-414, which was published to provide guidance on the ethical issues raised by lawyer mobility, states that “notification of current clients is required.” The key questions involve how and when the leaving lawyer’s clients should be informed of the lawyer’s departure.

Best practice: Joint communication to affected clients. The ABA, the Minnesota Office of Lawyers Professional Responsibility, and virtually every other applicable authority on lawyer mobility recommend that the leaving lawyer and the departed firm should issue a joint communication informing the affected clients of the departure.1 Under these circumstances, the leaving lawyer and the departed firm can work together to craft a communication to the affected clients informing them of the lawyer’s impending departure, informing the clients that it is their choice as to who will continue the representation, and providing an election form for each client to complete and return indicating its preference of counsel. Moreover, the leaving lawyer and the departed firm can agree as to which clients to inform, avoiding a battle over who exactly to designate as a “client” of the leaving lawyer.

Option two: Individual communication to affected clients. The level of cooperation required for a joint communication may be difficult or impossible under certain circumstances. Moreover, it is possible that informing the firm of the lawyer’s intention to leave may result in immediate termination.2 If a joint communication is not possible, the leaving lawyer is still under an ethical obligation to provide notice to those clients for whom the lawyer is primarily responsible. The departed firm will frequently also issue an independent communication to the affected client in an attempt to maintain the client’s business. If such individual communications are required, the form and contents of the communication are critically important.

The first question is, who is a “client” of the leaving lawyer? ABA Formal Opinion 99-414 provides some guidance for determining who the leaving lawyer is ethically obligated to inform. The formal opinion indicates that the lawyer must provide notice to “those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services,” and makes clear that for the leaving lawyer to contact current clients regarding her departure does not constitute impermissible solicitation.

Under MRPC 7.3, the parties are also limited in how they communicate with the affected clients. Rule 7.3 allows the leaving lawyer to contact her current or former clients in person or by telephone without fear of violating the standard of conduct relating to solicitation. Under MRPC 7.3(a)(2), a lawyer may solicit any individual with whom the lawyer has a “family, close personal, or prior professional relationship.”

But ABA Formal Opinion 99-414 provides that a lawyer does not have a “prior professional relationship” “solely by having worked on a matter for the client along with other lawyers in a way that afforded little or no direct contact with the client.” Rather, the lawyer must have had some form of significant, substantive client interaction to establish a “prior professional relationship” that permits in-person or telephone solicitation. The ABA Opinion’s treatment of this issue might be criticized as overly restrictive and potentially even as an unconstitutional restriction on speech. But just because the leaving lawyer may contact the affected clients in person or via telephone, that does not mean that the lawyer has free rein to say whatever she pleases. If the leaving lawyer is still employed by the firm at the time of the communication with the client, she still has fiduciary obligations to that firm. Moreover, the leaving lawyer and the departed firm must both be careful not to run afoul of the ethical rules regarding client communication and solicitation.

Under MRPC 7.1, a lawyer is restricted in what she can say to her clients regarding the departure, and how. Rule 7.1 states that the communication cannot be “false or misleading.” Accordingly, the leaving lawyer may not inflate or otherwise misrepresent her involvement in working on the client’s matter. Similarly, MRPC 7.1 precludes the lawyer from misrepresenting the role that other attorneys who will remain at the departed firm had in the representation. These same obligations apply to the lawyers at the departed firm, meaning they

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A leaving lawyer should normally give notice of the departure to her firm before contacting clients in order to avoid accusations of impermissible solicitation.

When to Inform Affected Clients: Options and Best Practices

The question of when to inform the leaving lawyer’s clients is of primary importance to all parties. The big issues arise when the leaving lawyer’s notification to the client becomes a solicitation, especially when the leaving lawyer has not yet notified her firm of her intent to leave. Thus, while the issues of notification and solicitation are conceptually separate, they often overlap. Practically speaking, a leaving lawyer is unlikely to notify her client of her upcoming departure. When the leaving lawyer makes her departure imminent, informing the client is likely to continue the representation. As a result, the timing of the leaving lawyer’s communication with clients implicates significant tensions between her interests and the interests of the departed firm in competing to retain the affected clients.

Actually soliciting the client prior to informing the law firm exposes the leaving lawyer to potential claims for unfair competition, tortious interference with contract, breach of fiduciary duty or violation of the duty of loyalty owed by a partner or employee. Accordingly, a leaving lawyer should normally give notice of the departure to her firm before contacting clients in order to avoid accusations of impermissible solicitation.

Notification and solicitation prior to notifying the current firm. While ABA Formal Opinion 99-414 suggests that the leaving lawyer may ethically inform her clients of the departure before giving notice to her employer, scholars and practitioners in this area have noted that the ABA Opinion “offers a very specific point on the timing and solicitation under ethics standards and without regard to fiduciary duties owed to firms or colleagues.” Informing a client of the leaving lawyer’s departure before providing notice to the firm may comply with ethical rules, but it is likely to open a Pandora’s box of potential problems relating to fiduciary duties and any number of other legal (rather than ethical) issues.

If the leaving lawyer decides to ignore this authority and notify her clients before resigning from the firm, that communication must, at a minimum, conform with the standard set forth in ABA Formal Opinion 99-414. The Opinion provides the applicable ethical standard whenever the leaving lawyer makes her initial in-person or written notice informing a client of her upcoming departure. The standard is applicable regardless of when that communication is made. To comply with the ethical rules, the ABA Formal Opinion provides that the notice should conform to the following:

1. The notice should be limited to clients whose active matters the lawyer has direct professional responsibility for at the time of the notice;
2. The departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer’s willingness and ability to continue her responsibility for the matters upon which she currently is working;
3. The departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
4. The departing lawyer must not disparage the lawyer’s former firm.

It would be wise to keep detailed notes of this communication to ensure a clear and accurate record of what was communicated to the client, as protection in the event of a claim of impropriety by the departed firm. And although conforming to these recommendations will minimize the leaving lawyer’s risk of breaching the applicable ethical rules, it does not eliminate the risk of litigation.

Notification and solicitation after giving notice but prior to departure. Most authorities recognize that an attorney may solicitation after her resignation from the law firm but prior to departure, although there is conflicting authority. The Restatement (Third) of the Law Governing Lawyers, Section 9(3) provides that:

absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients: (a) prior to leaving the firm; (i) only with respect to firm clients on whose matters the lawyer is actively and substantially working; and (ii) only after the lawyer has adequately and timely informed the firm of the lawyer’s intent to contact firm clients for that purpose......

Accordingly, under the Restatement approach, the leaving lawyer may inform and solicit clients after giving notice to the departed firm but before leaving. But there is case law to the contrary. This conflicting authority demonstrates the inherent tension between the parties competing to maintain the client relationship. In some cases, the departed firm will not want to keep the leaving lawyer at the firm while she seeks to solicit affected clients. The leaving lawyer’s solicitation of clients while still employed with the firm also raises a risk of breach of fiduciary duty, especially when the lawyer utilizes the departed firm’s resources to solicit affected clients. Some authorities, including the estimable Robert Hillman, the author of the treatise Hillman on Lawyer Mobility, suggests that the departing lawyer may solicit a client after resignation so long as the solicitation occurs to permit the departed firm time to compete, the solicitation is not done in secret, and the client is advised that it is free to choose counsel. Although there is still debate on the question of the timing of solicitation, the best practice is to have an open conversation between the leaving lawyer and the departed firm about the transition process and how to notify affected clients.

Other Non-Ethical Principles Implicated

In addition to the ethical considerations noted above, a leaving lawyer must also consider the legal and fiduciary issues

A leaving lawyer should normally give notice of the departure to her firm before contacting clients in order to avoid accusations of impermissible solicitation.
that arise from her decision to leave her law firm. If not, the leaving lawyer may be faced with litigation against her former colleagues. Such litigation is almost always ugly. The departed firm may assert claims against the leaving lawyer (and often the new law firm) for breach of fiduciary duty, misappropriation of trade secrets, breach of contract, unjust enrichment, or tortious interference with contract (or prospective economic relations), among others. Many of these claims are especially likely to be implicated where the leaving lawyer solicits her clients before informing the firm. But regardless of what conduct led to the asserted claim, a leaving lawyer and new law firm should be cognizant of potential liability.

Fiduciary duty claims. Claims for breach of fiduciary duty can arise in several contexts. First, an employee owes a duty of loyalty to her employer. Accordingly, an attorney may breach her fiduciary duties to her employer by competing with the employer through improper solicitation of clients or misappropriation of confidential or proprietary information possessed by the employer. Second, a partner owes fiduciary duties to her partners. Among these fiduciary duties is a requirement to disclose material facts relating to the partnership. Courts outside Minnesota have held that a leaving lawyer’s conduct, such as concealing the intention to resign, surreptitiously meeting with another firm to offer to transfer clients in exchange for partnership, or inducing other employees to leave with the lawyer, is a breach of fiduciary duty. In these cases, damages may include the departed firm’s lost profits or recoupment of compensation paid to the leaving lawyer during the period in which she was in breach.

Tortious interference claims. A leaving lawyer and the new firm may also be faced with claims for tortious interference with contract or tortious interference with prospective economic relations. These claims arise from either the leaving lawyer’s or new law firm’s successful solicitation of clients to terminate their retainer agreements with the departed firm. As with claims for breach of fiduciary duty, Minnesota courts have not yet applied these claims in the context of lawyer mobility, but courts in other jurisdictions have done so. In Minnesota, the remedy for tortious interference may include damages reasonably equivalent to the revenue lost by the tortious conduct.

Misappropriation of trade secrets. When a leaving lawyer departs her former firm and brings with her the client lists of her former firm, has she misappropriated her former firm’s trade secrets? This was a hotly debated issue in recent litigation between two well-known Minnesota law firms. Disclosure: The authors’ firm advised the leaving attorney and new firm in this matter.) In that case, the law firm alleged that a departing partner violated Minnesota Uniform Trade Secrets Act (MUTSA), Minn. Stat. §325C.01 et seq., by taking the firm client list with her to her new firm. Courts in other jurisdictions have held that a law firm’s client list may be a trade secret. The Hennepin County District Court denied a request for a Temporary Restraining Order, in part because it did not believe the departed firm had a likelihood of success in establishing its claim for misappropriation. Accordingly, it is unclear whether a Minnesota court would recognize a law firm’s client list as a trade secret. At the margins, it seems clear that a leaving lawyer may take with her the contact information for those clients with whom she has a prior professional relationship, and that a leaving lawyer should not take with her lists of other clients represented by the departed firm with whom she had no substantial professional relationship.

Withdrawal and File Transfer

Once the client has made its decision as to who will continue the representation—the leaving lawyer, the departed firm, or another attorney—the affected parties have ethical obligations to protect the client’s interests. MRPC 1.16 generally provides the applicable standard of conduct for terminating a representation. If the client has selected the leaving lawyer to continue the representation, MRPC 1.16(a)(3) requires the departed firm to withdraw. From that point forward, under MRPC 1.16(d), the departed firm is ethically obligated to “take steps to the extent reasonably practicable to protect a client’s interests,” including “surrendering the papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has been incurred or earned.” MRPC 1.16(e) lists the “papers and property” the client is entitled to, including: (1) the papers and property delivered to the lawyer by or on behalf of the client; (2) the papers and property for which the client has paid the lawyer’s fees and reimbursed the lawyer’s costs; (3) all pleadings, motions, discovery, memoranda, correspondence, and other litigation materials in pending claims or litigation matters; and (4) all items for which the lawyer has agreed to advance costs regardless of whether the client has reimbursed the lawyer for the costs and expenses, including depositions, expert opinions, business records, witness statements, and other materials that may have evidentiary value. In other words, the client is entitled to receive much of what the terminated attorney has produced.

However, the terminated attorney does not need to return everything, especially if the attorney has not been paid in full. In matters with pending claims or in litigation, a nonpaying client is not entitled to documents in the lawyer’s file that have not been filed or served, including: lawyer notes, internal memoranda, and documents obtained by third parties. In non-litigation matters, a nonpaying client is not entitled to drafted but unexecuted documents.

The terminated attorney also may not condition the return of client papers and property on payment of the lawyer’s fee. Similarly, a terminated attorney may not charge a client for the costs of duplicating or retrieving the client’s file or property unless the client has agreed to such a charge, in writing, prior to the termination of the lawyer’s services. Regardless of whether the leaving lawyer or the departed firm is chosen by the client to continue the representation, both parties have an ethical obligation under MRPC 1.16 to protect the client’s interests following termination and promptly forward the client file to the client or the lawyer of the client’s choice.

What Can the Leaving Lawyer Take With Her? A leaving lawyer’s decision to take certain information, such as client lists, following her departure from the firm may have serious consequences. But what can a leaving lawyer take with her to the new firm?

Client files generally follow the client. But what if the client is not following the leaving lawyer to the new firm? ABA Formal Opinion 99-414 provides that the “lawyer does not violate any Model Rule by taking with her copies of documents that she herself has created for general use in her practice.” While that seems correct, it may be too broad. Many sophisticated clients now require as a condition of retaining a law firm that client documents will not leave the firm, or will be subject to destruction after a certain period, or both. Similarly, a non-disclosure agreement or protective order would govern where applicable, making it impermissible for the leaving lawyer to take documents that she created or that would normally be in the public domain, such as pleadings and briefs. In any event, leaving lawyers should be careful to avoid taking other documents such as fee schedules and other business information from their former firms.
Among the most pressing issues for the incoming law firm is the process by which it identifies potential conflicts of interest. Lawyer mobility presents its own set of issues for those firms looking to absorb a leaving lawyer. Among the most pressing issues for the incoming law firm is the process by which it identifies potential conflicts of interest and, to the extent a possible conflict is uncovered, how the incoming firm proceeds to ensure compliance with the ethical rules in managing that conflict of interest.

Clearing Potential Conflicts: ABA Formal Opinion 09-455 and the MRPC

“[B]efore a moving lawyer joins a new firm, the Model Rules and the common law require the lawyer and the firm to detect and resolve conflicts of interest to protect their clients and former clients, even if only one party to the move undertakes that actual conflicts analysis.”

But how does the leaving lawyer comply with her ethical obligation to detect and resolve conflicts while also abiding by the ethical obligation established under MRPC 1.6(a) to “not knowingly reveal information relating to the representation of a client”? Both the ABA and the MRPC recognize this inherent conflict and provide guidance to permit the parties to ethically detect and clear conflicts.

ABA Formal Opinion 09-455 and MRPC 1.6 (and the comments thereto) recognize that “lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest….” MRPC 1.6(b)(11) permits a lawyer to disclose information if the “lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer’s change of employment….” But what does that mean the leaving lawyer and the incoming firm can ethically disclose? And when should the parties provide such information?

What to disclose. The comments to MRPC 1.6 provide that a lawyer’s disclosure should “ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated.” But even this limited information should be disclosed “only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise….”

These provisions will provide sufficient guidance in most situations, but what about client matters of particular sensitivity? Under those circumstances, any form of limited disclosure “is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client.” The comments to MRPC 1.6 and ABA Formal Opinion 09-455 provide similar examples of such situations, such as “the fact that corporate client is seeking advice on a corporate takeover that has not been publicly announced” or “that a person has consulted a lawyer regarding the possibility of a divorce before the person’s intentions are known to the person’s spouse….”

When such circumstances are present, or when significantly more information is required to fully clear a conflict, client consent is required. If the client refuses to give consent to provide information to the other firm, the ABA Formal Opinion suggests utilizing an independent, third-party attorney to serve as intermediary to receive and analyze conflicts information in confidence. The intermediary may advise the parties generally without disclosing any facts to the other. The ABA Formal Opinion provides that utilizing an independent intermediary attorney “should not compromise any privilege nor frustrate the reasonable expectations of a client.”

Under any circumstance, the information disclosed in detecting and clearing conflicts can be used or disclosed only to the extent necessary to comply with the ethical obligations regarding conflicts. Accordingly, neither the leaving lawyer nor the incoming firm should utilize this information for any other purpose.

When to share conflicts information. Having ascertained what information may be exchanged to detect and clear conflicts, the question remains when that information should be exchanged. ABA Formal Opinion 09-455 provides that “conflicts information should not be disclosed until reasonably necessary….” According to the opinion, conflicts information should be shared when negotiations between the parties “have moved beyond the initial phase” such that “substantive discussions have taken place.” When hiring lateral associates, this may mean that conflicts information may not need to be shared until an offer of employment has been made contingent upon clearing conflicts. Conversely, when hiring a lateral shareholder, conflicts information likely must be shared much earlier, but not before the discussions have progressed to the point where the parties are reasonably committed to proceeding with the negotiations.

Interestingly, the guidance provided by the ABA Opinion is more restrictive than necessary for lawyers practicing in Minnesota. The ABA Model Rules lack a counterpart to MRPC 1.6(b)(2), which permits a lawyer to disclose non-privileged information relating to the representation of a client when “the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client” and where the client has not requested that the information be kept confidential. Thus, under the MRPC, a lawyer may disclose information to clear a conflict so long as it is not detrimental to the client, regardless of the stage of the recruitment process.

Conflicts of Interest, Imputation of Conflicts, and Screening

There are a number of questions that arise if a conflict is identified during the screening process. These include the nature of the conflict, whether screening is sufficient, and disqualification. Given the complexity and importance of these issues, this article can only provide a brief summary of each in relation to the question of lawyer mobility. However, there is significant scholarship that can provide a more in-depth analysis on these subjects. If a conflict of interest is identified, the incoming law firm must analyze the nature of the conflict and whether the conflict may be managed by effective screening of the leaving lawyer or by the consent of the affected clients.

MRPC 1.7 to 1.11 govern conflicts of interest and imputation. Under MRPC 1.10(a), “[w]here lawyers are associated in a firm, none of them shall knowingly represent a client when any of them...
An affected client can also give written consent to the representation. Of course, this general rule has exceptions. MRPC 1.7 and the comments thereto provide the standard for when a client may give informed consent. A client may not consent to the conflicted representation where “the institutional interest in vigorous development of each client’s position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.” Thus, a leaving lawyer may not switch sides in the same litigation and obtain informed consent from the former client to permit continued representation. If informed consent cannot be obtained, and screening is not permitted, the conflicted attorney and her firm may be disqualified from continuing the representation.

POLICIES REGARDING LAWYER MOBILITY

Given the many challenges that arise from an attorney’s lateral move to another law firm, firms should take steps to incorporate policies relating to lawyer mobility in their partnership or employment agreements. In particular, law firms should incorporate into their partnership or employment agreements that the firm and the lawyer agree to abide by the standard established in ABA Formal Opinion 99-414 if the lawyer departs the firm. By agreeing to abide by Opinion 99-414, the law firm and the attorney agree to issue a joint communication to all affected clients, informing the clients that it is their choice as to who will continue the representation, and providing an election form for each client to complete and return indicating its preference of counsel. In so agreeing, the parties can preemptively address some of the most significant issues that arise from independent communications to clients.

Law firms may also consider policies dealing with use of firm documents or client lists, although these policies are ineffective to the extent they conflict with the MRPC. For instance, a law firm may institute a policy against a lawyer’s copying of firm documents for outside use, thus requiring the leaving lawyer to request permission to copy and take documents with her when she leaves. On the other hand, if the client chooses the leaving lawyer and the new firm to continue the representation, the leaving lawyer may take the client file for use in representing the client. Similarly, a law firm may consider instituting confidentiality policies regarding the use of client lists in its agreements, handbooks, or manuals. When utilized, these policies should state that client information is a trade secret and restrict its use, so long as the firm’s own conduct treats such information as proprietary and confidential.

It is important to note that all policies must comply with the provisions of MRPC 5.6, which renders impermissible (and therefore unenforceable) any agreement restricting the right of a lawyer to practice after leaving a law firm. Law firms must be careful to craft their internal policies to reflect that the firm cannot restrict the leaving lawyer’s use of client information for clients they represented while at the firm.

Conclusion

Although the issue of lawyer mobility in modern legal practice presents numerous challenges, a lawyer’s lateral move to another law firm can be (and often is) accomplished without serious conflict. To do so often requires cooperation, transparency, and communication, conduct that can be difficult in an often-emotional parting of ways. There are numerous reasons—financial, reputational, personal—for all parties to ensure a lawyer’s smooth transition from one firm to another. But ultimately, as lawyers it is our obligation to act in the best interests of our clients, and ultimately our clients benefit when the leaving lawyer is able to transition from one firm to another without any (apparent) conflict.
Given the many challenges that arise from an attorney’s lateral move to another law firm, firms should take steps to incorporate policies relating to lawyer mobility in their partnership or employment agreements.

Notes
2 See ABA Formal Opin. No. 99-414 at 5.
3 Id (“a departing lawyer does not violate Model Rule 7.3(a) by notifying those clients that she is leaving…”)
4 See, e.g., Joint Formal Opinioan 99-100 of the Pennsylvania and Philadelphia Bar Assoc., at 2 (the former firm “should refrain from disparaging remarks and comparisons. . . .”); Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 98-5, 4/3/1998 (“The law firm should not unfairly disparage the departing lawyer to the client.”); State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1985-86 (“lawyers must act professionally by subliming their own feelings for the benefit of the client.”)
9 See §4.8.3.2.
11 Id. (“Parties in a fiduciary relationship must disclose material facts to each other.”)
13 Id.
14 See Kallok v. Medtronic, Inc., 573 N.W.2d 356, 362 (Minn. 1998) (tortious interference with contract) and Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc., 844 N.W.2d 210, 219 (Minn. 2014) for the standards to establish these claims.
16 Storage Tech., Corp. v. Sysco Sys., Inc., 395 F3d 921 (8th Cir. 2005).
19 See also Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 98-5, at 2 (“If a client discharges an attorney, the attorney must withdraw…. “); Martin A. Cole, “At Odds With Your Client,” Bench & Bar of Minn., Sept. 1997, at 16 (“Withdrawal from representation is mandatory if the client discharges the lawyer.”)
20 William J. Wernz, Minnesota Legal Ethics: A Treatise (5th Ed. 2015) at 704.
21 Id.
22 MRPC 1.16(g).
23 MRPC 1.16(f).
24 ABA Formal Ethics Opinion 09-455.
25 Comments to MRPC 1.6, at ¶ 12.
26 Id.
27 Id; see also ABA Formal Ethics Opinion 09-455 (the disclosure of information “should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest.”)
28 MRPC 1.6, cmt. 12.
29 ABA Formal Ethics Opinion 09-455 at 6.
30 Id. at 7.
32 See MRPC 1.10, cmt. 3.
33 See MRPC 1.10(b); see also Martin A. Cole, “Screening Conflicted Lawyers Under Rule 1.10,” Minnesota Lawyer (5/28/2001).
34 MRPC 1.10(b)(2).
35 Lennartson, 662 N.W.2d at 131.
36 See MRPC 1.7, cmts. 19-22.
37 See, e.g., State v. 3M, 845 N.W.2d 808 (Minn. 2014); Lennartson, 662 N.W.2d at 135.
39 Id. at 16.
40 MRPC 5.6(a) provides that “[a] lawyer shall not participate in offering or making: (a) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.” Richmond at 17.
Carpe tempus.

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Lawyers Specialize. Courts Should Too.

By Kevin S. Carpenter
Over time, lawyering has only grown more specialized; our courts remain committed to a generalist, jack-of-all-trades approach. Should it remain so? No, argues one longtime central Minnesota attorney: Progress ought to mean more specialization on the bench, too.

“The history of learning amounts to a history of specialization.”
– Beryl Smalley, Historians In The Middle Ages

The Proposal
After practicing law in Minnesota for 35 years, I have concluded that our state courts would do a much better job if judges specialized like lawyers do. What I propose is twofold: that our state district courts and our court of appeals be split into civil and criminal divisions; and that our court of appeals be gradually transformed into a group of judges with legal problem-solving expertise similar to the medical problem-solving expertise of the Mayo Clinic.

There are at least three distinct advantages to be gained through more specialization by judges:

■ We would make being a judge more appealing to more lawyers.
■ We would increase the level of confidence that lawyers have in the court system, because lawyers believe in legal specialization.
■ We would increase efficiency—which, over time, ought to save money.

Who am I to Judge our Judges?
When I was growing up, there were no lawyers in my family. My father only had a high school education. My mother had a two-year college diploma until she went back to college when I was a sophomore in high school, earning her four-year degree to be a school teacher. For the first 12 years of my life there were no lawyers in the town where my family lived—Prosper, North Dakota, population 29. (And no, the town didn’t get a lawyer then; my family moved to a much larger town—Moorhead, Minnesota.) I went to college right after high school and I went to law school right after college.

I was sworn in as a Minnesota lawyer on April 20, 1979; at that time I was 24 years old. From the summer of 1979 to the summer of 1980 I clerked for a Minnesota district court judge. Then I spent 17 years doing mostly civil defense work for a law firm. Since then, and for over 17 years now, I have done mostly plaintiffs’ civil work, first with another lawyer for a year and a half and then mostly as a sole practitioner, though I have associated with other lawyers and law firms on many occasions. I now do a lot of contract work for a plaintiffs’ personal injury law firm.

I have tried over 100 cases to a jury verdict, mostly as a civil defense lawyer. I have briefed and argued over 50 cases to the Minnesota Court of Appeals and six or seven cases to the Minnesota Supreme Court, again mostly as a civil defense lawyer. Many years ago, as a young lawyer, I worked on two or three marriage dissolution cases, and I remember one court trial involving a misdemeanor criminal charge, and I did a brief stint as a bankruptcy trustee. Other than that, my work has mostly been in civil cases involving negligence and other tort issues and in insurance coverage disputes.

My legal worldview, then, is largely from the perspective of civil cases, mostly civil tort cases. I tried a couple of cases in federal court, and I briefed and argued a couple of cases before the 8th Circuit Court of Appeals, but most of my work has been in Minnesota state courts.

I freely admit that I am only vaguely aware of what the state court system does apart from the civil cases I have worked on. I think it was about 10 years ago when one of the St. Cloud judges told me that being a judge was “90 percent social work.” More recently, another St. Cloud judge told me he estimates that about 5 percent of his work is civil, including collections; 12 percent juvenile; 10 percent child protection; 15 percent divorce and “the balance” (almost 60 percent) criminal.

The Problem
It seems a type of heresy for a lawyer to publicly suggest that our legal system currently does not work as well as it should. In writing this I considered citing a few of the cases I have worked on that were, in my humble opinion, decided wrongly by the courts. But every loser in a disputed court case complains that the court erred. I will still refer, in passing, to a few cases I have worked on that “aha” moments that I have experienced, occasions when it struck me that the court system ought to be different.

“Aha” number 1: Almost 30 years ago, as MSBA president, Richard L. “Dick” Pemberton of Fergus Falls asked in his final President’s Page column whether lawyers and judges ought to be concerned about the fact that lawyers were moving more and more toward specialization while judges were required to be generalists.

“Aha” number 2: About five years ago I was arguing a tort case in front of a court of appeals three-judge panel when, after a few questions from the judges, I thought, “Oh my god, these people don’t understand tort law!” Why is it that there are some court of appeals judges that know a lot about tort law, but if you appeal a tort case you might not have any of them assigned to it? I think it’s because when the court of appeals was formed, our only previous appellate experience was with the Supreme Court, and we created the court of appeals in the Supreme Court’s image.

But we’re repeatedly advised that the court of appeals is not like the Supreme Court; the Court of Appeals is an “error-correcting court.” So why don’t we make it a great “error-correcting court”?

If we hired a big law firm to resolve disputes—to serve as an error-correcting appellate court—would they hire a bunch of nice, smart lawyers haphazardly, without regard to their expertise? And once hired, would those lawyers be pooled and assigned cases without regard to their expertise?

If the Mayo Clinic was run like our court of appeals, they’d have one big department. They’d sometimes assign a cardiologist to do a hip replacement surgery. After all, cardiologists are smart people; a few may even have watched or participated in a hip replacement surgery in medical school and probably could follow a You Tube video and figure out how to do the hip replacement. But isn’t there a better way to do things?
Because lawyers believe in specialization, most of us perceive that judges not specializing either make mistakes or work inefficiently.

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“Aha” number 3: On several occasions I have waited in district court for a motion hearing in a civil case and watched the judge hear a variety of totally unrelated cases—a civil commitment, a marriage dissolution, a criminal sentencing, a default collection, and so forth. Granted, several judges have told me that a lot of what they do is “routine,” easily accomplished by someone who has had training to be a lawyer. But most of the stuff I have in court is not “routine,” especially if it is assigned to a judge whose lawyer background was in criminal law. And it is very disconcerting to have a complicated civil law issue put in front of someone who seems too busy with “routine” stuff and has no significant experience in complicated civil law issues.

In the 2002 movie Catch Me If You Can, Leonardo DiCaprio played con man Frank Abagnale, Jr. After seeing the movie, I also read a couple of articles about Abagnale. I was particularly struck by his explanation of how he managed to fake being a physician. He worked in a hospital, supervising resident physicians. When a medical issue presented itself, Abagnale would ask at least two of the residents what they thought should be done. Often the residents would agree; if they didn’t, Abagnale simply had to pick one of the two approaches to follow.

My sense is that, particularly with complicated civil law issues, we often have the issue decided by Judge Abagnale. I do not mean to insult those judges who, as lawyers, did mostly criminal defense work as lawyers have a better understanding of difficult tort concepts than judges who, as lawyers, did mostly criminal law work.

I would much rather have my plaintiff’s tort case in front of a judge who practiced tort law as a defense lawyer than in front of a judge whose legal background was as a prosecutor or a criminal law defense lawyer. I still firmly believe that Minnesota district court judges are good people who try to do the right thing. But judges who did civil defense work as lawyers have a better understanding of difficult tort concepts than judges who, as lawyers, did mostly criminal law work.

I realize that many lawyers and judges will dispute the notion that some district court judges currently don’t well in tort cases. But because lawyers believe in specialization, most of us perceive that judges not specializing either make mistakes or work inefficiently.

“Aha” number 5: Not long ago I was doing research and came across an appellate case decided by the Tennessee Court of Criminal Appeals. I had probably heard of this court before, but I saw it in a new light now that I have been working on this article about judicial specialization. Tennessee has a Court of Criminal Appeals. Minnesota doesn’t.

“Aha” number 6: A few months ago I was looking at the Comments section of CIVJIG 27.10 (Fourth Edition, 1999, page 180). The authors noted that “Direct cause” has been selected rather than “proximate cause.” “Proximate” is a term that may be meaningful to lawyers because of familiarity with the concept, but it is not so understood by jurors.

I thought to myself, “Ditto ‘negligence.’” My late friend Mike Ford used to like to say, “When you’re up to your ass in alligators, it’s hard to remember that your initial objective was to drain the swamp.” I think our judges would be better able to evolve legal principles (like “proximate cause” and “negligence”) if they specialized.

Solutions

We should change our courts to make serving as judges more appealing to more lawyers. We can do that by making being a judge more like being a lawyer. Both lawyers and judges are in the business of solving problems. But modern lawyers believe that solving problems well, and solving them efficiently, is best done by limiting the types of problems that you tackle. Courts need to limit the types of problems that judges tackle.

One challenge will occur in rural Minnesota counties that have few judges. Some will argue that it is impractical for judges in those counties to specialize. But what comes to mind for me is that when I started practicing, our 7th Judicial District had 10 counties and four district court judges. Each district court judge did the district court work for 2.5 counties. Thanks to the internet and video technology, it would actually be easier today to have four judges do a certain type of legal work for 2.5 rural Minnesota counties.

When the Supreme Court reviews decisions from the court of appeals, the Supreme Court often notes that it reviews legal issues de novo. I understand why this is, and I don’t see it as changing. But might our Supreme Court view a tort case differently if that tort case had been decided by two or three court of appeals judges recognized as specialists in tort law? Might the parties to the case be less likely to seek review by the Supreme Court if the case has been decided by specialists at the court of appeals?

The overall goals of the court reforms I’m talking about should be to [1] make being a judge more appealing to more lawyers; [2] increase the level of confidence that lawyers have in the court system because lawyers believe in legal specialization; and [3] increase efficiency—which in turn ought to save money over time.
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**BANKRUPTCY**

**JUDICIAL LAW**

■ **Default interest rate enforceable in bankruptcy.** The 8th Circuit has held that a clause in a note which provided that upon default, the interest rate on the remaining principal would be 5% in addition to the 5.04% interest rate, was enforceable in a bankruptcy proceeding. In an appeal from the USDC-MN, the court affirmed the bankruptcy court’s allowance of CW Capital’s proof of claim, which included the default interest. The debtors asserted that the default interest provision was an unenforceable penalty under Minnesota law and that the rate was disproportionate in amount. The court noted that under Minnesota law, liquidated damages in a fixed amount can be allowed without proving actual damages. The court looked then to the contractual facts and circumstances and found that actual damages on securitized commercial loans were unique and difficult to quantify, were not readily ascertainable and affirmed the judgment allowing the claim as filed. In re: Bowles Sub Parcel A, LLC et al. v. CW Capital Asset Management LLC, 2015 WL 4035375, No. 14-1055, (8th Circuit, 7/1/2015).

■ **Debtor lacks standing to appeal.** The court denied the Debtor’s appeal from an order allowing a general unsecured claim in debtor’s Chapter 13 case. The court noted that appellate standing in a bankruptcy appeal is narrower than ordinary prudential standing. Applying the person aggrieved doctrine, the court found that standing was limited to a person aggrieved by an order which “diminishes their property, increases their burden or impairs their rights.” In this case, the debtor has no pecuniary interest in the distribution of the assets of the case. The court further noted that the only exception to this general rule was if there was a surplus of funds in the estate which could be returned to the debtor after administration. In this case, the debtor was not paying Chapter 13 claims in full so there was no such surplus. The court went on to dismiss the appeal for lack of jurisdiction. In re Robb, 2015 WL 4287950, (8th Cir. BAP, 7/16/2015).

■ **Child tax credit exemption allowed under state law.** For several years, the debtor’s ability to exempt federal tax refunds based upon the Child Tax Credit (CTC) has been unclear. There were legislative changes in 2001 by Congress that modified the credit to assist low-income families. (Economic Growth and Tax Reconciliation Act of 2001. Pub. L. No 107-16). In 2003, Congress increased the tax credit (Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. 108-27) and in 2004 the Congress extended the $1000 credit for all future years and accelerated the refundability rate (Working Families Relief Act of 2004, Pub. L. 108-311). Further changes were made to the laws in 2008, 2009 and 2010 that enabled more low-income earners to claim an increased refund. Since then, these benefits have been extended through 2017 and increased to a minimum of $3,000. All of the legislative history after 2001 strongly suggests that the CTC is a “public assistance benefit.”

The laws of many states allow for an exemption claim in “public assistance benefits.” Minnesota, Illinois, Missouri, Idaho and Indiana are but a few of those states in which the bankruptcy court has addressed the issue and the decisions vary as to exemption allowance. The bankruptcy court in Minnesota, relying on the BAP opinion below in this case, has denied an exemption for CTC refunds in In re Dmitruk, 2014 WL 2600280 (June 2014).

More recently, the 8th Circuit Court of Appeals has suggested that the CTC refunds are “public assistance” and exempt under any state law that allows a public assistance exemption. The 8th Circuit indicated that the bankruptcy court and the BAP focused too narrowly on the CTC as originally enacted and

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* The online version of this section contains additional case note content. See www.mnbenchbar.com
failed to consider the legislative history of the amendments that followed, which indicated that Congress intended “to benefit the needy” with the Child Tax Credit. In re Pepper Minthia Hardy, 787 F.3d 1189, (8th Cir. 6/2/2015).

— Timothy D. Moratzka
DeWitt Mackall Crounse & Moore S.C.

**CRIMINAL LAW**

**JUDICIAL LAW**

**Restitution:** Victim’s role as aggressor not grounds upon which to reduce restitution order. Appellant was confronted by D.S. about marijuana that appellant sold D.S. months earlier. D.S. followed appellant as he tried to leave and attacked him. Appellant drew a knife and stabbed D.S. twice, causing serious injuries to D.S. Appellant ultimately pleaded guilty to terrorist threats, and D.S. filed a request for restitution. Appellant requested that the restitution award be reduced because D.S. was the initial aggressor, and the district court granted appellant’s request. The state appealed and the court of appeals reversed. Appellant’s petition for review was accepted by the Supreme Court.

The Supreme Court employed principles of statutory construction to determine if the two factors listed in Minn. Stat. §611A.045, subd. 1 (amount of economic loss sustained by the victim as a result of the offense, and the income, resources, and obligations of the defendant), are the only two factors a district court may consider when imposing restitution. The plain language of §611A.045, subd. 1, provides an exclusive list of factors for determining the amount of restitution to award, based on the common and approved meaning of the words and the surrounding statutory provisions. The court also holds that the phrase “as a result of the offense” does not allow a district court to consider “the circumstances of the offense and the victim’s role.” State v. Brandon Wayne Riggs, Sup. Ct. 7/1/15.

**Criminal procedure:** District court judge may hear request to disqualify judge for cause, and may not prevent moving party from seeking review from chief judge. Appellant was convicted of second-degree assault and placed on probation. After violating his probation, prior to the probation revocation hearing, appellant moved to disqualify the judge “based on a reasonable question of [judicial] impartiality,” or, in the alternative, for the chief judge to hear his motion or stay the proceedings to allow an independent tribunal to determine whether the judge violated the Code of Judicial Ethics by not recusing. The district court denied appellant’s motions and, rather than referring the motion to the chief judge, commenced the probation revocation hearing. Following the hearing, the court revoked appellant’s probation. Appellant appealed, arguing the district court erred by declining to refer his motion to the chief judge. The court of appeals affirmed his probation revocation, and appellant petitioned the Supreme Court for review.

Unlike the denial of a motion for peremptory removal of a district court judge, the Supreme Court has never held that the denial of a motion to remove a judge for cause must be challenged via a petition for writ of prohibition. A petition for writ of prohibition is not required to obtain appellate review of a request to disqualify for cause under Minn. R. Crim. P. 26.03, subd. 14(3). While Minn. R. Crim. P. 26.03, subd. 14(3) directs the chief judge to hear and determine a request to disqualify a judge for cause, a party is entitled to ask the district court judge directly for voluntary disqualification. Such a request does not constitute a waiver of the party’s right to have the chief judge hear his removal motion. The court points out that appellant made his motion in the alternative, seeking voluntary disqualification from the judge and, in the alternative, for review by the chief judge. As such, he did not waive his right to have the chief judge hear his motion.

Finally, while the district court had authority to first hear appellant’s request to disqualify, it did not have authority to deny his alternative request to refer the removal motion to the chief judge. This denial deprived appellant of his right under Minn. R. Crim. P. 26.03, subd. 14(3), to have the chief judge hear and determine his request. This error was not harmless, because, at the sentencing hearing for second-degree assault, the judge told appellant he would revoke his probation for any violation, and speculated that appellant had “duped” the court when he exercised his right to appeal. Because the judge prejudged appellant’s probation revocation proceeding, his impartiality is called into question, and vacation of the probation revocation order is required. State v. Alton Dominique Finch, Sup. Ct. 7/8/15.

**Criminal procedure:** Prosecutor acts in bad faith by dismissing and refiling complaint after court’s refusal to continue trial. The day before appellant’s DUI trial, the state learned the arresting officer left the state for a job interview and would not be able to testify. The state informed the court of the trooper’s absence when the case was called the next morning, and requested a continuance, informing the court that, if its request was denied, the state would dismiss the case and recharge it. The continuance request was denied, and the state dismissed the case. Two weeks later, the state refiled the charges. The district court denied appellant’s motion to dismiss, finding that the state had not acted in bad faith. After a stipulated facts trial, appellant was convicted, and he appealed, challenging the district court’s refusal to dismiss the refiled complaint.

Minn. R. Crim. P. 30.01 permits the state to dismiss a complaint or file charge without the court’s approval, if the prosecutor states the reasons for the dismissal in writing or on the record. Cases interpreting this rule have held that a dismissed complaint may only be refiled if it was dismissed in good faith. The state made clear in this case it was dismissing the complaint to bypass the court’s denial of the state’s motion to continue the trial. Minnesota law permits only the court to effect a continuance, and the court has exclusive case management authority. While the state has discretion to dismiss a charge, it is improper for the state to use that power to impede upon the court’s authority.

Held, when a prosecutor voluntarily dismisses a complaint to initiate a dismiss-and-refile tactic and to circumvent the district court’s denial of a continuance motion, the prosecutor acts in bad faith in both the dismissal and the refiling. State v. Douglas John Olson, Ct. App. 7/13/15.

**Prostitution:** Criminal prostitution statute not facially overbroad under the 1st Amendment. Appellant was convicted of multiple counts of prostitution-related offenses, stemming from his involvement in a prostitution scheme. On appeal, appellant argues the statute criminalizing the solicitation and promotion of prostitution, specifically the definition of “prostitution,” is facially overbroad and violates the 1st Amendment.

The criminal prostitution statute regulates both conduct and speech, because it prohibits soliciting or inducing an individual to practice prostitution, and the common definitions of “solicit” and “induce” implicate speech. Minn. Stat. §609.322, subd. 1a(1). Similarly, the statute’s prohibition of the promotion of prostitution also involves a combination of speech and conduct. Minn. Stat. § 609.322, subd. 1a(2). The
The prostitution statute is content-based, because it prescribes a particular type of speech (speech used to solicit, induce, or promote prostitution). However, the speech it prescribes is integral to criminal conduct, so it is outside the ambit of the 1st Amendment’s protection.

To be constitutional, a statute that punishes speech based on its content must not be overbroad. Appellant argues that the prostitution statute is overbroad because it prohibits or chills a substantial amount of protected speech, along with unprotected speech. Specifically, he argues that the statute unconstitutionally criminalizes the solicitation, inducement, or promotion of consenting adults to portray themselves in non-obscene films and photographs depicting sexual penetration and/or sexual contact, and lap dancing. First, the prostitution statute does not criminalize or prohibit the solicitation, inducement, or promotion of adults to portray themselves in films or photographs. Second, lap dancing is “lewd” and “lascivious” behavior and, therefore, obscene conduct not protected by the Constitution. So, even if the prostitution statute did criminalize or prohibit lap dancing, the statute is not overbroad because it does not proscribe constitutionally protected activity. Even if lap dancing is not obscene, the prostitution statute is not overbroad, because there is no substantial overbreadth here. State v. Antonio Dion Washington-Davis, Ct. App. 7/13/15.

DWI: Presence of more than one child in vehicle at time of offense may constitute only a single aggravating factor. Appellant was convicted of DWI after driving while intoxicated with three children in her vehicle. Although this was her first DWI charge, the state counted each child present in the vehicle as a separate aggravating factor, and charged her with second-degree DWI. Minn. Stat. §169A.095 permits each qualified prior impaired driving incident within the 10 years immediately preceding the current offense to be counted as a separate aggravating factor. However, Minn. Stat. §169A.09 requires that the prior impaired driving incident arise out of a separate course of conduct. The statute does not specifically address whether multiple children in the vehicle may be counted as multiple aggravating factors under Minn. Stat. §169A.03, subd. 3(3).

Held, the presence of one or more children, in the vehicle at the time of the offense may constitute only one aggravating factor. The statute plainly states that the presence of “a child” is an aggravating factor. In the impaired driving

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statutes, the legislature demonstrated its ability to provide for aggregating a factor for enhancement purposes, but did not do so concerning the presence of a child in the vehicle. Appellant’s second-degree DWI conviction is reversed and the case is remanded to the district court with instructions to enter a conviction for third-degree DWI. State v. Tarah Louise Fichtner, Ct. App. 7/13/15.

**DWI: Test refusal statute does not violate unconstitutional conditions doctrine.** Appellant was involved in a vehicle collision, after which he failed field sobriety tests and a PBT. He refused a breath test after being read the Implied Consent Advisory. After a stipulated facts court trial, appellant was found guilty of third-degree test refusal. On appeal, appellant argues that the test refusal statute violates the unconstitutional conditions doctrine because it compels a person to relinquish 4th Amendment rights as a condition of maintaining a driver’s license and avoiding criminal punishment.

As observed in State v. Netland, 762 N.W.2d 202 (Minn. 2009), which the court of appeals notes is still good law if Netland’s reliance on State v. Shriner, 751 N.W.2d 538 (Minn. 2008) (overruled by Missouri v. McNeely, 133 S.Ct. 1552 (2012)) is replaced with State v. Bernard, 859 N.W.2d 762 (Minn. 2015), the unconstitutional conditions doctrine is properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement. Citing Bernard, the court holds that the warrantless breath test appellant refused would not have been an unconstitutional search, because it would have been a valid search incident to an arrest. Because appellant cannot establish that the test refusal statute authorizes an unconstitutional search, his unconstitutional conditions argument fails.

Chief Judge Cleary concurred specially to emphasize his interpretation of Bernard’s search incident to arrest exception is limited to providing that a warrantless breath test is constitutional under these facts. As such, he believes that an unconstitutional conditions challenge to the test refusal statute in the context of a blood or urine test refusal may be successful. State v. David Ray Bennett, Ct. App. 7/27/15.

**Perjury: False statement is “material” if it has natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it is made.** During his trial for criminal sexual conduct, appellant claimed to have served four and a half years in the Army, which included overseas deployment, serious injury, receipt of two Purple Hearts, and medical discharge. After a hung jury, law enforcement learned appellant never served in the military. A second trial resulted in appellant’s conviction. At his sentencing hearing, he admitted to lying about his military service. The state subsequently charged him with felony perjury. The only issue at his stipulated facts court trial was whether his false statements were “material” under Minn. Stat. §609.48, subd. 1. Appellant was adjudicated guilty, and he appealed the issues of the materiality of his statements.

“Material” is not defined in Minnesota’s criminal code. However, the perjury statute makes clear that a false statement need not have any effect to be material, and that the declarant’s state of mind is irrelevant to the issue of the materiality of the statement. Citing a previous version of the perjury statute and federal case law, the court of appeals concludes that a statement is “material” within the meaning of Minn. Stat. §609.48, subd. 1, “if the statement has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it is made.” In this case, the ultimate question is whether appellant’s claim of exemplary military service had a natural tendency to influence, or was capable of influencing, the jury’s assessment of his credibility during his criminal sexual conduct trial. The court finds that appellant’s claims were capable of influencing the jury’s decision, and holds that appellant’s statements regarding his military service were material. Appellant’s perjury conviction is affirmed. State v. Gary Lee Burnett, Ct. App. 7/20/15.

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**EMPLOYMENT & LABOR LAW**

**JUDICIAL LAW**

**Disability discrimination; perception claim fails.** A janitor for the Minneapolis Public School system lost his disability discrimination claim under the Americans with Disabilities Act (ADA) and parallel Minnesota Human Rights Act long after he was not reinstated following a strength test he filed upon the recall from a lay-off. The 8th Circuit Court of Appeals, affirming the ruling of U.S. District Court Judge David Dory, held that there was insufficient evidence that he was “regarded as” disabled to invoke the perception of disability provisions of the two laws, nor was there any actionable retaliation. Fischer v. Minneapolis Public Schools, 2015 U.S. App. LEXIS 11727 (8th Cir. 7/8/2015).

**Non-solicitation agreement; lack of approved consideration bars claims.** The absence of an express recital of consideration in a two-year non-solicitation agreement bars its enforcement against an employee. The appellate court affirmed a Hennepin County District Court ruling denying an injunction against the employee because the Statute of Frauds, Minn. Stat. §513.01, requires a written memorialization for an agreement that cannot be performed within a year, and this agreement lacked any reference to consideration for the restriction. JAB, Inc., v. Naegele, 2015 Minn. App. LEXIS 46 (Minn. Ct. App. 7/13/2015) (unpublished).

**Misappropriation of trade secret; confession of judgment violation.** A former employee who was subjected to an injunction against using a trade secret misappropriated from the former employer was required to pay the full amount of an $1,880,475 confession of judgment. Reversing a ruling of the Dakota County District Court, it held that the ex-employee violated the injunction against use of a misappropriated trade secret, which led to the confession of judgment, warranting payment of the additional amount owing under the confession of judgment. Analog Tech Corp. v. Knutson, 2015 Minn. App. LEXIS 624 (Minn. Ct. App. 7/13/2015) (unpublished).

**ADMINISTRATIVE ACTION**

The Equal Employment Opportunity Commission (EEOC) has ruled that discrimination in the workplace on the basis of sexual orientation constitutes a form of sexual discrimination violative of Title VII of the Federal Civil Rights Act. The agency made the determination this summer in a narrow 3-2 vote on partisan grounds, building on the foundation of prior case law and EEOC rulings dealing with same-sex stereotyping and transgender discrimination. The agency reasoned that such discrimination is predicated “on sex-based differences.” The ruling, three weeks after the Supreme Court’s historic decision in favor of same-sex marriages in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), is not binding on courts and is likely to be the focus of significant litigation. The decision brings the EEOC’s view
in line with laws in Minnesota and 21 other jurisdictions banning workplace discrimination due to sexual orientation, a measure that Congress has refused to adopt despite various legislative initiatives over the last two decades.

LOOKING AHEAD

A pair of important employment law cases is on the docket for the upcoming term of the U.S. Supreme Court, which begins in the first week of October.

In Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146, the High Court will revisit the issues of overtime compensation and class creation certification when it reviews a $5.8 million judgment for production line employees in Iowa, which was affirmed by a narrowly divided 8th Circuit Court of appeals for time spent “donning and doffing” work-required apparel. 765 F.3d 791 (8th Cir. 2014).

The 2015-16 term also includes a labor law case challenging the imposition of mandatory union dues on public sector employees. Friedrichs v. California Teachers Assn., No. 14-915, could have impact on governmental employees in Minnesota under the Public Employees Labor Relations Act (PELRA) Minn. Stat. §197A.01, et seq.

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ENVIRONMENTAL LAW

JUDICIAL LAW

Minnesota Supreme Court concludes seasonal animal lot not a C AFO. The Minnesota Supreme Court held that a farm using fields as cropland in the summer and as an animal feeding site during the winter need not obtain a National Pollution Disposal Elimination System (NPDES) permit but must nonetheless obtain a state disposal system (SDS) permit. The Pope County, Minnesota, farm at issue uses a portion of its cropland as a winter feeding facility for cattle. Following the fall harvest, the farm places cattle on the lot, which consumes crop residues through the winter. In the spring, the farm moves the cattle off the lot and plants new crops for the growing season.

The Clean Water Act and EPA regulations require an NPDES permit for discharges from animal feeding operations (AFOs), which are facilities where at least 1,000 cattle are kept on the lot for more than 45 days in a 12-month period, and where “[t]raps, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot.” 40

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C.F.R. §122.23(b)(1). MPCA argued that the phrase “sustained in the normal growing season” should take into account the period during which the animals are present, and that because crops are “not sustained” on the Pope County farm through the winter, therefore the facility was an AFO and required an NPDES permit. Moreover, MPCA claimed the Court should defer to its interpretation of this phrase, in accordance with In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502 (Minn. 2007).

The Court disagreed, holding that Annandale does not require deference to an agency’s interpretation of a regulation where the language is unambiguous. In this case, the Court found the regulation was unambiguous—if crops are sustained on the lot during the “normal growing season” (which, in this case, they were), then under the plain language of section 122.23(b)(1), the lot is not an AFO. However, the Court determined that the farm would require an SDS permit because, under MPCA rules, it met the definition of an “animal feeding facility” and did not qualify for the “pasture exemption” under Minn. Stat. §116B.07, subd. 7d (which the Court held required a vegetative ground cover during the entire growing season, even during the very early part of the season, when crops were being planted).

In re Reichmann Land & Cattle, LLP, A13-1461, 2015 WL 4597534, at *1 (Minn. 7/29/2015).

**ADMINISTRATIVE ACTION**

**EPA finalizes carbon air emission standards for existing power plants.**

On 8/3/2015, the U.S. Environmental Protection Agency (EPA) finalized the first-ever performance standards for carbon emissions from existing power plants in the United States under section 111(d) of the Clean Air Act. President Obama called the so-called “Clean Power Plan” the administration’s “biggest step yet to combat climate change.” Whereas the proposed rule aimed to reduce carbon emissions from existing power plants by 30 percent compared to 2005 levels, the final rule is more ambitious, setting the goal at 32 percent.

Under section 111 of the Act, performance standards for pollutants such as CO2 must be based upon the degree of emission limitation achievable through the application of the “best system of emission reduction” (BSER). In this case, EPA identified four broad “building blocks” that together constitute BSER for existing power plants: making plants more efficient, increasing the use of low-carbon power sources such as natural gas, using more low-carbon power sources (e.g., solar, wind), and increasing energy efficiency.

On the basis of these BSER building blocks, the final rule establishes CO2 emission performance rates for two subcategories of affected electric generating units (EGUs)—fossil fuel-fired electric utility steam generating units and stationary combustion turbines. The rule then sets state-specific CO2 goals, expressed as both emission rates and as mass, that reflect the subcategory-specific CO2 emission performance rates and each state’s mix of affected EGUs subject to the two performance rates. States can determine the methods they will use to comply with the CO2 goals, which could include emissions credit trading between sources or even between states. Finally, the rule provides guidelines for the development, submittal and implementation of state plans that implement the BSER emission performance rates either through emission standards for affected EGUs, or through measures that achieve the equivalent, in aggregate, of those rates as defined and expressed in the form of the state goals. The final rule provides up to 15 years for full implementation of all emission reduction measures, with incremental steps for planning and then for demonstration of CO2 reductions, to ensure that progress is being made in achieving CO2 emission reductions.

Concurrent with the final rules for existing power plants, the EPA also issued a final rule establishing CO2 emission standards of performance for new, modified, and reconstructed power plants. More information on both final rules, including the agency’s preamble (excerpts of which are included above), can be found on EPA’s website.

**FAMILY LAW**

**JUDICIAL LAW**

**Child support; Social Security derivative benefits.** The Supreme Court has now resolved the issue of how Social Security derivative benefits are to be accounted for in the context of a post-decree child support obligation.

The obligor’s monthly support obligation was $1,977. During the six-month period from February through July 2012, the obligee received child support from the obligor as well as monthly derivative
benefits for the children from Social Security of $1,748. In July 2012, the obligor brought a motion to modify support, seeking both a reduction in his ongoing monthly support obligation based on the Social Security benefits and credit for the six months of overpayments.

The CSM subtracted the derivative benefits from the obligor’s monthly support obligation and determined that he should pay $229 per month. The CSM also calculated that the obligee had received an overpayment of $6,992 after reducing the amount of the overpayment by the obligor’s share of unreimbursed medical expenses that had accrued. The CSM’s order stated that the overpayment would be applied to any arrearage and that any remaining portion would “be addressed as provided by statute and/or applied to additional unreimbursed/uninsured expenses.”

Motions for review were filed and the district court amended the order to provide that the overpayment also could be applied to the obligor’s prospective support obligation.

Dakota County appealed, contending that the overpayment should not be applied to the obligor’s prospective support obligation or to the obligor’s arrearages or his share of unreimbursed/uninsured expenses. At the center of the appeal was the court of appeals’ decision in County of Grant v. Koser, 809 N.W.2d 237, 244-45 (Minn. Ct. App. 2012), which held that an obligor was entitled to credit against his prospective support obligation for an overpayment resulting from the obligee’s receipt of Social Security derivative benefits. Dakota County argued that Koser was wrongly decided and that the Court of Appeals should overrule Koser and reverse the district court. The court of appeals rejected these arguments and affirmed the district court. The court of appeals reasoned that the obligor was entitled to credit for the overpayment because the subtraction for Social Security derivative benefits provided for by Minn. Stat. §518A.31(c) and Minn. Stat. § 518A.34(f) and did not require a modification motion.

The Supreme Court reversed, explaining that the court of appeals in the existing case and in Koser misinterpreted these sections of chapter 518A by failing to consider the context in which those sections operate. Both provisions are part of the overall methodology for calculating child support within chapter 518A. As such, neither provision is an independent basis for modifying child support. Thus, accounting for the receipt of Social Security derivative
benefits is to be addressed through the modification provisions of Minn. Stat. §518A.39. The decision was reversed and remanded for further proceedings.

In dissent, Justice Page defended the rationale of Koser, arguing that offsetting a child support obligation by the derivative benefits was required by the plain language of Minn. Stat. §518A.31(c) and Minn. Stat. §518A.34(f) and did not constitute a retroactive modification of support because the amount of support the children were to receive was unchanged, only the source of funds through which the obligor would be fulfilling his support obligation. In re Dakota County, No. A13-1240, ___ N.W.2d ___ (Minn. 2015).

■ Security for spousal maintenance. A frightening unpublished decision from the court of appeals calls into question provisions for securing spousal maintenance obligations with life insurance.

The parties’ stipulated judgment and decree required husband to pay permanent spousal maintenance to wife of $2,250 per month until “the earliest of the death of either party, remarriage of [w]ife, or further [o]rder of the [c]ourt.” Husband was required to maintain a life insurance policy to secure his child support and spousal maintenance obligations to wife as follows:

As long as [h]usband has child support and/or spousal maintenance obligations to [w]ife, he shall maintain a policy of insurance on his life, naming [w]ife or a trust as the primary beneficiary thereon with a death benefit at least sufficient to fund his remaining child support and/or spousal maintenance obligations.

Within thirty (30) days after entry of the [j]udgment and [d]ecree, [h]usband may establish a trust and designate the trust as the beneficiary of the life insurance coverage on behalf of the children. The terms of the trust shall specifically direct the trustee to use the proceeds for the payment of [h]usband’s obligations under the terms of the [j]udgment and [d]ecree until the funds are exhausted. If there are sufficient funds in the trust for payment of [h]usband’s obligations under the terms of this [j]udgment and [d]ecree, any excess life insurance proceeds may be paid to such other beneficiaries as [h]usband may designate. ....

If, in the event of [h]usband’s death, it is determined that [h]usband has failed to maintain life insurance in accordance herewith, [w]ife shall have a claim against [h]usband’s estate in an amount sufficient to fund his remaining child support and/or spousal maintenance obligations.

Husband obtained a life insurance policy with a death benefit of $280,000. He designated wife to receive 10 percent of the benefit and designated each of the parties’ two children, one of whom was a minor and autistic, to receive 47 percent of the benefit. In 2013, husband was diagnosed with terminal cancer. He executed a will and established a revocable trust, leaving his entire estate for the benefit of the parties’ sole minor child in a supplemental needs trust. None of husband’s estate planning contained any provision for wife’s spousal maintenance.

In 2014, the parties appeared for hearing on cross-motions addressing a number of issues, one of which was wife’s motion to require husband to name her as the primary and sole beneficiary of his life insurance policy.

The district court denied wife’s motion, reasoning that husband’s spousal maintenance obligation to wife would cease to exist upon his death. (Husband died in 2015.) The court of appeals affirmed, holding that because the dissolution decree did not expressly state that husband’s obligation to pay spousal maintenance continued beyond his death, the presumption of Minn. Stat. §518A.39, subd. 3, that spousal maintenance ends upon the obligor’s death, was not rebutted. Since husband was not obligated to pay spousal maintenance beyond his death, he was not required to name wife as the primary sole beneficiary of his life insurance policy since there was no obligation to secure. Sager v. Sager, No. A14-2071, (Minn. Ct. App. 7/20/2015).

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FEDERAL PRACTICE

■ 28 U.S.C. §1353; collusively manufactured diversity jurisdiction. Where a Missouri corporation had been merged into a newly-established Florida corporation days before the Florida corporation commenced a diversity action, and the district found that the corporate maneuvers had been undertaken to manufacture diversity jurisdiction, the 8th Circuit acknowledged the dearth of controlling authority on manufactured jurisdiction, rejected the plaintiff’s criticism of the district court’s use of a six-factor test, and found that “the evidence as whole” supported the district court’s finding of manufactured diversity jurisdiction. The Branson Label, Inc. v. City of Branson, ___ F.3d ___ (8th Cir. 2015).

■ Exclusion of alleged contingent fee expert witness; clear error. An 8th Circuit panel that included Judge Schiltz sitting by designation held that a district court had clearly erred in excluding the testimony of the plaintiff’s treating physician and expert witness, finding no
evidence to support the district court’s determination that the physician’s compensation was contingent on the outcome of the litigation. The panel opinion includes a detailed survey of case law addressing the admissibility of testimony by experts compensated on a contingent basis, but expressly declined to decide whether such testimony might be admissible within the 8th Circuit.

Taylor v. Cottrell, Inc., ___ F.3d ___ (8th Cir. 2015).

Order limiting discovery of attorneys’ client-related information; no clear error. In a battle between attorneys over the use of the (612) INJURED telephone number and www.612injured.com, Judge Nelson overruled objections to an order by Magistrate Judge Thorson which had denied plaintiffs’ request for certain of the defendant’s client files, had limited the scope of those requests to certain non-privileged information, and had ordered the redaction of all to certain non-privileged information, finding the motion to an order by Magistrate Judge Rau, Judge Nelson overruled objections to an order permitting the use of the (612) INJURED telephone number and www.612injured.com.

Motion to enforce alleged settlement agreement denied. Judge Frank denied the plaintiffs’ motion to enforce an alleged settlement agreement, finding that an exchange of emails between counsel that referred to a settlement could not provide the basis for a settlement agreement where no specific settlement terms were proposed, and that even if a firm settlement offer had been made, it was never accepted. Olson v. Wells Fargo Bank, N.A., 2015 WL 4661984 (D. Minn. 8/5/2015).

Fed. R. Civ. P. 59(e); motion to reconsider; failure to sufficiently brief issues. Judge Doty denied the plaintiff’s Fed. R. Civ. P. 59(e) motion, which he characterized as an attempt at a motion for reconsideration, noting that the plaintiff offered no new law or recently discovered facts, and finding the motion “to be nothing more than an attempt to relitigate issues previously raised, albeit with less force and detail than now presented.” Arkwright Advanced Coating, Inc. v. ML Solutions GmbH, 2015 WL 4663366 (D. Minn. 8/6/2015).

Multiple depositions of same witness in different capacities; no abuse of discretion. Overruling objections to an order by Magistrate Judge Rau, Judge Doty found no clear error in the magistrate judge’s decision to permit a single deposition of a Fed. R. Civ. P. 30(b)(6) for multiple entities, and to limit the deposition to three and a half hours. Bison Advisors LLC v. Kessler, 2015 WL 4509158 (D. Minn. 7/24/2015).

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**IMMIGRATION LAW**

**JUDICIAL LAW**

- No due process violations in denial of Bosnians’ asylum case. The 8th Circuit Court of Appeals upheld the Board of Immigration Appeals’ denial of the Bosnian petitioners’ applications for asylum and withholding of removal, finding substantial evidence supported its rejection of their due process claims. The petitioners were accorded due process. Namic v. Lynch, No. 13-3246, slip op. (8th Cir. 7/20/2015). http://media.ca8.uscourts.gov/opndir/15/07/1332468pdf.

- Obstruction of legal process under Minnesota statute is not an aggravated felony. The 8th Circuit Court of Appeals reversed the Board of Immigration Appeals, finding an obstruction of legal process conviction under Minnesota statute §609.50, subd. 2(2) was not a “crime of violence,” and thus not an aggravated felony requiring removal under INA §237(a)(2)(A)(iii). Ortiz v. Lynch, No. 14-2428, slip op. (8th Cir. 8/6/2015). http://media.ca8.uscourts.gov/opndir/15/08/142428Ppdf.

- Forgery conviction is a crime of moral turpitude under California Penal Code. The 8th Circuit Court of Appeals held that a conviction under California Penal Code §472, criminalizing forgery and associated conduct, always includes the element of specific intent to defraud, and is thus categorically a “crime involving moral turpitude” as defined under federal immigration law. Miranda-Romero v. Lynch, No. 14-3387, slip op. (8th Cir. 8/12/2015). http://media.ca8.uscourts.gov/opndir/15/08/143387Ppdf.

- Consequences resulting from guilty plea to third degree criminal sexual conduct: “May”, “could”, or “shall” lead to deportation? The Minnesota Court of Appeals affirmed the post-conviction court’s finding that appellant Herrera Sanchez had received effective assistance of counsel when he pled guilty to third-degree criminal sexual conduct under Minn. Stat. §609.344, subd. 1(b). The deportation consequences were not “clearly certain” in that statutory provision as the term is used in Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010). As a result, Padilla’s holding that a defendant was denied the opportunity to present evidence to support the district court’s determination that the physician’s compensation was contingent on the outcome of the litigation. The panel opinion includes a detailed survey of case law addressing the admissibility of testimony by experts compensated on a contingent basis, but expressly declined to decide whether such testimony might be admissible within the 8th Circuit.

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REAL PROPERTY

JUDICIAL LAW

Mechanic’s lien; pre-lien notice. Contractor did not provide pre-lien notice before performing utility and street improvements on raw land as part of a mixed-use development. Contractor subsequently retained a law firm to record a mechanic’s lien for the unpaid work. The law firm believed a pre-lien notice was unnecessary because the work fell within the pre-lien notice exception for multiple dwellings. The law firm also concluded that the contractor was unable to apportion the value of its improvements amongst the lots given the nature of the utility and street improvements it performed, and because the owner had sold some of the parcels to third parties. The law firm advised the contractor to file blanket liens on all of the parcels and that an apportionment calculation was possible. Ryan Contracting Co. v. O’Neill & Murphy, LLP, ___N.W.2d___, 2015 WL 4507937 (Minn. Ct. App. 2015).

Title insurance; calculation of loss under policy. Lender who held a second mortgage obtained a mortgagee’s title insurance policy, which listed the first mortgage as an exception to the policy. Subsequent to the mortgage and policy, a contractor recorded a mechanic’s lien against the property that the district court determined was prior and superior to both mortgages on the property. The first mortgagee commenced a foreclosure suit due to the fact that it failed to give pre-lien notice prior to hiring any lawyer, and therefore, the mechanic’s liens were invalid from the start. The district court found that the property was not “nonresidential in use” before the planned improvement because it was raw land not being used for any purpose, and therefore, did not fall under the exception to the pre-lien notice requirement. The court of appeals ruled that Minn. Stat. §514.011, Subd. 4c is ambiguous and the “nonresidential in use” requirement could refer to the real property or the improvement. The court of appeals held that it was the “planned-for” use of the property that determined the property’s character under Section 514.011, Subd. 4c, not the property’s existing use or nonuse prior to the improvement. Moreover, the court of appeals held that the contractor could have recorded a blanket lien on all of the parcels and that an apportionment calculation was possible.

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commenced suit. The district court granted summary judgment in favor of the lender and held the lender suffered a covered loss under the title policy as a result of the mechanic’s lien.

The court of appeals reversed and remanded. The court of appeals held that in order for a junior mortgagee to sustain an actual loss under a lender’s title insurance policy, the junior mortgagee must retain equity in the mortgaged property notwithstanding any defects in title covered by the policy. If there is no equity after paying off the first mortgage, then the lender cannot suffer an actual loss when the mechanic’s lien reduced the value of the property further. Because there was evidence that the value of the property was less than the payoff of the first mortgage, the court of appeals reversed the grant of summary judgment in favor of the lender, and remanded to the district court to determine the true value of the property.


Landlord-tenant. Landlord and tenant entered into a written month-to-month lease with no expiration date. The lease required a 45-day notice of termination and did not allow notice to move out between November and February. In late November or early December 2006, tenant notified landlord that he was moving out and vacated. The tenant paid rent for November 2006, but did not pay rent for December 2006, or January or February 2007. The landlord commenced suit for the unpaid rent and for damages to the apartment. The district court concluded that the rental arrangement was a month-to-month rental arrangement not governed by any valid written lease. The district reasoned that the no-move-out clause was tantamount to an automatic renewal clause subject to a notice requirement under Minn. Stat. §504B.145, and because the landlord did not provide notice of renewal as provided in that statute, the arrangement resorted to standard month-to-month lease with a 30-day notice. The court of appeals reversed and held that the move-out clause specified winter months during which neither party could give notice to terminate, and nothing in record establishes that the move-out clause was intended to automatically renew the lease for more than two months upon the tenant’s failure to give notice to terminate. Therefore, the tenant was liable for rent through February 2007 and for costs and late fees.
Sales tax: indirect audit, standard of review. Conga Latin Bistro is a nightclub in Minneapolis that was subject to audit for the tax periods spanning January 2007 through March 2010. Using an indirect audit, the department determined that Conga had unreported revenues and assessed additional sales, use, and entertainment taxes; penalties and interest were also assessed. An indirect audit is an audit method that relies not on a taxpayer’s books—in fact, Conga did not have books and records for the 2007 tax period—but instead on a review of accounts available as well as estimates from other sources. In this instance, the indirect audit relied on a “unit volume method” to compare Conga’s alcohol purchases to its likely alcohol sales. The Department of Revenue determined that Conga had underreported about 33 percent of its total revenues for 2008. This underreporting rate was then applied to all the tax years at issue, despite the availability of books and records for tax periods in 2008 and later. The tax court reviewed the use of the indirect audit under the standard set forth in the Minnesota Administrative Procedure Act (MAPA), and determined that the indirect audit method was acceptable for 2007, but not for the balance of the audit period. The Supreme Court reversed. The Court first addressed the standard of review and held that the tax court applied the wrong standard: Minn. Stat. 271.06, subd. 6, and not MAPA, sets forth the legal standard by which the tax court is to review orders and decisions of the commissioner. The Court noted that “in most cases the commissioner should use a direct audit” but went on to hold that the commissioner has statutory authority to use the indirect audit method to assess sales and use taxes when it is “reasonable” to do so. The court also determined that an indirect audit is not a “statistical or other sampling technique” subject to generally accepted auditing standards. The case was remanded so that the Tax Court could independently review the record to determine taxes owed. Conga Corp. v. Comm’r, No. A14-1042, 2015 WL 4637286 (Minn. 8/5/2015).

Income tax: Current deduction proper for strawberry farmer’s field-packing materials. In an issue of first impression that the court characterized as “one of considerable interest to farmers generally,” the Tax Court permitted a strawberry and vegetable farming corporation to deduct currently the cost of field-packing materials, even though the materials were not used in the year that the materials were purchased. Cash-method taxpayers are permitted to deduct expenses for supplies in the year in which the supplies are purchased, and farmers are permitted to use the cash method. In this case, the taxpayer’s farming business relied on having special field-packing material on hand. The strawberries and some of the vegetables the taxpayer produced were highly perishable, the field-packing materials were highly specialized, and the materials had to be pre-ordered so that they could be ready when the fruit was. For these reasons, the taxpayer would often purchase field-packing materials in one tax year (and would deduct the cost of those materials) even if the materials were not consumed within that year. The packing products would always be consumed during the next taxable year—the materials themselves, like the produce, were perishable. Pointing to Code section 464 and regulation section 1.162-3, the commissioner argued that the taxpayer could not deduct the cost of materials in the year purchased, but instead should be required to deduct the cost of the field-packing materials as they were consumed: “Section 464 restricts ‘farming syndicates’ from deducting ‘feed, seed, fertilizer, or other similar farm supplies’ earlier than for the year that those supplies are ‘actually used or consumed.’” Although the parties agreed the taxpayer in this case was not a farming syndicate, each party suggested that Section 464 supported his interpretation of regulation section 1.162-3. Section 1.162-3, for its part, provides that taxpayers “carrying materials and supplies on hand should include in the expenses the charges for materials and supplies only in the amount that they are actually consumed and used in operation during the taxable year for which the return is made, provided that the costs of such materials and supplies have not been deducted in determining the net income or loss or taxable income for any previous year.” In a jiu-jitsu of statutory interpretation, the court held as a matter of first impression that the field-packing materials did not fall within statutory phrase “feed, seed, fertilizer, or other similar farm supplies” of section 464. This holding undermined the taxpayer’s argument that section 464 supported an immediate deduction for the cost of the packing materials. The taxpayer had better luck, however, with regulatory section 1.62-3. Quoting the language of the section for a third time, but with emphasis differently placed, the court held that the regulatory clause “provided that” was best interpreted as “on the condition that” or “if” and “with the understanding.” This meaning of “provided that,” then, meant that the taxpayer could not deduct the cost of supplies used up in tax year 2 if the cost of those supplies was already deducted in tax year 1. Finally, the court addressed the regulatory term “on hand,” and in its final holding (also an issue of first impression), the Court held that the regulatory term “on hand” was not broadly interpreted and applies to those that are “already actually physically present or those imminently about to arrive.” The taxpayer could deduct materials for year in which it bought them. Agro-Ial Farming Enterprises, Inc. v. Comm’r, No. 15103-10, 2015 WL 4577110 (T.C. 7/30/2015).
Corporate income tax: Regulation invalidated; arbitrary and capricious.

In an extensive opinion, the tax court (Judge Marvel) invalidated regulation section 1.482-7(d)(2), which the Department of the Treasury issued in 2003 and which requires participants in qualified cost-sharing arrangements to share stock-based compensation costs to achieve an arm’s-length result. The petitioner was a group of consolidated corporations with certain risk and cost-sharing agreements. The commissioner issued notices of deficiencies to the group for several tax years. Code Section 482 authorizes the commissioner to allocate income and expenses among related entities to clearly reflect income. The regulations to section 482 have long incorporated an “arm’s-length” standard—in other words, the transaction is tested against the standard of whether it is consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances. In 1986, Congress added the “commensurate-with-income standard” to Section 482. Treasury was then tasked with determining the relationship between the standards and determined that the two standards were to work consistently. In 2003, Treasury issued a notice of proposed rulemaking on proposed amendments to the cost-sharing regulations. In 2003, the final rule was issued.

In a thorough discussion, the tax court held first that the rule was legislative rule subject to notice and comment requirements under Administrative Procedure Act (APA). The court then held that the commensurate-with-income standard, as interpreted by Treasury, did not provide sufficient basis for the rule, and that the rule did not satisfy State Farm’s “reasoned decision-making” standard because it lacked any basis in fact, Treasury failed to articulate rational connection between facts found and rule, and Treasury failed to respond to significant comments submitted by commentators before promulgating rule. The court concluded, citing a circuit court opinion, that “Treasury’s ‘ipse dixit conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decision-making.” Altera Corp. & Subsidiaries v. C.I.R., No. 6253-12, 2015 WL 4522662 (T.C. 7/27/2015) (internal citation omitted).

Income tax: Cancellation of indebtedness income and limits on net operating loss, case of first impression. A group of related entities that filed consolidated tax returns petitioned for bankruptcy. In the proceeding, the group realized cancellation of indebtedness (COD) income. COD income is not included in gross income when the COD occurs during a bankruptcy proceeding. However, the Code provides that when COD income is excluded from gross income, certain tax attributes must be reduced. The court relied on the Supreme Court’s opinion in United Dominion v. United States, 532 U.S. 822 (2001), to determined that the proper net operating loss subject to reduction under section 108(b)(2)(A) is the group’s consolidated net operating loss. Neither the Code nor the consolidated return regulations provided authority for affiliated group to allocate and apportion CNOL to individual group members for section 108(b)(2)(A) purposes. Marvel Entn’t v. Comm’n, No. 12113-13, 2015 WL 4451046 (T.C. 7/21/2015).

Welfare benefit plan found to be split-dollar life insurance arrangement; penalties upheld. Attorney Ronald H. Snyder and two fellow attorneys established the Sterling Plan as a way for employers to fund and receive greater benefits than pension plans allowed. The Sterling Plan was designed to operate as a single welfare benefit plan, which is an aggregation of separate multiple single employer welfare benefit plans under section 419(e). The commissioner assessed deficiencies relating to the plan against a number of taxpayers. In a consolidated opinion to which parties in approximate 40 other cases pending had agreed to be bound, the tax court issued a series of holdings supporting the commissioner. The court held that for certain taxpayers, the life insurance arrangement in the plan was subject to federal taxation as split-dollar life insurance arrangements; the court denied deductions in some instances, and in others held that corporate taxpayer’s payment to the plan was constructive distribution and therefore taxable. The court upheld penalties. Our Country Home Enterprises, Inc. v. Comm’n, No. 11520-11, 2015 WL 4186662 (T.C. 7/13/2015).

TORTS & INSURANCE

Insurance; excess UIM benefits. Plaintiff was one of 19 individuals injured in a motor vehicle accident involving a school bus that was struck by an at-fault vehicle. The at-fault vehicle had a liability limit of $60,000 per accident and the school bus had UIM limits of $1 million. Both policies tendered their limits to the district court. Plaintiff’s damages were valued at $140,000, but because of the number of individuals injured, plaintiff’s pro rata share of the policy proceeds was $35,144.03. Plaintiff then sought to recover $65,456 in excess UIM from defendant insurer, which insured plaintiff’s family’s vehicle for up to $100,000 in UIM coverage. The insurer denied plaintiff’s claim for excess UIM benefits because its coverage ($100,000) did not “exceed” the UIM-coverage limit of the bus company’s insurance ($1,000,000). The district court agreed with the insurer and granted its motion for summary judgment. The court of appeals affirmed.

The Minnesota Supreme Court reversed the decision of the district court and court of appeals. The Court concluded that the phrase “coverage available” in Minn. Stat. §65B.49, subd. 3(a)(5) was subject to two reasonable interpretations. First, as the insurer argued, the term could mean “the policy limit of the [occupied] vehicle’s UIM coverage” so that plaintiff would be unable to recover excess UIM benefits. Second, as plaintiff argued, the term could mean the “amount recovered by the insured person from the [occupied] vehicle’s UIM policy” so that plaintiff would be entitled to recover excess UIM benefits because the “limit of liability for like coverage” ($100,000) exceeded the “coverage available to” him ($34,543.70). Therefore, the Court held the statute was ambiguous and considered the intent of the legislature in passing the statute. The Court held plaintiff’s proposed interpretation most furthered the legislature’s purposes “by compensating accident victims while also limiting their claims to the amounts of coverage selected by the insured.” Therefore, the Court concluded that the term “coverage available” means the benefits actually paid to the insured under the coverage provided by the occupied vehicle’s policy.

Justice Stras wrote a strong dissent criticizing the reasoning of the majority. Justice Stras reasoned that the statutory term should be read as a whole so that the phrase “the limit of liability of the coverage available” would unambiguously refer to the policy limit of the occupied vehicle’s UIM coverage. Sleiter v. Am. Family Mut. Ins. Co., No. A13-1596 (Minn. 8/5/2015). http://mn.gov/lawlib/archive/supct/2015/OPA131596-080515.pdf

Jeff Mulder
Bassford Remele, A Professional Association
Gov. Mark Dayton appointed the Hon. Natalie E. Hudson as Associate Justice of the Minnesota Supreme Court. Judge Hudson will replace Associate Justice Alan C. Pemberton, who retired from the Court at the end of August. Judge Hudson has served as an at-large judge on the Minnesota Court of Appeals since her appointment by Gov. Jesse Ventura in 2002.

Eric J. Beecher joined Moss & Barnett, A Professional Association, in the firm’s business law team. Beecher focuses his practice on corporate and commercial transactions, including mergers and acquisitions and business succession planning. Beecher received his JD from the University of St. Thomas School of Law.

Patrick J. Kelly was elected to the North America Regional Council of the World Services Group, a global network of professional business services with more than 130 member firms representing worldwide clients. Kelly’s two-year term begins in September. Kelly is an attorney at Fredrikson & Byron PA, and has more than 25 years of experience as a commercial lawyer representing clients both domestically and internationally.

Janeen Massaros, Midwest Senior Solutions, attended Eldercaring Coordinator Training held in Columbus, Ohio in July 2015 as part of a nationwide pilot project to assist families in the court system with decision-making for aging parents and avoid litigation. Massaros will begin serving on the panel of eldercaring coordinators in Hennepin County.

Thomas J. Norby and Aaron M. Simon have joined Brownson & Linnihan, PLLP. Norby, a senior litigator, previously practiced with a St. Paul firm for more than 23 years. Simon’s practice includes professional liability representation of insurance agents and agencies, toxic torts, asbestos litigation, and insurance coverage litigation.

Chang Wang, chief research and academic officer of Thomson Reuters, was among the honorees to receive 2015 Diversity in Business Awards from Minneapolis/St. Paul Business Journal. The Diversity in Business awards recognize some of the Twin Cities’ top business leaders from ethnic minority and LGBT communities. Wang is a native of Beijing and a graduate of the University of Minnesota Law School.

Patricia E. Furlong joined Kendricks, Bordeau, Adamini, Greenlee & Keefe, PC as an associate. Furlong received her JD from William Mitchell College of Law. After law school she served as law clerk in the U.S. District Court for the District of Minnesota, and worked as associate litigator for two Minneapolis-area law firms.

Ashley Wenger-Slaba has rejoined Ogletree, Deakins, Nash, Smoak & Stewart, PC in the Minneapolis office as of counsel. Wenger-Slaba focuses her practice on advising and representing large and small employers on a full range of employment law matters.

Cyri Wiggins joined Maslon LLP as an attorney in the firm’s real estate and financial services groups. Wiggins focuses her practice on commercial real estate transactions, including real estate acquisition, leasing, development, environmental issues, and financing matters.

CPR, The International Institute for Conflict Prevention & Resolution has named 3M and Ivan K. Fong, its senior vice president of legal affairs and general counsel, as the recipients of CPR’s 2015 Corporate Leadership Award for their demonstrated leadership in dispute resolution. 3M and Fong will be honored at CPR’s Annual Corporate Leadership Award Dinner on November 18, 2015, at The American Museum of Natural History in New York.

Angela V. Lallemont was named a partner in the law firm of Price, McCluer, Plachecki & Lallemont. Lallemont joined the firm in 2011 and practices in the areas of family law, bankruptcy, real estate, civil litigation, estate planning and personal injury.

Jeemin Chung has joined Fredrikson & Byron as a senior associate in the securities, mergers & acquisitions and investment management groups.

In Memoriam

Raymond J. Dittrich Jr. of Wayzata, MN, passed away on August 2, 2015 at the age of 83. Dittrich had a distinguished 40-year legal career, including as a corporate attorney for Cargill, and as vice president and general counsel at Pillsbury and Medtronic.

Jeffrey M. Markowitz joined Arthur, Chapman, Kettering, Smetak & Pikala, PA as an associate attorney. Markowitz works with clients in the areas of construction and construction defect law, employment law, general liability and appellate law. He received his JD from the University of Minnesota Law School.

Stephen L. Hennessy joined Dykema Gossett PLLC as an associate in the firm's Minneapolis office. Hennessy's practice includes patent and trademark prosecution, intellectual property litigation, and client counseling. Hennessy received his JD from William Mitchell College of Law in 2007.

Kevin Dunlevy has been elected to The Fellows of the American Bar Foundation. Fellows are elected because they have demonstrated outstanding achievements, and dedication to the welfare of their communities and to the highest principles of the legal profession. Dunlevy, a shareholder at Beisel & Dunlevy, PA concentrates his practice areas on real estate litigation, real estate transactions and creditor remedies. He is MSBA-certified real property specialist.

Gov. Mark Dayton appointed Pamela A. W. King and Carmaine M. Sturino as district court judges in Minnesota’s 3rd judicial district. King will be replacing the Hon. Robert Birnbaum, and will be chambered at Rochester in Olmsted County. Sturino will be replacing the Hon. James A. Fabian, and will be chambered at Caledonia in Houston County.

Melissa Hortman, a state representative from Brooklyn Park, Minnesota, was elected to serve a one-year term as vice-president of the Uniform Law Commission (ULC). Rep. Hortman was elected vice-president at the recently concluded 124th Annual Meeting of the Uniform Law Commission in Williamsburg, Virginia.

Vern Hoium received the 2015 Columbia Heights Alumni of Distinction award on June 4 at the Columbia Heights High School commencement ceremony. Hoium, who co-founded the Alumni Scholarship Foundation in 1998, is the eighth recipient of the award. Hoium was selected for his distinguished service to the civic community. He has been practicing private law in Columbia Heights since 1959.

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Melissa Hortman

Vern Hoium

Kevin Dunlevy

Pamela A. W. King

Carmaine M. Sturino

Michael K. Browne

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Regular Bench & Bar columnist Tony Zeuli is an intellectual property trial lawyer with Merchant & Gould. Prior to becoming a registered patent attorney, Tony worked in the field of nuclear physics for the University of Chicago and Department of Energy at Argonne National Laboratory. Tony is a frequent speaker and writer on patent litigation issues at national intellectual property law conferences such as those sponsored by the American Intellectual Property Law Association and the Association of Patent Law Firms, and his articles have appeared in national publications such as The Federal Lawyer. Tony can be reached at 612.371.5208 or at tzeuli@merchantgould.com or by visiting merchantgould.com/zeuli.

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LEGAL Services of Northwest Minnesota seeks attorney for its Moorhead office. Half-time to represent low income clients and half-time to recruit, train, support and retain volunteer and Judiciary attorneys. Poverty law and family law experience preferred. Salary range: depends on experience. Send resume and three references to: Anne Hoefgen, Executive Director, Legal Services of Northwest Minnesota, PO. Box 838, Moorhead, MN 56561. Legal Services of Northwest Minnesota is an EO/AA employer.

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**FEONLY SENTENCINGS & PROBATION VIOLATION HEARINGS: THE ONE THING A JUDGE SHOULD NEVER SAY**

During a felony sentencing or probation violation hearing (PVH), judges may warn defendants that a violation of probation can have serious ramifications, but the court should never promise, announce or otherwise imply that the court will send the defendant to prison if he/she violates conditions of their probation, or that the court has otherwise prejudged the proceedings. If such a statement is made and a reasonable examiner would question whether the judge could impartially conduct the proceedings, then at the request of the defendant, the judge would likely be disqualified from the probation violation hearing.

During a felony sentencing or PVH, there are many instances where the presiding judge could justifiably sentence the defendant to prison, but instead exercises judicial discretion to place or keep the defendant on probation. In the judge’s desire to impart upon defendants the seriousness of probation and the potential consequences of a violation, some of us may resort to slight exaggeration or hyperbole to make our point.

Therefore it’s important to remember:
1. In a downward dispositional case (where a defendant gets probation instead of prison), **never say**: “If you come back on a probation violation, you are going to prison.”
2. Likewise, in a probation violation hearing in which the defendant stays on probation instead of being sent to prison, **never say**: “If you violate probation one more time, I am going to send you to prison.”

**KEY QUOTES** (from State v. Finch, 865 N.W.2d 696 [Minn.2015]): A judge is disqualified “due to an appearance of partiality” if a “reasonable examiner, with full knowledge of the facts and circumstances, would question the judge’s impartiality.” In considering whether to revoke probation, district court judges “must take care that the decision to revoke is based on sound judgment and not just their will. Judges must remain impartial by not prejudging; they must maintain an open mind.”

**Judge Alan Pendleton**
10th Judicial District
Anoka

For the complete text of Judge Pendleton’s tip, with citations, visit the Minnesota Judicial Training & Education Blog at www.pendletonupdates.com

**STUDENT GETS SCHOOLED IN UNEMPLOYMENT COMPENSATION LAW**

As students join teachers and administrative personnel and staff in flocking back to public and private schools in Minnesota to begin the 2015-2016 academic year, they can learn from a recent ruling of the Minnesota Court of Appeals. In a mid-summer decision, the appellate court upheld denial of unemployment compensation benefits by the Department of Employment & Economic Recovery (DEED), the agency that oversees the state unemployment program, for an undisclosed applicant who limited her job search to accommodate her schooling in Marcellais v. Prairie Harvest Health Center, 2015 Minn. App. LEXIS 653 (Minn. App. July 20, 2015) (unpublished).

The case turned on the claimant’s statement in her application for benefits that she would “not be available” to seek or accept full-time work because of her class schedule while attending school. The self-limitation to part-time work conflicted with the requirement under the unemployment law that a claimant must be “available for [and] … actively seeking… suitable employment pursuant to Minn. Stat. §268.085, subd. 1(4) – (5). The statute further mandates that a student abandon or withdraw from classes if the school schedule restricts seeking a job and the claimant is unable to change the schedule to accommodate “suitable” job opportunities. Minn. Stat. §268.085, subd. 15 (a) – (b).
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Whether you have a newly injured client and want us to help from the beginning or seek litigation assistance after settlement options have stalled, you can refer to TSR Injury Law with confidence. We pride ourselves with trying cases to verdict with exceptional results. The insurance companies know what law firms have the resources, expertise and attorneys with the time to try cases. Our litigation reputation also helps gets cases settled for more.

TSR Injury Law focuses on helping injured people in a variety of cases.

**ACCIDENT CASES**
- Auto
- Semi Tractor Trailer
- Motorcycle
- Animal Bites
- Product Liability

**INJURY CASES**
- Spinal Injuries
- Brain Injuries
- Burns
- Electric Shock

Experience, resources and results matter. TSR Injury Law has...

- Tried over **100 jury trials**
- Tried **cases in 10 states** across the country
- **Spent millions of dollars** for just trial preparation and much more obtaining verdicts
- Handled cases involving **corporate giants** like General Motors, Ford Motor Company, Kia Motors, Polaris, Caterpillar, Michelin, Arctic Cat and most recently New Horizons Kids Quest Daycare
- Earned **multiple 7 and 8 figure** jury verdicts and settlements

If you are a non personal injury attorney, or one that is in the field but wants to free up your time and resources, refer with confidence. Contact us today at **612-TSR-TIME** or visit **TSRInjuryLaw.com**