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## President’s Page

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*By Robin M. Wolpert*

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## Navigating Minnesota’s New Drug Laws

**A guide for criminal law practitioners**

Minnesota substantially changed its criminal drug laws in 2016. The reforms, designed to better distinguish addicts from dealers, include new offenses and revised sentencing guidelines as well as new aggravating factors and mandatory minimums.

*By Justin Collins*

## On Closing a Law Practice

**A retiring lawyer’s open letter to younger lawyers on lessons learned the hard way**

Winding down a law practice is hard work. In this open letter to lawyers who are not yet contemplating retirement, a solo practitioner from Austin, Minnesota describes the process and offers advice to make it less arduous. (Hint: Go paperless now.)

*By Scott Richardson*

## Arguing at the Appellate Level

**A Judicial Clerk’s Perspective**

Through her experience as a clerk, the author learned that the best appellate attorneys accomplished two goals at oral argument—helping judges reach a well-reasoned decision while at the same time firmly advocating for their clients. This article offers tips to help appellate lawyers achieve both goals.

*By Emily R. Bordtke*

## On the Cover:

**Parsing Minnesota**

**A history of the original U.S. public land survey system in Minnesota**

The Public Land Survey System (PLSS), launched in Ohio in 1785, is the source of all real estate titles. Its measurements are sacrosanct in law, but recovering the original section corners presents a challenge. This article describes how the survey was done and reviews some of the most salient Minnesota case law.

*By David J. Meyers*

## Take Two: President Trump’s Suspect March 6 Travel Ban Order

The president’s March 6, 2017 Executive Order, which is unlikely to prove temporary, continues to raise legal and constitutional concerns.

*By Caroline Ostrom and George C. Maxwell*
The Irish writer Frank O’Connor told the story of two boys wandering the countryside. Whenever they reached an orchard wall that was too imposing for them to continue their journey, they would take off their hats and throw them over the wall. That way, they would have no choice but to climb the wall and get them back. President Kennedy referenced O’Connor’s story in his 1963 speech announcing the commitment of the United States to space travel. Despite the unknown dangers, JFK declared that the United States had thrown its hat over the wall of space and would take off their hats and throw them to continue their journey, they orchard wall that was too imposing for 

It is time for the MSBA to throw its hat over the wall and commit itself to identifying its purpose, why it exists, and why anyone should care. Why is this so critical? Because otherwise the almost certain future we are facing is one of continued declining membership and decreasing engagement of our newer lawyers. Despite the great work we are doing, market forces are speaking to us loud and clear. The declining engagement of our newer lawyers is particularly striking. We are a young bar. Of our 25,229 active licensed attorneys, 34 percent were admitted in the last 10 years and 58 percent were admitted in the past 20 years. Millennials will soon be the face of our profession in every sector of the legal services market. Taking action is urgent. We must respond to our new environment and transform ourselves into an organization that is not only relevant for the next generation, but also empowers that next generation.

How do we do this? We start with the question of why we exist. This is because, as Simon Sinek puts it, “people don’t buy WHAT you do, they buy WHY you do it.” Long-term success and customer loyalty are driven and inspired by what an organization believes, not what products it sells. Indeed, great organizations identify what Jim Collins calls the “hedgehog concept” and devote all their energy and resources to that one thing. The MSBA needs to decide what it is deeply passionate about, what it can be the best in the world at, and what drives our membership. This will permit us to create a future for the MSBA that empowers our members and thrives in today’s lawyer market. Without our pole star, we cannot make sensible decisions about how to set membership dues and spend membership revenue. We can’t know how to spend our money if we don’t know why we exist. We cannot organize and focus the great work of our staff and volunteers. If we were in the private marketplace, we’d be acting like our life depended on doing this transformative work. From the perspective of our members, our life does depend on it.

We are ready to build a shared future, one that celebrates the amazing accomplishments of the past, but also closes a chapter on our past ways of doing things in recognition that they no longer serve us in this new environment. We “vintage lawyers” are stuck in a mindset and a way of seeing and being that no longer fits with our changing legal services market. That is why our generation has been unable to transform the MSBA by itself. Diversity, including generational diversity, thrusts us into reality by expanding the bandwidth of perception and creating better options and outcomes that work. I am proud of all we have accomplished this year on diversity and inclusion. It has taken courage and foresight. And it is a mountain with no top. We are now ready to have the critical conversations needed to transform the MSBA with our council and assembly, with our diverse lawyers and next-generation lawyers at the table as equal partners.

So I am throwing the MSBA hat over the wall. Should we continue to set membership dues and create our annual budgets based on a past way of seeing and doing that does not serve us now? Should we wait for the next generation to build a bar that works for them when it is their turn to lead? Or should we grab this opportunity and leverage our strengthened ties to our affinity bars and the next generation to create a 21st Century bar that works right now? I am excited to create with you a new MSBA that empowers our members to empower their clients, the profession, and our community. It won’t be easy. And we won’t necessarily look good doing it. And we cannot fail. I invite you to climb that orchard wall with me.
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The MSBA’s Minnesota State Bar Foundation exists for the express purpose of providing monetary grants to community and law-related programs and activities. We focus on:

- legal assistance to the disadvantaged;
- improvements in the administration of justice; and
- law-related education.

Typical foundation grant amounts range from $500 to $3,000. For some time, the foundation has explored the idea of making a larger Impact Grant. A significant cy pres award to the foundation in the spring of 2014 provided a source of funding for a $25,000 Impact Grant.

In October 2014, the foundation issued a request for proposals to provide legal services to victims of human trafficking throughout Minnesota. According to the Human Trafficking in Minnesota Report to the Legislature released in September 2012, trafficking in persons is a global and domestic problem requiring a comprehensive and coordinated response that prevents trafficking, prosecutes traffickers, protects victims, and promotes partnerships among agencies that work to address this issue. Qualifying organizations were nonprofits engaged in providing legal services to child or adult victims of human trafficking.

The criteria for the funded proposal included:

- a strong legal component;
- an innovative approach that might be replicated by other organizations doing similar work; and
- a measurable improvement to that organization’s ability to provide services and improve outcomes for the victims of human trafficking that the organization serves.

A number of proposals were submitted to the foundation board for their consideration in December 2014. The proposal that was selected as having the most potential for improved outcomes for those served was submitted by Standpoint (formerly the Battered Women’s Legal Advocacy Project). Standpoint proposed using Impact Grant funds as seed money to support a permanent expansion of statewide services by hiring a part-time legal advocate to provide direct representation for trafficked women and act as a resource for others needing support and training. This project was selected based upon its alignment with the foundation’s mission.

Other factors contributed to the foundation’s selection of this project. Standpoint was currently working with victims of trafficking, was uniquely positioned to increase legal services for them, and was committed to providing legal assistance to them as an ongoing and integrated part of its service. The project provided resources to other organizations that serve victims of trafficking, could be replicated as a cost-effective service model for other agencies, and addressed a service gap to trafficked women age 18 and older.

With foundation funding, Standpoint was able to help a part-time paralegal intern earn Board of Immigration Appeals certification through the Department of Justice’s Executive Office for Immigration Review. This allowed Standpoint to represent victims of labor trafficking who had also experienced domestic or sexual violence. When the staff member decided to leave Standpoint to attend law school, Standpoint was able to leverage additional grant funding to employ a full-time staff attorney to represent these clients in the immigration appeals process.

The foundation’s ability to fulfill its mission depends on the generosity of its donors. The majority of the foundation’s contributions come from optional $25 donations given as part of the MSBA’s annual dues renewal process. Funds are also received from local district bar association donations, cy pres awards, and donations to commemorate the work, retirement, or memory of another lawyer.
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Legislature: MSBA supports child-protection grants

In March, the MSBA Council voted to support a request from the Minnesota County Attorneys Association for legislation providing grants to county attorneys’ offices. (The Council is authorized to take legislative positions when there is insufficient time for the Assembly to act.) The grants would fund juvenile protection legal services provided by county attorneys’ offices to social services agencies.

The bill addresses a critical public safety concern—child protection. Two years ago there were widespread reports in the media following the death of a child from abuse and neglect, prompting calls for enhanced child protection enforcement. The Legislature responded by providing funding for additional investigators/social workers. The legislation also required county attorneys’ offices to act on investigations and reports. In the past two years, the number of investigations in our 87 counties has increased but generally there has not been additional funding for county attorneys offices to handle this increased volume.

For that reason, many counties—most of them in greater Minnesota—have had to address the increasing number of CHIPS cases by making hard decisions about resource allocation. County attorneys have significant public safety obligations for processing felonies and other critical cases. The county boards, particularly in greater Minnesota, do not have the resources to adequately address this issue. Accordingly, the MCAA is at the Legislature this year asking for funds to handle the increased volume. Two years ago the Minnesota Department of Human Services supported additional funds for investigations; at that time MCAA told DHS that they would eventually need funds for county attorneys to process these cases. DHS supports the MCAA’s bill this year. The requested funds would be allocated to county attorneys offices through grants from the DHS.

Call to action: Justice system funding

The MSBA’s top legislative priority during this budget year at the state Capitol is helping to secure adequate funding for the justice system: the courts, public defenders, and civil legal services. All three parts of the justice system are seeking funding increases to help meet the challenges they face and perform the critical services they provide. The MSBA will be reminding policymakers that the justice system safeguards citizens’ rights, protects the most vulnerable members of our society, promotes a healthy business and investment climate, and is critical to our democracy. But only an adequately funded justice system can perform those roles at the level Minnesotans expect and deserve.

Please contact your state senator and representative to support adequate justice system funding. For more information and help in finding your legislators, visit www.mnbar.org/JusticeSystemFunding.

A message from the Minnesota ADR Ethics Board

Editor’s note: The state ADR Ethics Board—which, to be clear, is not an MSBA-affiliated body—has asked for our help in publicizing a statement they have released concerning the practice of some neutrals of limiting a party’s input on disputes when the party’s financial obligations to the neutral are delinquent. That statement follows:

“As members of the state Alternative Dispute Resolution (ADR) Ethics Board, we have occasion to review ADR Neutrals’ engagement agreements and practices from time to time. One practice which the Board has observed in several recent instances has given us cause for concern. It arises in a situation where an ADR Neutral who, when not paid by one of the parties in a dispute, continues on in his or her role but with a willingness to receive input only from the party who is current on his or her financial obligations. Most often, this appears to occur in the context of an ongoing family court case with the ADR Neutral functioning as a parenting consultant or in a similar role.

“ADR Neutrals have every right to expect payment for their services. In fact, these services are vital to many families; neutrals assist them in resolving disputes, or even averting disputes altogether. But the parties have other reasonable expectations as well, among which are that when an ADR Neutral is engaged, he or she will remain neutral, and will make decisions only after reasonable input from both sides. Rule 114 (not to mention notions of due process and fundamental fairness) requires as much, and faith in the process will collapse under any other scenario.

“The Board recommends that neutrals engaged in ADR practice review their engagement letters to screen for any provisions which might call for a party’s right to provide input to be cut off for financial reasons. If so, we would urge you to rewrite your agreements and modify your practices accordingly. The following are some links to some engagement agreement templates with sample language: https://mediationcentermn.org/resources-professionals/; http://www.aflcnet.org/portals/0/afccguidelinesforparentingcoordinationnew.pdf.”
Check out Fastcase improvements

As you may have heard, the MSBA renewed its relationship with Fastcase effective January 1, 2017. Through this partnership, the MSBA is able to offer members free legal research (a savings of almost $1,000 annually). According to a recent survey conducted by Clio, Fastcase is the number two legal research tool in the market, trailing only Westlaw (and that by less than a quarter of 1 percent). But in addition to basic legal research, Fastcase has made several improvements, including its new and more user-friendly interface, Fastcase 7, and a court opinions by email system (based on the MSBA’s Court Ops by Email service) that allows members to receive email alerts for not only federal civil, state civil, federal criminal, and state criminal opinions, but also bankruptcy and tax court decisions.

- To learn more about the court opinions service, visit www.mnbar.org/courtops.
- To learn more about Fastcase 7, check out one of the monthly free CLE webinars available: www.fastcase.com/webinars.
- To read more on current trends in the legal profession, check out the 2016 Legal Trends Report from Clio at my.mnbar.org/viewdocument/legal-trends-report-2016.

Recognition of tribal court orders and judgments

The MSBA has submitted a request to appear at a public hearing, along with summary comments, to the Supreme Court’s Advisory Committee on the General Rules of Practice. The Court Committee solicited input regarding a petition to amend Rule 10 of the General Rules of Practice, which addresses recognition of tribal court orders and judgments. The petition was filed by the Minnesota Tribal Court/State Court Forum. The MSBA’s Judiciary Committee and Court Rules Committee held a joint meeting in March to review the petition and voted to recommend the MSBA support the petition. The MSBA Council took up the matter at their March meeting and approved the recommendation of these two committees. The MSBA based its support on the following factors:

- the value of enhancing comity—the voluntary recognition by courts of one jurisdiction of the laws and judicial decisions of another;
- the opportunity to increase clarity and efficiency for the courts, litigants, and institutions that do not currently recognize tribal court orders;
- the reduction of delays in obtaining services for tribe members when institutions do not recognize tribal court orders; and
- the improvements made to tribal courts since the original proposed Rule 10 came before the MSBA in 2002.

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  - MSBA

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  - May 1-2 • 11.75 Credits
  - MCLE

**CIVIL LITIGATION**
- **2017 Medical Malpractice Conference**
  - Minneapolis
  - Apr 20 • 5.25 Credits
  - HCBA

- **An Evening with Erwin Chemerinsky: The US Supreme Court after Justice Scalia**
  - Minneapolis
  - Apr 27 • 1.0 Credit
  - MSBA

**CONSTRUCTION LAW**
- **Construction Law Section Social Event**
  - Minneapolis
  - Apr 18
  - MSBA

**CORPORATE COUNSEL**
- **Evolving Technology: Cybersecurity, Smartphones, Tablets & Wi-Fi**
  - Minneapolis
  - Apr 20 • 1.0 Credit
  - HCBA

- **Implicit Bias: Studies and Practical Advice for Dealing with Bias**
  - Minneapolis
  - May 18 • 2.0 EOB Credits
  - HCBA

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- **Recent Cases that Every Lender or Borrower's Attorney Should Know**
  - Minneapolis
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  - HCBA

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- **2017 Minnesota Environmental Institute**
  - Minneapolis
  - Apr 20 • 6.0 Credits
  - MCLE

**ETHICS**
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  - St. Paul
  - April 26 • 1.5 Ethics Credits
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- **Family Law in the 21st Century – ADR Ethics Rules Changes**
  - St. Paul
  - May 24 • 1.0 Ethics Credit
  - RCBA

**IMMIGRATION LAW**
- **Immigrants and Minnesota Family Law – Current Strategies in Uncertain Times**
  - Minneapolis
  - Apr 27 • 2.0 Credits
  - MSBA

**LAW DAY CLE**
- **Equal Protection of the Laws: The Journey from Jim Crow to Gay Marriage**
  - St. Paul
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- **2017 Probate & Trust Law Section Conference**
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  - St. Paul
  - June 13 • 1.0 Credit
  - MSBA

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- **Transgender 101 for the Legal Community**
  - St. Paul
  - June 1 • 1.5 EOB Credits
  - RCBA

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- **Implicit Bias in the Legal Profession: Focus on Age and Disability**
  - St. Paul
  - May 11 • 1.0 EOB Credit
  - RCBA

**TRUSTS & ESTATES**
- ** Implicit Bias in the Legal Profession: Focus on Age and Disability**
  - St. Paul
  - May 11 • 1.0 EOB Credit
  - RCBA

**WORKERS' COMP**
- **2017 Workers' Compensation Institute**
  - Minneapolis
  - April 27-28 • 9.75 Credits
  - MCLE

**INDIAN LAW**
- **2017 Indian Law Conference**
  - Prior Lake
  - May 5 • 5.5 Credits
  - MCLE

**HOW TO REGISTER**
To register for courses listed, contact the organizations below.

**HCBA:**
Hennepin County Bar Association
Phone: (612) 752-6600
www.hcba.org

**MCLE:**
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(800) 759-8840
www.minnCLE.org

**MSBA:**
Minnesota State Bar Association
Phone: (612) 333-1183
(800) 882-6722
www.mnbar.org

**RCBA:**
Ramsey County Bar Association
Phone: (651) 222-0846
www.ramseybar.org

**CLASS NOTES:**
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  Email: jpickles@mnbar.org

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Beth El Synagogue

**An Evening with Serial co-creators Sarah Koenig and Julie Snyder**

Launched in 2014, Serial became the fastest podcast to reach five million downloads in iTunes history. The first season of the podcast presented a 12-part series on one legal case, captivating an audience that downloaded the episodes more than 100 million times. Serial co-creators Koenig and Snyder will come together to take the audience backstage in this cultural phenomenon, using some of their favorite tape to narrate personal stories about the ups and downs of creating a new form of modern storytelling.

**Date:** Wednesday, May 10, 2017  
**Time:** 7:30 p.m.  
**Location:** St. Louis Park  
**Tickets:** [www.besyn.org](http://www.besyn.org)

Lawyers Concerned for Lawyers

**Mindfulness Group**

LCL’s newest “Mindfulness Group,” part of our Common Experiences series, is based on the general theories of Jeena Cho’s book, The Anxious Lawyer: An Eight-Week Guide to a Joyful and Satisfying Law Practice. We will open discussions on topics such as mindfulness (what is it?), anxiousness among lawyers, meditation (yes...meditation, NOT meditation) and self-compassion. Held every Thursday through May 11, 2017. This is an open group and attendance at every session is not necessary. Open to lawyers, law students, judges, and their immediate family members.

**Date:** Thursdays (through May 1)  
**Time:** 4:00 – 5:15 p.m.  
**Location:** LCL Office, St. Paul  
**Register:** Email Annette at aarbst@mnkl.org or call (651) 646-5990

Mid Minnesota Legal Aid

**36th Annual Law Day Testimonial Dinner**

Benefiting Mid-Minnesota Legal Aid, co-sponsored by The Fund for Legal Aid and Hennepin County Bar Association, the Law Day Dinner is a 35-year-old tradition that raises funds and recognizes the invaluable contributions of the lawyers and donors who make Legal Aid’s work possible.

**Date:** Monday, April 24, 2017  
**Time:** Silent Auction – 4:30 p.m., Dinner & Program – 6:00 p.m.  
**Location:** Hilton, Minneapolis  
**Tickets:** mylegalaid.org

Citizenship Workshop

Volunteer attorneys and paralegals attending the workshop meet with an individual who is pre-screened by MMLA staff to verify eligibility for citizenship. Volunteers work with the individual to complete applications for citizenship. Once the applications are finalized, pro bono attorneys can sign up to represent the immigrant at their citizenship interview before the local USCIS office. This project is a great introduction to the world of immigration law. Clients come prepared to work with the attorney to draft and finalize all forms necessary for citizenship. A pre-workshop training is mandatory for all volunteers who do not have experience with this type of immigration work. For more information, or to register for either the training (typically held 2 weeks prior to the workshop) please contact MMLA Pro Bono Director, Kirsten Olson at (612) 746-3716 or kkdilon@mylegalaid.org

**Date:** Thursday, April 27  
**Time:** 12:30 – 4:30 p.m.  
**Location:** Minneapolis  
**Website:** mylegalaid.org

Mitchell Hamline School of Law

**Global Privacy and Cybersecurity Legal Considerations in the Age of Big Data**

Global organizations are more frequently positioning big data as a growth opportunity likely to increase customer loyalty, provide better service, improve operational efficiency, and enable data insight transfer to third parties. Although data transfer, analytics, and location limitations complicate achieving these business goals, strategic contract management and smart technology implementation may reduce risk for organizations pursuing big data opportunities internationally. Presenter Charlotte Tsichler is owner and principal of Cybersimple Security, which provides privacy and security consulting services for small to large businesses, and is on the faculty of Mitchell Hamline’s Cybersecurity and Privacy Law certificate program.

**Date:** April 14, 2017  
**Time:** 12:00 – 1:00 p.m.  
**Location:** Main Campus - Room 319  
**Cost:** Complimentary for alumni, $40 for non-alumni  
**CLE Credit:** 1.0 credit approved  
**Website:** calendar.mitchellhamline.edu

**University of Minnesota Law School**

**Pro Bono: The Ethics of Doing Good**

Please join 1996 U of M Law alumna Michele Garnett McKenzie from The Advocates for Human Rights and other distinguished panelists as they discuss the ethical rules and standards of the legal profession and how they apply in the pro bono context.

**Date:** Saturday, April 22  
**Time:** 10:00 – 11:30 a.m.  
**Location:** Walter F. Mondale Hall, Room 25  
**CLE Credit:** 1.0 Ethics credit requested  
**Cost:** Free  
**Website:** [www.law.umn.edu/events](http://www.law.umn.edu/events)

**Minnesota Women Lawyers**

**2017 Conference for Women in the Law: Leading and Evolving**

The goal of the conference is to collaborate across MWL’s statewide community, providing high-value programming of interest to our diverse membership, and creating meaningful networking opportunities, all in the effort to advance MWL’s mission. Currently, the legal profession is evolving at a rapid pace. How can women attorneys not only shape, but lead this evolution? Hear from leaders who are helping to create a legal profession that not only promotes, but also advances, equity and diversity. Lend your voice to defining the ways in which attorneys can help, as well as other value, in the legal profession to our diverse membership, and creating meaningful networking opportunities, all in the effort to advance MWL’s mission. Currently, the legal profession is evolving at a rapid pace. How can women attorneys not only shape, but lead this evolution? Hear from leaders who are helping to create a legal profession that not only promotes, but also advances, equity and diversity. Lend your voice to defining the ways in which attorneys can help, as well as other value, in the legal profession.

**Date:** Friday, April 21 (RSVP by April 17)  
**Location:** Radisson Blu, Minneapolis  
**Register:** [www.mwlawyers.org](http://www.mwlawyers.org)  
**Contact:** Debra Pexa (612) 338-3205 or dpexa@mnlawyers.org

**Volunteer Lawyers Network**

**Making a Difference for Clients in Poverty**

This CLE reviews the needs of those in poverty for pro bono legal services, the ways in which attorneys can help, some pointers to address cross cultural communication, and the support that VLN offers its volunteers. The CLE concludes with an opportunity to meet VLN staff and sign up for a specific opportunity in the area of poverty. It is a great opportunity to meet with other volunteers too. Pizza lunch provided.

**Date:** Wednesday May 10, 2017  
**Time:** 12:00 – 3:00 p.m.  
**Location:** Hennepin County Bar Association  
**CLE Credit:** 3.0 Elimination of Bias credits requested  
**Website:** [www.vlhn.org](http://www.vlhn.org)

**Volunteer Attorney Program**

**LawLaw Paloosa 2017 Benefit**

LawLaw Paloosa brings the legal community and its supporters together for an out of the ordinary evening of fun and a shared celebration of valued pro bono services. The event raises funds and community support for the Volunteer Attorney Program’s mission to provide pro bono legal services to Northeastern Minnesota. The event includes dinner, presentation of volunteer awards, a silent auction and musical performances by judges, attorneys, and local justice partners. Minnesota Supreme Court Justice Lillehaug will be the guest speaker during the program portion of the evening.

**Date:** Friday, April 29, 2017  
**Location:** Clyde Iron Works, Duluth  
**Time:** 5:30 p.m.  
**Tickets:** Call (218) 336-1392  
**Website:** [www.volunteerattorney.org](http://www.volunteerattorney.org)

**MSBA CONVENTION**

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Congressional interest in lawyer advertising

I did not expect to receive letters from Congress when I was appointed as director of the Office of Lawyers Professional Responsibility, but that is what my mail contained on March 10, 2017. Congressman Bob Goodlatte (R-Va.), chair of the U.S. House of Representatives Committee on the Judiciary, wrote to me and all other lawyer regulation offices throughout the country on the subject of lawyer advertising. The letter begins, “I write to you to take immediate action to enhance the veracity of attorney advertising.” Rep. Goodlatte’s specific concern, apparently raised initially by the American Medical Association in June 2016, is attorney commercials “which may cause patients to discontinue medically necessary medications,” and advocates a requirement that such commercials contain an “appropriate warning that patients should not discontinue medications without seeking the advice of their physician.”

The letter goes on to describe specific commercials, including one relating to the drugs Pradaxa and Xarelto, which apparently directs individuals to call the law firm at 1-800-BAD-DRUG. Not mentioned in Rep. Goodlatte’s letter—but easily discovered through a web search—is the fact that www.1800baddrug.com is an alias URL that takes you to the website for a Texas law firm. The letter is concerned with the apparent fear-mongering in these commercials, and it notes that deadly consequences can occur from “deceptive advertisements” if patients stop taking medically necessary medications. Rep. Goodlatte offered a specific request:

The legal profession, which prides itself on the ability to self-regulate, should consider immediately adopting common sense reforms that require legal advertising to contain a clear and conspicuous admonition to patients not to discontinue medication without consulting their physician. It should also consider reminding patients that the drugs are approved by the FDA and that doctors prescribe these medications because of the overwhelming health benefits from these drugs.

Rep. Goodlatte’s request has been referred to the Lawyer Professional Responsibility Board’s Rules Committee and Minnesota State Bar Association’s Rules of Professional Conduct Committee for their consideration, and we will see where that leads. It did get me thinking about lawyer advertising, however—something that the American Bar Association (ABA) is also reviewing.

Current efforts to amend the rules

At the request of the Association of Professional Responsibility Lawyers (APRL), the ABA Standing Committee on Ethics and Professional Responsibility is considering potential changes to the model rules on lawyer advertising. The proposed changes involve an essential rewrite of the current model rules by limiting and merging Rules 7.2 and 7.3 and deleting Rules 7.4 and 7.5.1 No amendments are recommended to the cornerstone rule on communications concerning a lawyer’s services, Rule 7.1, but the comments to Rule 7.1 would be expanded to pick up portions of Rules 7.4 and 7.5. The proposed changes are in the review and comment stage and are apparently a “work in progress,” with the earliest anticipated action in May 2018. Minnesota largely follows the model rules, so it will be interesting to see where this leads as well.

Minnesota rules on lawyer advertising

Given the current interest in changes and additions to lawyer advertising rules, this is a good time to review the current state of Minnesota’s Rules of Professional Conduct. Under the broad heading “Information about Legal Services” falls several rules:

- Rule 7.1: Communications Concerning Lawyer’s Services;
- Rule 7.2: Advertising;
- Rule 7.3: Solicitation of Clients;
- Rule 7.4: Communication of Fields of Practice and Certification;
- Rule 7.5: Firm Names and Letterheads.

The cardinal rule is that “[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”2 This rule governs all communications about a lawyer’s services, not just advertising.3 The rule’s comments note that truthful statements can be misleading if facts are omitted, or may impermissibly create unjustified expectations about results.4

A lawyer may not state or imply that the lawyer is a specialist or certified as a specialist in a particular field of law except where the lawyer clearly identifies the name of the certifying organization.
Lawyer advertising is expressly permitted by rule, subject to Rule 7.1 (false or misleading) and Rule 7.3 (solicitation of clients). Lawyers may not give anything of value to a person recommending their services except under specified circumstances, and any advertisement must include the name of at least one lawyer responsible for its content.

The rules treat advertisements aimed at the public in general differently from direct communications with specific individuals who may need a lawyer. Specifically, a lawyer cannot solicit work in person or by phone unless the person contacted is a lawyer, family member, close personal friend, or there is a prior professional relationship. Lawyers may otherwise solicit work by written, recorded or electronic communication, but only if it is clearly and conspicuously marked “Advertising Material” on the outside of the envelope and on the communication itself—unless, again, the person is a lawyer, family member, close personal friend, or there is a prior professional relationship.

A lawyer may not state or imply that the lawyer is a specialist or certified as a specialist in a particular field of law except where the lawyer clearly identifies the name of the certifying organization, and the certifying agency is accredited by the Minnesota Board of Legal Certification (BLC). If the latter is not the case, the communication must note the agency is not accredited by the BLC.

Finally, the rules prohibit trade names that imply a connection with a governmental agency or public or charitable legal services organization. Lawyers may not state or imply that they are in a partnership or other organization unless that is a fact, or use the name of a lawyer holding public office while the lawyer is not actively and regularly practicing with the firm. And the use of the word “Associates” or the phrase “& Associates” in a name can only be used if there are at least two or three licensed attorneys in the firm, respectively.

In 2016, there were five admonitions that involved violations of one of the above-referenced advertising rules, and nine public cases that involved Rule 7.1 violations. About 5 percent of advisory opinion calls in 2016 involved questions relating to one of the “seven series” rules. If you are advertising your services and soliciting clients, which I know you are, you are well-served to take a few minutes to review the current rules on advertising. It will be interesting to see where the profession moves next, given the competing interest of protection of the public, constitutional commercial speech, and the ever-evolving business orientation of the legal profession.

Notes
2 Rule 7.1, Minnesota Rules of Professional Conduct (MRPC).
3 Comment [1], Rule 7.1, MRPC.
4 Comment [2], Comment [3], Rule 7.1, MRPC.
5 Rule 7.2(a), MRPC.
6 Rule 7.2(b), MRPC.
7 Rule 7.2(c), MRPC.
8 Rule 7.3, MRPC.
9 Rule 7.3(a), MRPC.
10 Rule 7.3(c), MRPC.
11 Rule 7.4(d), MRPC.
12 Rule 7.5(a), MRPC.
13 Rule 7.5(d), MRPC.
14 Rule 7.5(c), MRPC.
Why complete my MSBA profile?

Because there’s no such thing as “the average lawyer”

It’s a challenging time to be a lawyer. And frankly it’s a challenging time to be a bar association. As the professional lives of lawyers change—whether it’s because of the many technological and economic pressures facing us, or the continuing march of legal specialization—the MSBA aims to stay out in front of those changes by tailoring our services to your evolving needs.

To do that well, we need up-to-date information from you. Not a lot—basic information like where you work. Your email address. Your employment setting and practice area. And as much demographic information as you feel comfortable sharing.

Please take 3-5 minutes to help us serve you by visiting: mnbar.org/edit-profile
Meet Heidi Hovis
‘Rural communities have opportunities for new lawyers’

Tell us about your work and goals at the St. Cloud office of the Minnesota Department of Human Rights.

The goal of the Minnesota Department of Human Rights is to make Minnesota discrimination-free. The St. Cloud office is focused on achieving that goal by education and outreach to our diverse community. We hold “Know Your Rights” events where we explain the Human Rights Act. Our office also investigates instances of discrimination in the community and holds those who engaged in discrimination accountable. Our office depends on citizens reporting when discrimination has occurred, so it is essential that Minnesotans know about and how to assert their rights.

You previously worked for Mid-Minnesota Legal Aid in St. Cloud and Northwest Legal Services in Bemidji. What did you find rewarding and challenging in those positions?

In both roles, I was able to provide free civil representation to indigent clients. I practiced housing law, family law, public benefit law, and in Social Security Disability appeals. At Legal Aid, I started a medical-legal partnership with a local clinic where I represented or counseled over 400 clients in the first two years. While I enjoyed the work, I found my civil litigation practice had a very individualistic focus; I was not making any systemic change.

In my current role, I investigate claims of discrimination under the Human Rights Act. A probable cause of discrimination determination has a two-fold result. The person who was discriminated against will receive damages and the person or entity that engaged in the discriminatory act is held accountable. That accountability can take the form of employers retraining staff, businesses developing or revising antidiscrimination policies, or schools being more transparent in discipline policies. MDHR is able to make systemic change in that it ensures workplaces, apartment complexes, stores, schools, and public services become more accommodating for all Minnesotans.

How does your background as a social worker affect your legal practice?

My social work practice absolutely influences my legal practice. My social work background helps me to be more empathetic to persons with mental illness or those experiencing crisis. My law background helps me to get these same folks to understand their legal options in a fact-based, linear way.

As an attorney who has made a couple of career transitions in the early years of practice, do you have any advice for newer lawyers who want to make a transition?

I think it is important to always be open to the possibility. I graduated in 2010 when the job market for new attorneys was bleak. I accepted a job offer in northern Minnesota, in an area of the state that I had never visited, because it was an opportunity to practice family law. I joined the local bar association and met several established attorneys who became mentors during my first years of practice. I then accepted a position with Legal Services in another unfamiliar area of the state. At Legal Services, I was able to expand my practice beyond family law with the help of great supervisors.

Being open to moving to rural Minnesota allowed me to gain practice skills that I would never have been afforded the opportunity to learn had I stayed in the metro area post-graduation. Then and now, rural communities have many opportunities for new lawyers interested in litigation. I also recommend considering a transition if a new role would help you either diversify your practice or align you with a supervisor or mentor who can help you grow your legal skills.

HEIDI HOVIS worked as an Ameri-Corps VISTA and licensed social worker before going to law school. As an attorney, Heidi practiced in White Earth Band of Ojibwe’s tribal court before becoming a legal aid attorney in rural Minnesota. In her current role, Heidi is an enforcement officer with the Minnesota Department of Human Rights.
The Public Land Survey System (PLSS), launched in Ohio in 1785, is the source of all real estate titles. Its measurements are sacrosanct in law, but recovering the original section corners presents a challenge. This article describes how the survey was done and reviews some of the most salient Minnesota case law.
When you fly west over the United States from Ohio and cross over Minnesota, you see one of the most remarkable achievements of humankind: fields, property lines, and roads predictably laid out along north-south and east-west lines. This is a visible testament to the original government survey of United States lands, referred to as the Public Land Survey System (PLSS).

This grid is how we all came to own the land. It is remarkably simple. The U.S. government divided millions of acres into small parcels that could be bought by settlers at a low price. With a simple glance at a PLSS map, a settler understood what they were buying and where their boundaries would be located.

The PLSS was a big government operation and, believe it or not, it was designed principally by a committee and approved by Congress. The original idea of dividing land acquired by the United States into rectangles was probably Thomas Jefferson’s, but no one can take all of the credit.

**Origins of the system**

In the late 1700s, after the Revolutionary War, the United States government found itself land-rich and cash-poor. The Treaty of Paris granted to the United States most of the land lying east of the Mississippi River. But the young government had few resources to protect the land against European powers who still had designs on North America.

The simple answer was to sell land to raise cash, and to have the settlers become U.S. citizens with an interest in protecting the boundaries of their property against foreign intrusion. The question was how this could be done.

If you think about it, you cannot simply send surveyors out to square off land and sell it. The system had to start and proceed in an orderly and logical fashion. The system had to be simple and efficient to ensure it could be understood both at the time of sale and in the future.

Work on the PLSS started in what later became the State of Ohio under the Land Ordinance of 1785 with the laying out of the Seven Ranges. The idea was to divide the land into rectangles. Eventually, as the surveys moved west and into Wisconsin and Minnesota, the rules changed to divide the land into square miles called sections, with 36 square sections constituting a township. To divide the land, the government first laid out east-to-west baselines along a parallel of latitude, and then south-to-north meridian lines along a longitudinal line. The exterior township lines would first be surveyed off of these baselines and guide meridian lines. Later surveyors would return and divide the townships into the now familiar 36 square miles.

The south baseline for Wisconsin and eastern Minnesota is the Galena baseline, near the southern boundary of what later became the state of Wisconsin. This was called the 4th Principal Meridian (P.M.). The portion of Minnesota lying east of the Mississippi River is in the 4th P.M. All of the land in Minnesota in the 4th P.M., with the exception of the far north Arrowhead, lies west of the 4th P.M.

Townships and ranges in Minnesota were laid out in six-mile segments north of the baseline and west or east of the meridian. For example, the area that is today the portion of St. Cloud lying east of the Mississippi River (you drive through this area on U.S. Highway 10 as you go past the St. Cloud Reformatory) is designated as Township 35 North, Range 30 West, 4th P.M. This means that the six-mile square township is laid out 35 six-mile segments north of the Galena baseline, and 30 six-mile segments west of the north/south meridian.

What is today the portion of Minnesota lying west of the Mississippi is in the 5th Principal Meridian, which was part of the Louisiana Purchase. The exception is an area around Fort Snelling, which was laid out under the 4th P.M. The baseline for the 5th P.M. is called the Clarendon Baseline, which runs through the middle of Clarendon, Arkansas. The 5th P.M. runs north through Minnesota to the Canadian border. The portions of Minnesota surveyed under the 5th P.M. are all Township North and Range West. As a reference, the segment of St. Cloud lying west of the Mississippi River, where St. Cloud State University and downtown St. Cloud are laid out today, is designated as Township 124 North, Range 28 West, 5th P.M.

The Sections in both the 4th and 5th P.M. were subdivided into 40-acre quarter-quarters by protraction, but not surveyed. To do this, the government surveyors first set the exterior section corners. Drawing straight lines north to south and east to west at an equal distance between the set corners. The boundaries of the 40-acre quarter-quarters were calculated and not surveyed.

Settlers wishing to claim the land would apply at a U.S. Government Land Office—in central Minnesota this was typically Sauk Rapids—where an agent would be authorized to enter into contracts for sale of quarter-quarter sections of land. The settler was given preemptive rights and later would be given a land patent when the contract was fulfilled. Often, to buy the land, the settler had to actually move on to and settle the land for up to five years. This prevented land speculators from buying large tracts of land.

Some land was given to the railroads as an enticement to build rail lines. Other lands were given to the state of Minnesota for schools—typically Sections 16 and 36 in each township. Lands were sometimes given to the families of soldiers who had served in past wars. In that case, the soldiers’ land was immediately sold to a settler, with the money going to the soldiers’ families.

Surveying the interior lines of each township started at the southeast corner of the town, and proceeded west and north. Dividing a town into 36 equal mile squares (sections) presented a problem, because the world is round. To compensate, the remnant last quarter mile or quarter-quarter portion of sections along the west and the north edges of a town were laid out and sold as lots containing the number of remaining acres. The early surveyors would square off the end of the interior town lines and calculate the number of acres. This was called lottting—or later, government lots.

Surveying along lakes and rivers presented another problem. Permanent bodies of water were meandered or lotted. This meant that the surveyor would run lines to the water and, using a meander line along the shore, calculate the acreage of the government lot. Government lots were established by calculating the area in acres, created by intersecting the interior subdivision lines with the meander lines. Government lots can be exceedingly difficult to resurvey.

**Lingering problems**

This system is simple and it has worked well for the last 150 years. It mostly works well today. But we are still living with problems that date from the original work. As example, most sections are not a perfect square mile on each side.
In theory, the original surveyors placed markers at the SE, SW, NW, and NE corners of each section, with quarter corner posts placed halfway on the section lines between the four corner posts. Lines connecting the quarter corners made quarter sections with further subdivision, called aliquot parts, of 40 acre quarter-quarter section tracts.

Some surveyors did a good job of laying out the sections, but the work of others left much to be desired. The Cardinal Rule, still enforced today, is that the government corner is where the original surveyor placed it. This could mean that the original corner, when accurately located on the ground, is not in the location where you would expect to find it, or where the original surveyor notes claimed it was placed. All disputes on a PLSS corner are resolved in favor of the location of the original corner as placed.

There is one problem in applying that rule; however: In most cases the original corners were lost long ago. Today we are faced with the task of trying to relocate those corners, as accurately as possible, with the best evidence available, at the location originally set.

To make the job more difficult, the corners were set using wood, pits, stones, or whatever material might be available. The U.S. Deputy Surveyors were not trained surveyors as we know the profession today. Instead, almost anyone with some competence in pulling a Gunter’s Chain (a 66-foot-long chain consisting of 100 links) and using a compass could bid a job to be a deputy government surveyor.

The original idea seems to have been that after the government sold the land, it would be up to the settlers to protect their corners so their boundaries could always be determined. That sounded good, but over time the corners were lost. The federal government passed the responsibility of maintaining the original corners to the states, which in turn shifted the burden to the counties.

The original work was difficult to say the least. The southern and western Minnesota prairies included a lot of swamp land. Mosquitoes were terrible. As the surveyors moved west, the Native Americans understood what was happening and often would disrupt the surveys. The northern Minnesota woods, brush, wetlands, and lakes must have been almost impossible to navigate with survey equipment. To accurately survey through the forest, trees had to be cut, and the terrain was harsh and hilly. Iron deposits caused problems with the magnetic compass. Thousands of lakes and numerous rivers had to be meandered.

The surveyors were often hardly a step ahead of loggers who were trespassing and cutting on government land. The instructions to the surveyors were to do their best, but they were allowed to be off by as much as one chain (66 feet) in a mile.

It has been my observation that the original surveys done in southern Minnesota, mostly on the prairie, were probably a little more accurate than those in northern Minnesota with its forests and lakes.

As the PLSS surveys and boundaries have come down through time to us today, we find that some of the original corners were maintained, but many are open to question. Starting in the 1980s, the county surveyors in some parts of the state went on a mission to locate corners and accurately remonument them to the original PLSS survey records. This has led to problems.

Imagine that a section corner has historically been located in one place. Then the county surveyor comes along to excavate and examine the original records. The surveyor may find evidence—possibly even remnants of a cedar post, rock, or other marker set by the original surveyor as stated in the survey notes. The surveyor may find substantive evidence that the original location of a corner is 20 feet away from the long-used historic location of what was thought to be the corner. If your legal description is in the northwest quarter, for example, and the county surveyor relocates the NW corner to the original position, your boundary moves. Like it or not, you may have gained or lost land. This has led to many problems, and will continue to lead to problems as efforts are made to find the location of the original corners.

In the end, all land titles originate with the PLSS survey. All boundaries are subject to accurately locating and preserving the original corners.

In the courts

A series of interesting Minnesota Supreme Court decisions have helped clear up some of the problems.

Lawler vs. Rice, 147 Minn. 236, 180 N.W. 37 (1920): At least from the perspective of the original government survey, this is what I believe to be the most interesting case. Rice and Goodhue Counties wanted to improve a road along an exterior township section line. The parties agreed on the location of both the northeast and southeast corners in Section 1, but could not agree on the east quarter corner—which, in theory, should have been placed on a straight line halfway between the northeast and southeast corners, or on a straight line at a prorated position (being in the northeast township tier). Rice County argued that the original survey notes showed the east corner to be exactly that, halfway on a straight line between the northeast quarter and the southeast quarter.

The property owner in Section 1 did not want his land taken for the road. He brought in as a witness an old surveyor who had done survey work in the area right after the original surveys were laid out. The surveyor testified that he recalled seeing the east quarter corner approximately 1 1/2 rods east of the straight north south line between the northeast corner and the southeast corner. He said it was unusual to be that far off its intended location, but he remembered seeing the original pit, mound, and stake. While this case determined that the quarter corner was where the original surveyor put it, the more interesting part of the testimony from someone who actually saw the original corner set by the original surveyor.

Chan vs. Brandt, 45 Minn. 93, 47 N.W. 461 (1890): This case involved the west quarter corner of Section 31 in a township, and the east quarter corner of Section 36 of the township just to the west. In theory, the quarter corner should be at the same location for each section and township. In fact, there were two quarter corner posts, one for Section 36 and one for Section 31.

The Minnesota Supreme Court decided that the original GLO surveys were never in error and that the Land Office would have corrected any error. The Court held in favor of the long-standing rule that the corners are where they were placed by the original government surveyor. The two quarter markers, though inconsistent, stood.

Kirwin vs. Murphey, 189 U.S. 35, 23 S. Ct. 599, 47 L. Ed. 698 (1903): This is one of the more interesting cases. The Howe brothers (U.S. government deputy surveyors) must have been very experienced surveyors. At some point while surveying in what later became a township in St. Louis County, they decided it was really too much work. It appears that they set corner posts at the southeast and southwest corners of Section 36, then quit work, sat in their camp, drank whiskey, and drew up survey notes for the entire township. The Government Land Office (GLO) used the notes to draw a town plat, and the land was sold.
Work on the PLSS began in the Minnesota territory in 1849, and was completed around 1907. By the end, most of Minnesota was in private ownership. Roads and drainage were the next problem, but that is a different story.

The PLSS worked as planned. Millions of people were able to own land and became United States citizens. European powers were never a problem. The United States border with the British Dominion of Canada was settled by diplomats and surveyors, not soldiers. Other unintended benefits of the PLSS were substantial and long term.

The surveys created enormous wealth in the new citizens. The ability to buy land at a low price, on easy payment terms, allowed people of limited financial means to create wealth. It was not preordained to happen this way. Historically, European governments had given large tracts of land to a few people. Allowing millions of people to buy and own in fee small tracts of land from the government was not the norm.

Landownership gave people access to capital in the form of mortgages. A landowner could mortgage their property to raise money to improve the land, farm, start a business, or buy more land. Like the property owners, the lender or mortgagee would understand the boundaries and value of the land taken as collateral. This unlocked credit markets for massive numbers of people.

Once the land was sold to the settlers, they needed transportation. The government used the land to entice capital to build rail lines into the interior of the country. This further connected the settlor citizens to their government.

This is not to say the PLSS worked out best for everyone. Certainly, the native peoples who lost their land did not benefit. The railroads, having been given land as an enticement to build rail lines, had no hesitation to use their rail line monopoly to charge high transportation prices. And, as recent history shows, there still are and always will be booms and busts in real estate.

The deputy surveyors not only measured and divided the land; they also made notes on native vegetation. This information helped settlers understand the land they were purchasing, and also helped Congress understand how likely it was that the land would sell.

In the late 1920s, the USDA took the field notes and developed a native vegetation map of Minnesota. This map has been updated by the Minnesota DNR. The unintended benefit of the surveys is that we have a good picture of what native Minnesota looked like prior to European settlement.

Finally, and maybe most importantly, giving a lot of people ownership of small parcels of land gives real estate lawyers like me a job.
It would have worked, except that a rough calculation of the size of Cedar Lake in the north part of the township turned out to substantially overstate its actual size. This meant that the government lots around the lake included much more land than was shown on the original surveys. The timber company, which bought the government lots, argued they should own the land, no matter the fraudulent survey. The government surveyor from Minnesota argued successfully that since the land had not been surveyed in the first place, the government could resurvey and determine the correct sizes of the lots. The U.S. Supreme Court ruled in favor of the government and said that the administration of public lands was vested in the GLO, and the courts could neither correct nor make surveys.

- **Schurmeier v. St. Paul and Pacific Railroad Company**, 10 Minn. 82 (1865): Land along the Mississippi River in St. Paul was bought and owned by a private party. At low water, the land was a single parcel. When the Mississippi rose, part of the land was submerged, creating an island. The railroad claimed the island was public property because it was surrounded by navigable water. The railroad wanted to build a bridge on the island. The Court ruled that the meander lines along a shore of a government lot on the river were intended only to calculate the number of acres in the government lot. They are not a boundary. The Court said the landowner took title to the middle or thread of the river, subject to the state’s rights to retain the navigable waters. In this case, the island belonged to the private owner and he had riparian rights as the water level ebbed and flowed. This is why owners of lake shore in Minnesota almost always have lake access, no matter the water level.

- **Ruikke v. Nall**, 798 N.W.2d 806 (Minn. App. 2011): The original government survey map had a mistake. It showed a government lot with access to the lake for land that eventually was owned by Ruikke. The map was wrong because the meander lines on the PLSS plat did not accurately depict the lake. When the land was surveyed on the ground, it did not provide lake access. The Minnesota Court of Appeals decided that Ruikke bought lakeshore as shown on the original government survey map and he was entitled to lakeshore. The court carved out some of the neighbors’ property and gave it to Ruikke.
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www.LRAPMN.org
Minnesota substantially changed its criminal drug laws in 2016. The reforms, designed to better distinguish addicts from dealers, include new offenses and revised sentencing guidelines as well as new aggravating factors and mandatory minimums.
For the first time in 27 years, the Minnesota Legislature made significant reforms to the criminal drug laws in 2016.1 Observers on all sides criticized the old laws for being too tough on addicts and not tough enough on serious offenders.2 The reforms are designed to better distinguish addicts from dealers and to provide addicts with less punitive, more rehabilitative sentences.3

A number of these reforms affect practitioners. The primary changes include a new “aggravated first-degree” offense, increased quantity thresholds for certain offenses, new aggravating factors, a new firearm provision, a new sentencing guidelines grid, and new mandatory minimum sentences.

**Minimum quantity thresholds**

There are five degrees of controlled substance crime, first-degree being the most severe.4 The degree of offense is based on the type and quantity of drug involved and whether it was sold or possessed. The first change the Legislature made was to increase the minimum quantity thresholds for first-, second-, and third-degree offenses involving cocaine and methamphetamine.5 The Legislature also, interestingly, decreased the minimum quantity threshold for marijuana for first- and second-degree offenses.6 There were no changes to fourth-degree offenses or fifth-degree sale offenses.7 The charts at upper right show the changes.

**Gross misdemeanor fifth-degree offense**

The Legislature also created a gross-misdemeanor fifth-degree possession offense.8 If a defendant has a prior drug-related conviction9 in Minnesota or elsewhere, then possession of any schedule I through IV substance is a felony.10 But if the defendant does not have a prior drug-related conviction, then the minimum felony-level quantity threshold for all schedule I through IV controlled substances except heroin is 0.25 grams or 1 dosage unit, and the minimum felony-level quantity threshold for heroin is 0.05 grams.11 If a defendant does not have a prior drug-related conviction, and the quantity is under those thresholds, then the offense is a gross misdemeanor. There were no changes to the minimum thresholds for procuring a controlled substance by fraud or deceit.12 The chart on the lower right details the changes.

**Aggravated first-degree offense**

Prior to the changes, there was no difference in presumptive sentence for a repeat offender who sold 200 grams of a controlled substance and a first-time offender who possessed 25 grams.13 To target so-called “kingpin” offenders, the Legislature created an aggravated first-degree offense.14 The aggravated first-degree offense carries a mandatory minimum prison commitment of 86 months, or the fixed duration in the guidelines box, whichever is greater.15 To qualify as an aggravated first-degree offense, the offense must involve (1) the sale or possession of 100 or more grams of cocaine, methamphetamine, heroin, other narcotic, or hallucinogen; or, if packaged in dosage units, 500 or more dosage units of amphetamine, PCP, or a hallucinogen; and (2) the presence of two or more aggravating factors or the possession or use of a firearm.16

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**TABLE**

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<td><strong>FIRST-DEGREE SALE</strong></td>
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<td>Cocaine, methamphetamine</td>
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<td>Heroin</td>
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<tr>
<td>Other narcotic</td>
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<tr>
<td>Amphetamine, PCP, hallucinogen</td>
</tr>
<tr>
<td>Marijuana or THC</td>
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</tbody>
</table>

| **FIRST-DEGREE POSSESSION** | OLD | NEW |
| Cocaine, methamphetamine | 25 g | 50 g |
| Heroin | 25 g | 25 g |
| Other narcotic | 500 g | 500 g |
| Amphetamine, PCP, hallucinogen | 500 or 500 dosage units | 500 or 500 dosage units |
| Marijuana or THC | 100 kg | 50 kg or 50 plants |

| **SECOND-DEGREE SALE** | OLD | NEW |
| Cocaine, methamphetamine | 3 g | 10 g |
| Heroin | 3 g | 3 g |
| Other narcotic | 10 g | 10 g |
| Amphetamine, PCP, hallucinogen | 10 or 50 dosage units | 10 or 50 dosage units |
| Marijuana or THC | 25 kg | 10 kg |

| **SECOND-DEGREE POSSESSION** | OLD | NEW |
| Cocaine, methamphetamine | 6 g | 25 g |
| Heroin | 6 g | 6 g |
| Other narcotic | 50 g | 50 g |
| Amphetamine, PCP, hallucinogen | 500 or 100 dosage units | 500 or 100 dosage units |
| Marijuana or THC | 50 kg | 25 kg or 10 plants |

| **THIRD-DEGREE SALE** | OLD | NEW |
| Cocaine, methamphetamine | Any amount | Any amount |
| Heroin | Any amount | Any amount |
| Other narcotic | Any amount | Any amount |
| Amphetamine, PCP, hallucinogen | 10 dosage units | 10 dosage units |
| Marijuana or THC | 5 kg | 5 kg |

| **THIRD-DEGREE POSSESSION** | OLD | NEW |
| Cocaine, methamphetamine | 3 g | 10 g |
| Heroin | 3 g | 3 g |
| Other narcotic | 10 or 50 dosage units | 10 or 50 dosage units |
| Marijuana or THC | 10 kg | 10 kg |

| **FIFTH-DEGREE OFFENSE** |
| **FIFTH-DEGREE POSSESSION** | OLD | NEW |
| Schedule I, II, III, or IV (except heroin or a small amount of marijuana) | Felony: Any amount | If prior drug conviction: Any amount |
| No gross-misdemeanor-level offense | No gross-misdemeanor-level offense | If no prior drug conviction: 0.25 grams or more, or more than 1 dosage unit |
| Gross misdemeanor if no prior drug conviction and less than 0.25 grams or 1 dosage unit | Gross misdemeanor if no prior drug conviction and less than 0.25 grams or 1 dosage unit |
| Heroine | Felony: Any amount | If prior drug conviction: Any amount |
| No gross-misdemeanor-level offense | If no prior drug conviction: 0.05 grams or more |
| Gross misdemeanor if no prior drug conviction and less than 0.05 grams | Gross misdemeanor if no prior drug conviction and less than 0.05 grams |
| Controlled substance procured by fraud or deceit | Felony: Any amount | Felony: Any amount |
| No gross-misdemeanor-level offense | No gross-misdemeanor-level offense |

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Prior to the changes, there was no difference in presumptive sentence for a repeat offender who sold 200 grams of a controlled substance and a first-time offender who possessed 25 grams.

Creation of aggravating factors and new firearm provision

The Legislature created new “aggravating factors” that reduce the minimum quantity thresholds for first- and second-degree offenses involving methamphetamine or cocaine. For first-degree offenses, the presence of two aggravating factors reduces the minimum quantity threshold for sale from 17 grams to 10 grams, and for possession from 50 grams to 25 grams. For second-degree offenses, the presence of three aggravating factors reduces the minimum quantity threshold for sale from ten grams to three grams, and for possession from 25 grams to 10 grams.

There are 10 aggravating factors: (1) The defendant has a conviction for a crime of violence within 10 years of the offense; (2) the offense was committed for the benefit of a gang; (3) the offense involved separate acts of sale or possession of a controlled substance in three or more counties; (4) the offense involved the transfer of a controlled substance across a state or international border into Minnesota; (5) the offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to sell or transfer; (6) the circumstances of the offense reveal the defendant to have occupied a high position in the drug distribution hierarchy; (7) the defendant used a position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; (8) the offense involved the sale of a controlled substance to a person under 18 or a vulnerable adult; (9) the defendant or an accomplice manufactured, possessed, or sold a controlled substance in a school zone, park zone, correctional facility, or drug treatment facility; or (10) the defendant or an accomplice possessed equipment, drug paraphernalia, documents, or money evidencing that the offense involved the cultivation, manufacture, distribution, or possession of controlled substances in quantities substantially larger than the minimum threshold amount for the offense.

The Legislature also created a new firearm provision that operates the same way as the new aggravating factors. If the defendant or an accomplice is in actual possession of a firearm or if a firearm is within their immediate reach, then the minimum quantity thresholds for first- and second-degree offenses involving methamphetamine and cocaine are reduced. For first-degree offenses, the firearm provision reduces the minimum quantity threshold for sale from 17 grams to 10 grams, and for possession from 50 grams to 25 grams. For second-degree offenses, the firearm provision reduces the minimum quantity threshold for sale from ten grams to three grams, and for possession from 25 grams to 10 grams. The new firearm provision is different from the firearm sentencing enhancement found in Minnesota Statutes section 609.11, subdivision 5. The new provision does not include constructive possession of a firearm beyond the person’s immediate reach.
Sentencing guidelines changes

Prior to the changes, drug offenses were part of the standard sentencing guidelines grid. Following the statutory reforms, the Minnesota Sentencing Guidelines Commission created a separate guidelines grid for drug offenses. Despite the new grid, the only changes to the presumptive sentences are to first- and second-degree offenses.

First-degree offenses used to be a severity-level 9 offense, which carried a presumptive prison commitment of 86 months with a criminal-history score of 0. Under the new grid, aggravated first-degree controlled substance crime is a severity-level D9 offense, which has the same presumptive sentence as the old severity-level 9. Non-aggravated first-degree offenses are now a severity-level D8, which carries a presumptive prison commitment of 65 months with a criminal-history score of 0.

Under the old grid, a second-degree offense was a severity-level 8 offense, which carried a presumptive prison commitment of 48 months. Second-degree offenses are now a severity-level D7, which carries a presumptive stayed sentence of 48 months with a criminal-history score of 0.

Changes to mandatory minimum sentences

Under the old laws, mandatory minimum sentences were only triggered if the defendant had a prior drug conviction or statutory stay of adjudication under section 152.18. Under the new statutes, mandatory minimum sentences are triggered by four things: (1) quantity of the drug; (2) possession of a firearm; (3) a prior first- or second-degree drug conviction; and (4) application of the aggravating first-degree offense.

Quantity of drugs

The mandatory minimum sentence based on the quantity of the drug only applies to first-degree offenses. For possession offenses, the mandatory minimum sentence applies if the defendant possessed 100 or more grams of methamphetamine, cocaine, or heroin; or, if packaged in dosage units, 500 or more dosage units. For sale offenses, the mandatory minimum applies if the person sold 100 or more grams of methamphetamine, cocaine, heroin, other narcotic, or hallucinogen; or, if packaged in dosage units, 500 or more dosage units. If triggered, the mandatory minimum is 65 months, or the fixed duration in the applicable guidelines box, whichever is longer. The sentencing judge can depart from this mandatory minimum if the defendant does not have a prior first-, second-, or third-degree drug conviction. If the defendant has a prior first-, second-, or third-degree conviction, then the sentencing judge cannot depart.

Possession of firearm

The mandatory minimum sentence based on possession of a firearm only applies to first- and second-degree sale offenses. The mandatory minimum sentence applies if the defendant or an accomplice was in actual possession of a firearm or a firearm was within their immediate reach. If applicable, the mandatory minimum sentence is 36 months or 60 months if previously convicted of an offense involving this mandatory minimum. A judge cannot depart from this mandatory minimum.

Prior drug conviction

Under the old laws, mandatory minimum sentences were only triggered if the defendant had a prior drug conviction or stay of adjudication under section 152.18. The mandatory minimum sentence was a 48-month prison commitment for a first-degree offense, a 36-month prison commitment for a second-degree offense, a 24-month prison commitment for a third-degree offense, a 12-month and 1-day prison commitment for a fourth-degree offense, and a 180-day jail sanction for a fifth-degree offense. The sentencing judge could not depart from the mandatory minimum for first- through fourth-degree offenses.

Under the new statutes, the mandatory minimum sentence only applies to first- or second-degree offenses, and only a prior first- or second-degree drug conviction triggers the mandatory minimum sentence. There are no mandatory minimum sentences for third-, fourth-, or fifth-degree offenses based on a prior conviction. The judge cannot depart from this mandatory minimum.
**Aggravated first-degree offense**

Finally, as mentioned above, a person convicted of an aggravated first-degree drug offense faces a mandatory minimum sentence of at least 86 months. The judge cannot depart from this mandatory minimum.

**Statutory stay of adjudication**

One of the biggest changes for practitioners is the expanded eligibility for statutory stays of adjudication under section 152.18. Under the old law, only first-time offenders who committed a fifth-degree possession offense were eligible for a statutory stay of adjudication. Under the new law, statutory stays of adjudication are permissive for third-, fourth-, and fifth-degree possession offenses, and mandatory for certain fifth-degree offenses.

A statutory stay of adjudication is now permissive for third-, fourth-, and fifth-degree possession offenses if the defendant (1) does not have a prior diversion adjudication for a drug offense, (2) does not have a prior statutory stay of adjudication under section 152.18, and (3) does not have a felony-level drug conviction in Minnesota or elsewhere within the past 10 years.

A statutory stay of adjudication is mandatory for fifth-degree possession offenses if (1) the above criteria are met, and (2) the defendant does not have a prior gross-misdemeanor fifth-degree drug conviction.

**Conclusion**

It is too early to tell whether the new reforms will achieve their intended purpose, but the early returns have been positive. The increased quantity thresholds, expanded eligibility for statutory stays of adjudication, and retooling of the mandatory minimum sentences will certainly keep more addicts out of prison and jail. At the same time, the increased penalties for kingpin offenders and firearm offenses will keep serious offenders off the street.

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**Notes**

2. Id.
9. Minn. Stat. §152.021, subd. 2 (a) (2016); Minn. Stat. §152.021, subd. 2 (a) (2015).
11. Minn. Stat. §152.022, subd. 2 (a) (2016); Minn. Stat. §152.022, subd. 2 (a) (2015).
12. Minn. Stat. §152.023, subd. 1 (2016); Minn. Stat. §152.023, subd. 1 (2015).
13. Minn. Stat. §152.023, subd. 2 (a) (2016); Minn. Stat. §152.023, subd. 2 (a) (2015).
15. “Prior drug-related conviction” means any conviction under chapter 152 or a similar law of another jurisdiction, including misdemeanor- and gross-misdemeanor-level offenses.
17. Minn. Stat. §152.025, subd. 4 (a) (2016).
22. Minn. Stat. §152.021, subd. 3d (2016).
23. Minn. Stat. §152.021, subd. 2b (2016).
24. Minn. Stat. §§152.021, subd. 1(2)(i); 152.021, subd. 2a (2)(ii) (2016).
25. Minn. Stat. §§152.022, subd. 1(2)(ii); 152.022, subd. 2a (2)(ii) (2016).
26. Minn. Stat. §152.01, subd. 24 (2016).
27. Minn. Stat. §152.021, subd. 1 (2016) for firearm possession definition.
28. Minn. Stat. §§152.021, subd. 1(2)(i); 152.021, subd. 2a (2)(i) (2016).
29. Minn. Stat. §§152.021, subd. 1(2)(i); 152.022, subd. 2a (2)(i) (2016).
37. Minn. Stat. §152.021, subd. 2b (2016).
38. Minn. Stat. §609.11, subd. 8c (2016).
40. Minn. Stat. §609.11, subd. 8c (2016).
41. Minn. Stat. §609.11, subd. 5 (2016).
42. Minn. Stat. §§152.021-.024, subd. 3(b) (2015).  
43. State v. Turek, 728 N.W.2d 544, 547-48 (Minn. Cr. App. 2007); Minn. Stat. §§152.021-.024, subd. 3(b) (2015).
44. Minn. Stat. §§152.021-.024, subd. 3(b) (2016).  
45. Minn. Stat. §152.021, subd. 16a.; 152.021, subd. 3b.; 152.022, subd. 3b. (2016).  
47. Turek, 728 N.W.2d at 547-48.
50. Minn. Stat. §152.18, subd. 1 (2016).
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Use it Wisely

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On Closing a Law Practice

A retiring lawyer’s open letter to younger lawyers on lessons learned the hard way

Winding down a law practice is hard work. In this open letter to lawyers who are not yet contemplating retirement, a solo practitioner from Austin, Minnesota describes the process and offers advice to make it less arduous. (Hint: Go paperless now.)

BY SCOTT RICHARDSON

Hello:

You will thank me someday for this letter. I am a solo practitioner. I am retiring in the near future. Lawyers in firms with younger members shouldn’t have this problem that I have found myself confronting.

Here is what I have learned about client files and closing a solo law practice.

I started this process knowing that I could turn my files over to another law firm, but to do that I have to send written notice to each client whose file I am placing with a different firm. I have to give the client a chance to retrieve their file from me before I give it to anyone else. Confidentiality is the issue. At $.49 per stamp per mailing times several thousand files, plus the cost of envelopes plus the hassle of getting the mailing addresses and putting the mailing labels on the envelopes, and waiting to see if they even respond—it’s a huge task in terms of money and time. (The post office advised me to use regular mail, as the cost of a bulk mailing permit would make bulk mail more expensive than regular mail.)
And if a client wants his/her file, I will have to make a copy for my own protection if statutes of limitations have not passed. Minnesota Lawyers Mutual Insurance is my malpractice company. They want me to retain files until 10 years have elapsed since the last work was completed. Longer in some situations—such as child support matters where the kids haven’t aged out, spousal maintenance, ante-nuptial agreements, estate planning documents, etc.

MLM advises me (if I understood them correctly) that a scanned/digital copy of the file is satisfactory and I can shred the file once I have scanned it. I have been in the process of scanning (and then shredding) the files that need to be retained. I am saving the scanned files to my computer, an external hard drive and to One Drive. I continue to shred without scanning the files that I determine are clearly not of any value or potential liability.

The ethics code requires that I return all original documents to the client. My practice has been to keep an original of each POA. I keep only photocopies of Trusts or Wills. My point is that this requirement of not shredding original documents is a hassle you will face someday, so review your policy about retaining originals. I am scanning my originals of clients’ POAs and I am keeping the originals all in one file. My clients always leave with several originals of the POA, yet I have had families contact me for my copy of the original (blue ink signed—not a photocopy) POA because they can’t find theirs.

I called a retired lawyer in a nearby town and learned that he has stored his client files. Once past the malpractice statute of limitations, I gather he will shred/destroy the files. I think that would be a viable solution, but I do not want to incur the expense and responsibility for storing the actual files. I would have to move them to a storage facility, which is a significant hassle—they are heavy and slippery and numerous trips would be necessary. My wife and I both do not want them in our basement. Storing incurs rental expense, and I would probably have to go to the storage unit occasionally to retrieve a file.

Using a local shredding service, I went through about half of the files and culled/shredded files that were clearly junk. (Now, with the benefit of hindsight, I wish that I had investigated the costs and ability to take the shreddable files to the Olmsted County (Rochester) Waste-to-Energy facility for incineration.) Each full bin cost me about $90. They came and picked up the bins and left empties. It cost $.27 per pound and I’ve been through about six bins with them and about six equivalent bins with another service. I have at least another eight to 10 bins to review.

I am dealing with many files opened years ago, but the people involved are still clients. I started out saving those files figuring I would ask a firm in town to take them. But then I learned about the duty to write those letters. So I decided to scan and shred those files. I spent about two months doing this before I decided to take a different course. It was slow going.

I have a Scansnap ix 500 scanner. If I had to do it over, I would have gone paperless long ago, with a scanner at my desk and at my assistant’s desk. Everything would get scanned and no paper would be retained. If a client wants their file, I would give them a digital copy of their file. MLM is okay with that procedure. This letter is a heads up for you to do this now—convert to a paperless office! The scanner costs about $450.

And by getting a scanner now, you can start pecking away at getting your old files scanned and shredded. Very time-consuming.

**Shredding**

Each full bin cost me about $90. They came and picked up the bins and left empties. It cost $.27 per pound and I’ve been through about six bins with them and about six equivalent bins with another service.

**Scanning**

If I had to do it over, I would have gone paperless long ago, with a scanner at my desk and at my assistant’s desk. Everything would get scanned and no paper would be retained.
Staples!

When I scan a file, I first have to remove all staples. They hide from me, but my scanner finds them and jams up. Stop using staples! You will regret later having used a stapler when you set about copying your files. They are a time-consuming pain to remove and they are dangerous. Update your work-comp policy and your tetanus shots! Brush up on your cuss words! If you are not going to convert to a paperless office, then use binder clips instead of staples.

I have certain clients to whom I feel some extra loyalty, and I intend to contact them about my retiring and ask them what to do with their files. (I will scan the files regardless of their instruction.)

Imagine if you drop dead. Who can do this all for you? If your files are digitized, you can go ahead and die and rest in peace. I hope the place we lawyers get sent to is peaceful—and not too hot! I wonder if a malpractice company would sell tail insurance to an estate? Especially if it is in disarray.

I haven’t yet figured out how to preserve my emails. It isn’t entirely a bad process. It brings back many memories of clients and cases—some good and some not so good.

Malpractice insurance: I can buy a policy that protects me into retirement—for at least six years, I believe. Or I can purchase a one-year policy each year after retirement. The premiums for the one-year policy are high enough that in the fourth year I will have paid more than the $8,200 one-time premium for that first policy. I have decided I want to be insured for at least six years past my retirement date.

The process of scanning files as described above proved so time-consuming that I finally changed my mind. I decided to stop scanning and to transfer the remaining files to a local firm. So now my assistant and I will stop scanning and shredding and start going through the remaining files to collect names and addresses to make a mailing list with the capability of printing out mailing labels. I will send the clients a letter advising them of the transfer of files to the law firm and to give them an opportunity to stop in and get their file.

But how to place the files with another firm? I will share a copy of the letter that I sent via email attachment to several Austin firms. (See sidebar.) On the same day I sent the letter, one of the firms contacted me to accept the terms.

In a couple of months this process should be completed, and then my next project will be to figure out what to do with myself in retirement.

Author’s postscript: On February 27, we mailed out approximately 1,400 letters to clients advising them of my pending retirement and the need to dispose of the client files. I got back approximately 400 of the letters—return to sender. It took us about three weeks to research each of those client files to determine what to do with the file. We have called clients, emailed them, investigated through Google and also the local paper’s on-line obit file. Many of those files were old enough to allow us to determine they could be shredded without further attempt to contact the client.

Stop using staples! You will regret later having used a stapler when you set about copying your files. They are a time-consuming pain to remove and they are dangerous.
Hello _____________:

I am in process of disposing of client files preparatory to retirement. I have approximately 2,100 files from 2003 to the present remaining to dispose of. I have already shredded many of the files from about 1950 up to 2003. Many of the files from that period I have scanned and then shredded.

The process of inspecting each file, scanning it and then paying for it to be shredded is a significant hassle and expense.

If your firm would:

1. take possession of the remaining files and properly store them such as how you store your own files,
2. agree to retain the files for 10 years from the date of my last involvement with the client as indicated in the file. (Many of these files are already past that 10 year mark, but I believe the client still regards me as their attorney and therefore, I haven’t shredded the file),
3. agree to allow the client to take possession of their file at their request,
4. agree to scan the file prior to releasing it if a client demands to take the file to a different firm,
5. agree to allow me and/or my malpractice carrier to take possession of the file or retrieve a scan of it in the event of a possible malpractice claim against me (there are no pending claims that I am aware of),
6. and pay me $____.00 (part of the actual cost I will face in mailing notices out to these about 2,500 clients to obtain their consent to move the files to your possession and ownership) and (I believe that the files and the phone number have at least that much value) and (I would give the client a set time such as 45 days within which to contact me to take possession of their file.)

I will obtain your approval of the content of the letter prior to mailing it.

Then, in exchange, I would be willing to:

a. give your firm the remaining files and transfer to you a copy of what we have scanned thus far,
b. give your firm the mailing list of the clients that I send the notice to (not the client’s addresses whose files I have already shredded as I didn’t save those addresses on the file),
c. give your firm our card catalog that locates the file by alphabetical listing by client’s last name and the client’s file number (not on computer, but instead on recipe cards in a cabinet measuring about 30” deep by 2’ wide by 4’ tall – the cards are in the top three drawers that consume about 18” of the 4’ tall dimension),
d. participate in advertising this arrangement (announcement in the Herald, for example) that your firm now has my client files,
e. turn over to your firm ownership of my office phone number so that calls to that number will be received by your firm,
f. physically assist in moving the files to your storage area, and
g. sign a non-compete agreement in favor of your firm.

h. I cannot give you the addresses of the former clients whose files I have already shredded but not scanned. Those files are gone for good. The files that I have scanned and then shredded, I will get the addresses from the scanned file and include them in the mailing list. I do have a record of those files that I have shredded, but not scanned and I would give you a copy of that record.

i. If your firm ever is dissolved within the above-referenced 10 year period, you would make disposition of the files subject to the terms set forth in this letter.

You are welcome to stop in to inspect the quantity of files involved.

[end of letter]
ARGUING AT THE APPELLATE LEVEL

A Judicial Clerk’s Perspective

Through her experience as a clerk, the author learned that the best appellate attorneys accomplished two goals at oral argument—helping judges reach a well-reasoned decision while at the same time firmly advocating for their clients. This article offers tips to help appellate lawyers achieve both goals.

By Emily R. Bodtke
WHAT TO DO—AND NOT TO DO—IN ORAL ARGUMENT

My first job as a law school graduate was clerking for the United States Court of Appeals for the 6th Circuit. In many ways, an appellate clerkship is a quiet and solitary position. But that sense of isolation evaporated whenever the week of oral arguments arrived. Oral argument brought the attorneys and judges into one room to hash out competing arguments and challenging legal issues. As a clerk, I repeatedly observed this interchange and how it affected the judicial decision-making process. Gradually, I came to appreciate that the best appellate attorneys accomplished two goals at oral argument: (1) they helped the judges reach a well-reasoned decision, and (2) they firmly advocated for their client. These two goals do not always easily coexist, but both are indispensable to effective appellate advocacy.

Judicial Views of Oral Argument

Judges’ chambers follow a regular pattern in preparing for oral argument. The clerks read the briefs, research the law (including cases above and beyond those cited in the briefs), draft bench memoranda, and discuss the cases with their co-clerks and judge. Judges read the briefs, review the bench memoranda, and often ask their clerks for additional research on particular issues. Judges will often pose questions to their clerks that they will later raise at oral argument. All of this preparation means that judges have typically formed a preliminary determination about the case by the time of oral argument. They then use oral argument to confirm or dispel that impression.

Both in chambers and during oral argument itself, I encountered a wide range of judicial postures toward oral argument. Some judges focused primarily on the factual record during oral argument. Other judges used oral argument principally as a forum to discuss the law and the implications of each party’s proposed application of law. Sometimes, judges would use oral argument as an opportunity to explore an interesting intellectual question, even if that question was unlikely to affect the final decision. The most common tendency I saw among judges was using oral argument to question attorneys about the weakest parts of their case, essentially providing the attorneys an opportunity to rebut the judge’s preliminary conclusions on that issue. Finally, oral argument presented an important opportunity for the writing judge (and his or her clerk) to gain insight into the other judges’ thoughts and concerns, enabling them to draft a majority opinion that incorporated each signing judge’s viewpoint.

Oral Argument as a Tool to Help the Judges

The most effective oral advocates that I observed treated oral argument as a conversation during which they guided the judges toward a reasoned decision that favored the client’s interests. Less effective advocates, on the other hand, tended to treat oral argument as a lecture or presentation where the conclusion was foregone and persuasive reasoning was unnecessary.

Techniques of Effective Advocates

Here are the key techniques I saw effective advocates use to help the judges reach a reasoned decision:

- Squarely answering questions without excessive hedging. It is extremely helpful for the judges when a lawyer answers their yes-or-no questions with a “yes” or “no” (or “I don’t know”). Attorneys who attempted to dodge a difficult or uncomfortable question only made their position look untenable. Question-evasion is also extremely frustrating for the judges and rapidly depletes their patience. That being said, a good advocate will usually follow a preliminary “yes” or “no” answer with explanation or caveat. But trying to evade the question entirely is not helpful for the judges or the client.

- Answering questions in a way that clarifies rather than confuses the record. The judges and clerks want to know the record as well as the attorneys. That means that the best oral advocates should lend clarity rather than confusion to an already complicated case. This skill requires having a thorough knowledge of the factual record, being able to resolve any confusion about the facts, and being able to provide citations to key portions of the record. It also entails having the candor and humility to admit: (a) an undisputed fact in the record, even if it’s not the best fact for your client, and (b) the absence of binding legal authority to support a particular argument. In many cases, this skill includes asking a judge to repeat or clarify a question, as sometimes judges will pose convoluted questions or questions premised on a faulty understanding of the facts.

- Communicating a thorough and nuanced understanding of the legal landscape. Oral advocates with a thorough knowledge of the applicable law are better able to dialogue with the judges about the appropriate outcome in a case. That is because judges tend to take an overarching view of law and clerks consistently go beyond the immediate issues in their research. Thus, attorneys with broader knowledge of the law have an advantage over attorneys with limited knowledge because they can better understand the judges’ perspective. Similarly, attorneys who are aware of authority contrary to their position are better prepared to answer the inevitable question about how that authority affects the case.

- Picking up on and addressing opposing counsel’s arguments. Effective oral advocates understand that oral argument does not occur in a vacuum. They study the counterarguments contained in their opponent’s brief. They listen carefully during the opposing party’s oral argument and to the questions posed by the judges to their opponent. They are then equipped to respond to the opponent’s main arguments, to correct the opponent’s misstatements of the facts or law, and answer questions that their opponent failed to answer.

- Articulating a reasoned path, supported by facts and law, for the court to reach the desired result. The best oral advocate is able to step into the shoes of the judge (and the law clerk) and anticipate the problems a judge or clerk might encounter in written arguments that adopt the advocate’s proposed reasoning and conclusion. They then provide an avenue—supported by facts in the record and convincing legal authority—to overcome the anticipated objections, counterarguments, and tensions with other laws or facts.
Mistakes by less effective advocates
In contrast, here are the mistakes I saw less effective advocates make that counteracted their ability to help the judges:

■ Talking over the judges. Interrupting a judge’s comment or refusing to stop talking when a judge interjects with a question raises many judges’ ire and undermines the attorney’s persuasive capacity. Although talking over the judges might not substantively weaken an attorney’s legal arguments, it definitely distracts from them.

■ Being overconfident. Sometimes it’s clear from an attorney’s demeanor and lack of preparation that they assumed the judges would take their client’s part. This error is often fatal because it squanders the attorney’s final opportunity to answer challenges leveled at arguments expressed in the briefing.

■ Failing to recognize when a judge’s question benefits the client’s position. Oral argument is as much about listening as it is about speaking. It can be difficult to listen when you’re focused on persuading a judge to accept an argument, but careful listening is critical to addressing the judges’ concerns and questions. Sometimes, I saw attorneys so fixated on making their arguments that they failed to recognize when a judge’s question was actually calculated to guide the attorney toward an argument helpful for the client.

■ Trying to force the judges to focus on one point when the judges are clearly more interested in another. There is usually a good reason for a judge’s question, so it’s counterproductive to avoid the question in favor of addressing a different point. Moreover, it’s frustrating for the judges to have their questions dismissed as unimportant. The best oral advocates are willing to engage on the judges’ topic of choice, even if the attorney would prefer to discuss a different issue. Oral argument should be a dialogue—not a presentation—which means the attorney does not always get to dictate the topic of conversation.

■ Being overly emotional. I saw several attorneys who argued passionately against what they saw as a grave injustice to their clients. Passion is not necessarily misplaced at oral argument, but it must be carefully tempered to the audience. Oral argument is not the same as arguing to a jury, preaching a sermon, or delivering a political address. Oral argument entails reasoning with a panel of judges who are bound by law. The judges are not free to decide cases based on their intuitive sense of right and wrong. They have to articulate carefully supported rationales for their decisions and may have to defend their reasoning against dissenting judges. That means that no matter how instinctively unjust a client’s experience seems, it is far better to use the limited time available to explain why the law supports a desired outcome, rather than pontificate about the wrongs committed against a client.

ORAL ARGUMENT AS AN OPPORTUNITY TO ADVOCATE FOR THE CLIENT

While an effective oral advocate should strive to help the judges, the advocate has an equal, if not more primary, responsibility to represent their client’s interests. The duty to assist the court and the duty to advocate for the client are not always perfectly aligned. For example, an attorney must represent the client’s interests even when they know a particular position has some weaknesses. Sometimes, in the middle of a back-and-forth with a judge, attorneys unwittingly concede a judge’s point and in doing so defeat their own argument. As much as a good oral advocate should strive to help the judges, he or she must also stay true to the client’s position.

Here are some common techniques I saw from oral advocates who managed to strike this balance between judicial assistance and zealous advocacy:

■ Answer the judges’ questions, but turn the conversation. As mentioned earlier, good oral advocates answer questions straightforwardly. Oftentimes, that means acknowledging weaknesses in their case. But, for good oral advocates, an admission will not defeat their entire legal argument. Rather, good oral advocates show why the admission does not hurt the client’s case. They point out other facts or law that makes the admission less relevant, or they explain why an assumption underlying the judge’s question is incorrect. They spend as little time as possible admitting to a weakness in their case and turn the conversation to the strong points of their case—all without evading the judges’ questions or ignoring their concerns.

■ Avoid getting sucked too deeply into hypotheticals. One danger every oral advocate faces is getting sucked into a hypothetical that forces you to make damaging admissions regarding a fictional scenario. Many judges ask hypothetical questions to consider how a particular decision will set precedent for future cases. While future impact is important to consider, the attorney’s primary concern is the present case. Because hypotheticals necessarily involve facts outside the scope of the present case, they can easily lead the advocate down a path that is neither beneficial to the client nor immediately relevant to the present case. While it is important to engage with the court on hypothetical questions, it is equally important to point out where the hypothetical differs from the case at hand. Zealous advocates resist the pressure to concede arguments based on a theoretical fact pattern.

■ Argue with passion channeled by the bounds of law. As mentioned earlier, overly emotional arguments tend to disserve clients. But passion is not wholly inappropriate at oral argument. On the contrary, the most impressive oral advocates are those who argue with passion channeled by reason. I still recall one attorney who I watched argue two separate habeas corpus cases. He never spoke in abstract terms about the injustice of his clients’ criminal convictions, but he emphasized law and facts that made his clients’ convictions appear unjust and fall outside the bounds permitted by the Constitution. His combination of passion with reason made him one of the most persuasive oral advocates I witnessed.

CONCLUSION

My experience as a law clerk taught me that effective oral argument at the appellate level involves a careful balancing between helping the court reason through difficult legal issues and firmly representing the client’s interests. While these two goals can be in tension, attorneys who master both will undoubtedly earn judges’ respect and attention.

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Take Two: President Trump’s Suspect March 6 Travel Ban Order

The president’s March 6, 2017 Executive Order, which is unlikely to prove temporary, continues to raise legal and constitutional concerns

BY CAROLINE OSTROM AND GEORGE C. MAXWELL

When President Trump signed Executive Order 13769, “Protecting the Nation from Foreign Terrorist Entry into the United States,” on January 27, 2017 (the “January 27 Order”), he exercised executive power to suspend the entry of all refugees and the entry of nationals of seven predominately Muslim countries in an unprecedented fashion that raised significant legal and constitutional concerns. Court challenges immediately followed, and a Temporary Restraining Order (TRO) from the Federal District Court in Washington State blocked the Order nationwide.1

On March 6, 2017, the President regrouped and issued Executive Order 13780, which revokes and replaces the prior one as of March 16, 2017, (the “March 6 Order”). In the March 6 Order, President Trump claims broad power under 8 U.S.C. §1182(f) and 8 U.S.C. §1185(a) to close our borders to refugees and citizens of six Muslim-majority countries in a way that continues to raise similar legal and constitutional concerns.

As many know, the January 27 Order immediately suspended the U.S. Refugee Admissions program for at least 120 days, and suspended the admission of Syrian refugees indefinitely.2 The January 27 Order also suspended for at least 90 days the entry of all people “from” Libya, Iran, Iraq, Syria, Sudan, Somalia, and Yemen, including those already holding U.S. immigrant (green card) and non-immigrant (temporary) visas, except on a case-by-case basis “in the national interest,” which was undefined.3 The administration then issued guidance that the ban did not apply to those who already hold permanent legal status in the United States,4 and it also carved out an exception for Iraqi interpreters entering the U.S. on special immigrant visas, but the text of the January 27 Order remained the same.
The March 6 Order continues to suspend the refugee program for at least 120 days, but it no longer singles out Syrian refugees to be banned indefinitely. It continues to suspend the entry for at least 90 days of nationals from the same countries listed in the January 27 Order, with the exception of Iraq, which is no longer included in the ban.

The effective date of the March 6 Order is March 16. Nationals of the six designated countries who are outside the U.S. on March 16, who did not have a valid visa at 5 pm Eastern Standard on January 27, 2017 and do not have a valid visa on March 16 are subject to the suspension of entry. The suspension is subject to a number of exceptions for people with current visas, lawful permanent residents, people traveling on advanced parole, dual nationals who travel on the passport of a country not subject to suspension, and asylees and refugees previously admitted to the U.S. However, the language of the March 6 Order casts doubt on the validity of visas issued after January 27, 2017, and before the March 16, 2017 effective date.

The March 6 Order allows those from the banned countries to apply for a waiver of the ban on a case-by-case basis as a matter of discretion. To qualify for a waiver, the person must establish to the consular officer or border patrol officer’s satisfaction that not being allowed to enter the U.S. will cause “undue hardship,” that he or she does not present a security threat, and that entry is in the “national interest.” There is no indication in the Order of the process to apply for such a waiver. The Q&A issued on March 6 by the Department of Homeland Security states that eligibility will be determined when making the visa application through the Department of State. When the January 27 Order was in effect, the National Visa Center front-desked applications, and nationals of the banned countries who had visa interview dates at consulates were told that their interviews were cancelled. The January 27 Order also allowed for an officer to grant entry on a case-by-case basis if “in the national interest,” but in practice, there was no way to get in front of the officer to make one’s case. The March 6 Order appears to pose a similar problem.

Although framed as a “temporary” ban to allow the administration to put in place a program of “extreme vetting,” the January 27 Order and the March 6 Order are not designed to be temporary. Under the January 27 Order, the president would have issued a proclamation on April 27, 2017, listing the countries that had failed to provide the yet-to-be-determined additional information necessary for extreme vetting, and the ban on entry of nationals from these countries would remain in place until there was compliance. The March 6 Order similarly contemplates that 70 days from March 16 (May 25), the president will issue a proclamation regarding the countries that remain subject to the ban.

In February 2017, Department of Homeland Security Secretary John Kelly testified to Congress that several of the countries are likely to stay on the list for an extended period of time, because they are unlikely to provide the information needed for extreme vetting. Secretary Kelly also said that he did not believe that new countries would be added. However, by the terms of the March 6 Order, the list of countries can be expanded without notice to include the nationals of other countries. In addition, the 120-day ban on refugee entries can also be extended.

The January 27 Order carved out special preference for minority religions in the admittance of refugees—on a case-by-case basis, to be determined by the immigration officer. Appearing on the Christian Broadcasting Network on January 27, President Trump confirmed that priority is to be given to Christian refugees over Muslim refugees. The March 6 Order omits this specific preference, although the prior January 27 Order and President Trump’s statements remain as evidence of the general intent of the revised March 6 Order.

Court challenges

On February 3, 2017, the Federal District Court in the Western District of Washington granted a Temporary Restraining Order (TRO) to suspend the January 27 Order’s application nationwide, while the court determined its constitutionality. The administration appealed the TRO to the 9th Circuit Court of Appeals, which upheld it. The administration’s motion for an emergency stay was denied. On March 8, the administration’s unopposed motion to voluntarily dismiss the appeal was granted, and as a result, the January 27 Order is no longer in effect.
The March 6 Order goes into effect on March 16, revoking and replacing the January 27 Order. The new Order likely resets the table for new litigation to start. The state of Hawaii has already moved for a TRO on the March 6 Order, citing similar constitutional and statutory concerns as those raised by the prior Order. The states of Washington and Minnesota also appear ready to challenge the March 6 Order.

The Order’s stated purpose and its effect

The administration has stated in both the January 27 Order and March 6 Order that the Order was necessary in the name of national security. Its stated purpose is to “prevent infiltration by terrorists or criminals.” However, both orders install a ban that applies, in unprecedented fashion, across the board to millions of individuals who could not possibly be terrorists or criminals.

The government to date has cited no immediate event as the basis of the Order that supports its issuance. It could not cite one to the 9th Circuit Court, or any evidence at all, for why the ban was necessary. In the March 6 Order, the government cites as examples cases that lack a rational connection to the countries listed or to the refugee program. For instance, the March 6 Order cites to two Iraqi nationals who were sentenced for terrorism-related crimes, but Iraq is no longer on the list of banned countries. It also cites as an example a U.S. citizen who grew up in the United States and self-radicalized in the U.S., who was convicted of planning a terrorist act; the tenuous connection to this March 6 Order is that as a young child the person came as a refugee from Somalia. The administration’s own Department of Homeland Security intelligence unit (in a recent memo leaked on February 24, 2017) found that country of citizenship was an “unlikely indicator” for terrorist threats against the United States.

The March 6 Order has a 10-day notice period, not going into effect until March 16, 2017, likely to avoid the procedural chaos of the first Order, which played out in airports nationwide and internationally. Substantively, this second ban will likely have the same disruptive effect. The following Minnesota-specific examples illustrate difficulties created by the January 27 Order, which appear unchanged by the March 6 Order:

- Rochester-based Mayo Clinic reported that the travel ban could prevent approximately 20 patients from receiving life-saving medical care not available in their home countries, and that approximately 80 physicians and scholars associated with the medical center have ties to the seven originally named countries. Iraq has been deleted from the list with the March 6 Order, but other than that, these patients, physicians and scholars face the same challenges and uncertainty of applying for a waiver of the ban on a case-by-case basis.

- The University of Minnesota (U of M) and Macalester College, mentioned in the Minnesota Attorney General’s lawsuit against the first Order, remain affected. Students and faculty feel they have no freedom of movement, and have no reasonable expectation of being able to return to the U.S. to continue their studies if they leave, as the March 6 Order and the DHS Q&A reflect that new visas and waivers will need to be applied for, if visas expire during the ban, which could likely be of infinite duration, depending on your country of nationality. By signaling to the best and the brightest that they are not welcome in the U.S., the Order has a significant immediate financial impact on higher education, because foreign students often pay full tuition, in addition to the long term economic impact.

- Minnesota families will be kept apart unnecessarily. Minnesota has a large population of U.S. citizens originally from Somalia, who have successfully petitioned for immediate family members to enter the U.S. Although these petitions have been approved by the Department of Homeland Security, under the terms of the March 6 Order, it does not seem likely that these family members, including elderly parents, spouses, and young sons and daughters, will be reunited with their U.S. citizen relatives in the foreseeable future, unless they are granted “unusual hardship” waivers in the consular officer’s discretion, through a system that is unclear.

- Refugees who are fleeing governments based on persecution will likely be unable to come to the U.S. indefinitely, unless they can prove on a case-by-case basis that their entry is “in the national interest,” which is undefined and at the discretion of the immigration officer. The Order does not create any exception for young children. Under the January 27 Order, a four-year-old refugee from Somalia who was appropriately vetted, was originally not allowed on the plane to join the rest of her family here in Minneapolis, until the TRO was in place. The March Order does not provide significant relief from this type of situation.

Both the January 27 and the March 6 Orders are an unconstitutional overreach of executive power

More importantly than its ill-conceived implementation, President Trump’s January 27 and March 6 Orders are inconsistent with other immigration laws established by Congress and violate the U.S. Constitution. The Immigration and Nationality Act (INA) in 8 U.S.C. §1182(f) allows the president to suspend the entry of people or groups when he finds that entry of those people or groups “would be detrimental to the interests of the United States.” The March 6 Order also claims authority under section 8 U.S.C. §1185(a)(1), which requires that non-U.S. citizens enter and depart the U.S. in conformance with rules and regulations subject to limitations and exceptions prescribed by the president. These are broad powers, but they are not without constitutional constraints.

No president has ever used §1182(f) to institute a broad ban across the board on the entry of all citizens of six countries and all refugees. Presidents, instead, have used it with much greater care and consideration for the countervailing statutory and constitutional issues involved. President Reagan invoked 1182(f) to suspend the entry of Cuban nationals to the U.S., in direct response to Cuba having suspending outbound migration, and Reagan’s order had several broad categorical exceptions that are not present here. The other oft-cited example for the president’s power under this provision is Executive Order 12807, which instructed the Coast Guard to return undocumented Haitians caught on the high seas who had not yet reached U.S. waters back to Haiti—another specific response to a specific concern.

Importantly, no U.S. president prior to President Trump has ever publicly called for a Muslim ban, and then, in his first week of office, issued an Executive Order
While non-U.S. citizens who have immigration, courts have not found that have broad discretion in the realm of recognized that Congress and the executive judicial review is incorrect as a matter of these types of Orders are not subject to Courts can review these types of Orders
The executive branch’s claim that these types of Orders are not subject to judicial review is incorrect as a matter of law. While courts have generally recognized that Congress and the executive have broad discretion in the realm of immigration, courts have not found that these actions were beyond judicial review. While non-U.S. citizens who have never been to the United States have been found not to have a constitutional claim when denied admission, U.S. citizens, lawful permanent residents (LPRs), people in the U.S., and people with the right to return to the U.S. may seek judicial review of Orders that violate their rights.
Both Orders conflict with the INA’s anti-discrimination provisions and the due process clause
The president’s use of §1182(f) and §1185(a)(1) here directly conflicts with the antidiscrimination provisions established by Congress in the Immigration and Nationality Act, since the Order seeks to ban the issuance of immigrant visas for nationals of the six named countries. Congress has made clear regarding the issuance of immigrant visas that “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s… nationality, place of birth, or place of residence.” Congress listed specific exceptions to §1152(a)(1)’s anti-discrimination prohibition and did not list §1182(f) (President Trump’s basis for the Order). Because Congress drafted §1152(a)(1) after §1182(f) or §1185(a), under the rules of statutory construction, Congress did not intend for the President to use §1182(f) or §1185(a) in a manner inconsistent with its prohibition on discrimination based on nationality, place of birth, or place of residence—which the January 27 Order did, and the March 6 Order, on its face, still does. In prohibiting discrimination in the issuance of immigrant visas, Congress protected the constitutional equal protection and due process rights of U.S. citizens and U.S. LPRs, as well as the individuals to whom the immigrant visas would be issued. In Section 8 U.S.C. §1153(a), Congress created a system that enabled U.S. citizens and LPRs to sponsor their close relatives. U.S. citizens and LPRs are likely to have family members of the same nationality or place of birth as their own. An action that prevents U.S. citizens and LPRs from sponsoring relatives solely based on their nationality or place of birth, such as the Order, impinges on the rights of the U.S. citizen and LPRs in violation of §1152(a)(1) as well as the constitutionally protected rights of family unity. See Bustamonte v. Mekashey (“Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause”).
While the March 6 Order provides a waiver in section 3(c)(iv) for individuals seeking an immigrant visa, it imposes a new requirement of demonstrating “undue hardship” which is not present in §1152(a)(1), and which is not imposed on individuals from other countries. This additional imposition is itself necessarily discriminatory and not consistent with the language in §1152(a)(1). Temporary visa holders also have due process rights under the 5th Amendment
International students, scholars, employees, and others legally in the U.S. from the banned countries who are on temporary visas have a claim that the Order deprivesthe of the ability to travel outside the United States without due process under the 5th Amendment. All persons in the United States, without regard to immigration status, have due process rights under the 5th Amendment. Non-immigrants, such as students, are not considered to have a protected due process property right in their visa, and so, in a case challenging the Order, the Massachusetts Federal District Court did not find that the students had a reasonable chance of success on their due process claim. In its focus on property interests, the court in that case misses the issue. As the 9th Circuit correctly held, it is not about a property right, but instead whether the person’s 5th Amendment protected liberty interest (freedom to travel) has been impacted by the Order without due process.
While the March 6 Order attempts to address these rights, it has some clear blind spots, and it is also has the overall problem of not being supported by any rational basis, as outlined above. The due process rights of individuals with valid visas issued after January 27, 2017 and before March 16 also remain affected, although the administration attempts to address this in the Q&A. Even with the waiver provision, it will be difficult for students, scholars, and employees who are relatively new to the U.S. to gain entry under the ban, as the waiver section sets as examples of “undue hardship” cases where the person has long-standing contacts with the U.S., either through work or school. The March 6 Order and the Q&A also make clear that nationals of the banned countries will have to go through the waiver process to renew their visas to travel internationally, if they are in need of a new visa during the suspension period, even if they are currently in the U.S. on a valid visa. Accordingly, the March 6 Order does not address the affected employee or student lawfully in the U.S. who would like to travel internationally, but faces additional hurdles based on their country of nationality.
The freedom to travel is not insubstantial. The best and the brightest from other countries come to the United States to study, teach, and research, and work in important fields including health and business. This freedom to travel in and out of the U.S. for these important temporary visa holders is important to the economic and social welfare of our state and nation.
Religious discrimination

In the State of Washington case, Minnesota and Washington have asserted an important and central constitutional challenge to the January 27 Order, stating that it violated the establishment clause of the 1st Amendment and the equal protection clause, because statements by President Trump and his advisors indicate that the Order is intended to disfavor Muslims. The March 6 Order continues to target the same Muslim majority countries with the exception of Iraq, which was dropped for geopolitical reasons. Even though the Orders might appear to be facially neutral on religion, it must be invalidated if the intent has the effect of favoring one or more religions (e.g., non-Muslim faiths) over another (e.g., Muslims). Additionally, there is a related equal protection challenge to the Order on the basis that discrimination against Muslims was a motivating factor for its issuance.

Looking beyond the four corners of the Orders

The courts can and should consider evidence of intent to discriminate from outside the four corners of both Orders. The Justice Department has cited precedents holding that inquiry beyond the face of the Order is improper, because the president has provided a facially legitimate and bona fide reason for it. The administration has not provided a facially legitimate and bona fide reason for this broad exercise of authority, but in any event, in Kerry v. Din, Justices Kennedy and Alito recognized that “an affirmative showing of bad faith” on the part of the government official would be sufficient to look behind the facially legitimate and bona fide reason set out by the Court in Kleindienst. Given the public statements by the President and his advisors, an inquiry into the intent behind any stated reason is warranted here.

The last legal chapter on the January 27 Order and the March 6 Order has yet to be written. The January 27 Order has been blocked because at this initial stage, the states of Minnesota and Washington have demonstrated that they have a substantial chance of success on the merits of their legal and constitutional objections to the January 27 Order.

The new March 6 Order attempts to address many of the due process objections raised by the 9th Circuit concerning the January 27 Order, but it does nothing to address the violation of the establishment clause or the violation of § 1152(a). The new March 6 Order, by reducing the number of affected individuals, may make it more difficult as a practical matter to challenge in court. Nevertheless, we predict that affected individuals whose rights have been denied by this new version will challenge it. We will keep you updated as those cases proceed.
Notes

2 January 27 Order, Sections 5(a); 5(c).
3 January 27 Order, Sections 3(c); 3(g).
5 March 6 Order, Section 6(a).
6 March 6 Order, Section 2(e).
7 March 6 Order, Section 14.
8 March 6 Order, Section 3(a). It is unclear whether those who obtained a visa after January 27th but before March 16th are admissible without a “waiver.” The Order suggests that the valid visa must have been obtained prior to 5 pm Eastern on 1/27/2017, but the QA issued by DHS suggests that those with a valid visa issued prior to the effective date of the new order, 3/16/2017 at 12:01 am EST, are also admissible. https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states
9 March 6 Order, Section 3(b)(i)-(vi).
10 March 6 Order, Sections 3(c); 6(c).
11 QA from DHS regarding the March 6 Order, issued the same date - https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states
12 January 27 Order, Sections 3(g); 5(e).
13 January 27 Order, Section 3(e).
14 March 6 Order, Section 2(e).
15 March 6 Order, Section 2(e).
16 March 6 Order, Section 6(a).
17 January 27 Order, Section 5(e).
21 January 27th Order, Section 3 (c).
22 State of Washington v. Trump, No. 17-35105, Order, at 27 (9th Cir. 2/7/2017).
23 March 6 Order, Section 1(h).
24 March 6 Order, Section 1(f).
25 March 6 Order, Section 1(h).
27 8 U.S.C. 1182(f).
28 See Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (the power of the other branches over immigration “is subject to important constitutional constraints”); Boumediene v. Bush, 553 US 723, 765 (2008) (the “political branches” lack “the power to switch the Constitution on or off at will”).
29 See Pres. Procl. 5517 (8/22/1986) (did not apply to family-based immigrant petitions, special immigrant visas or Cubans who had been outside Cuba a year).
31 “Rudy Giuliani says Trump asked him how to make a ‘Muslim ban’ legal,” Quartz Media 1/29/2017 https://iq.com/897616/rudy-giuliani-says-donald-trump-asked-how-to-make-a-muslim-ban-legal/; At the House Committee on Homeland Security, in the Committee Hearing for Department of Homeland Security Secretary John Kelly, Chairman McCaul stated, “Let me say first, I agree with the policy of the Executive Order. It is consistent with a memo I drafted to then Candidate Trump with Mayor Giuliani and Attorney General Casey advocating a shift from a Muslim Ban, which he was campaigning on, which we thought was unconstitutional, to rather an enhanced vetting process of immigrants and refugees based on risk, not religion, from high threat areas.” See 17:58 minute mark of full transcript of committee meeting at https://www.c-span.org/video/?423321-1/homeland-security-secretary-john-kelly-testifies-us-border-security.
35 Din at 2131.
36 See e.g. Din at 2131; Boumediene, 553 US at 765; State of Washington, No. 17-35105, Order, at 13-18.
38 Bustamonte v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008).
39 This precedent was undisturbed in this regard by Kerry v. Din, 135 S.Ct. 2128 (2015), because five justices did not reach the question of “whether a citizen has a protected liberty interest in the visa application of her alien spouse.” Id. at 2139 (Kennedy, J., concurring).
43 March 6th Order, Section 3(c)(i) and 3(c) (ii).
44 March 6th Order, Section 3(a) and 3(b); DHS QA regarding the March 6th Order, of the same date. https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states
45 See Larson v. Valente, 456 U.S. 228, 244 (1982).
47 See Kleindienst, 408 U.S. at 770.
48 Din, 135 S.Ct. at 2141 (Kennedy J. Concurring).
49 Id.
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COMMERCIAL AND CONSUMER LAW

JUDICIAL LAW

Precision is required. Uniform Commercial Code (UCC) §9-406, as a general rule, protects the account debtor on an account, chattel paper or a payment intangible (see UCC §3-602 for the negotiable instrument rule) by allowing the discharge of the payment obligation by paying the assignor in the event of an assignment until the account debtor receives a notification authenticated by the assignor or the assignee that the amount due or to become due has been assigned and that payment is to be made to the assignee.

What does this notice need to look like? Clearly, it needs to reasonably identify the rights assigned, UCC §9-406(b)(1), and, if requested by the account debtor, the assignee also must furnish reasonable proof of the assignment. UCC §9-406(c).

Official Comment 3 elaborates on this, and provides that a reasonable identification need not identify the right to payment with specificity, and if an account debtor has doubt as to the adequacy of a notification, it may not be safe in disregarding the notification and paying the assignor unless it notifies the assignee with reasonable promptness as to the respects in which the account debtor considers the notification defective.

Now comes a recent case from the Washington Court of Appeals, Northwest Business Finance, LLC v. Able Contractor, Inc., where an assignee of accounts sent the account debtor both a UCC financing statement and a notice of assignment. Both documents stated that “all” of the accounts “now owned or hereafter acquired” were assigned. The notice was attached to most of the invoices the assignor sent to the account debtor. The court found this insufficiently specific to obligate the account debtor to pay the assignee all amounts owed to the assignor. First, the financing statement merely provided notice that the accounts were collateral and did not itself assign the accounts. Second, as to the notice, the court held that to reasonably identify the assigned rights, or the amount due, it had to state that each identified account receivable had been assigned.

If Official Comment 3 to §9-406 is to be credited (official comments are prepared by the drafting committee after a UCC article is approved by its sponsors and are intended to discuss what the statutory language was intended to cover to assist in uniform interpretation of that language—see UCC §1-103(a) (3)), the court’s decision has put the burden of clarity on the persons due payment rather than on the account debtor. Accordingly, assigns and assignees would be wise to go the extra mile and provide a notice that describes each item of collateral assigned rather than follow Official Comment 3, unless (and perhaps not necessarily even then) the Permanent Editorial Board—set up by the sponsoring organizations, the Uniform Law Commission and the American Law Institute, to monitor and respond to subsequent developments that may work to lessen uniformity of the UCC—issues a commentary questioning the analysis of the Washington court. But in that regard it may be well to note that the court also pointed out that the security agreement between the assignee and the assignor established that only “acceptable accounts” were assigned to the assignee and allowed the assignee to select, so in that respect the notification was not adequate to advise the account debtor who to pay and thus to protect the account debtor who may not have known about this provision. Northwest Business Finance, LLC v. Able Contractor, Inc., 91 U.C.C. Rep Serv. 2d 1, 2016 WL 6459837 (2016).

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Notes&Trends
CRIMINAL LAW

JUDICIAL LAW

Traffic stop: Vehicle lights must be displayed when raining, regardless of visibility. Respondent’s vehicle was stopped for not displaying lighted headlamps or tail lamps on a rainy afternoon. During the stop, respondent told police a handgun was in the middle console, and respondent was charged with possessing a pistol without a permit. The district court suppressed all evidence obtained from the stop of respondent’s vehicle after finding that it was not supported by a reasonable, articulable suspicion of criminal activity. The state appeals.

Minn. Stat. §169.48, subd. 1(a), requires drivers to display lighted headlamps and tail lamps (1) from sunset to sunrise, (2) when raining, snowing, sleet ing, or hailing, and (3) when visibility is impaired. The district court incorrectly concluded that the statute requires lights when raining only if visibility is also impaired. The statute unambiguously indicates that its provisions are to be considered separately. Under the plain language of the statute, rain alone is sufficient to trigger the light requirement, so the police had reasonable suspicion to stop respondent’s vehicle. Reversed and remanded. State v. Catherine Nyree McCabe, Ct. App. 2/6/2017.

Procedure: For-cause dismissal permitted when prospective juror is not forthcoming. Prior to appellant’s trial for first-degree burglary, kidnap ping, and criminal sexual conduct, the district court required jurors to complete a questionnaire that stated jurors were under oath. Prospective juror K.H. stated on the questionnaire that he was not a U.S. citizen, and appellant signed plea petition included a state ment that his plea was not accurate, voluntary, or intelligent, because his trial counsel provided only vague and inconclusive advice about the immigration consequences of his guilty plea. The postconviction court concluded appellant’s trial counsel’s advice was constitutionally adequate, and the court of appeals affirmed.

The Supreme Court addresses whether counsel was constitutionally entitled to specific, definitive advice about the immigration consequences of pleading guilty. Under Padilla, counsel must inform a noncitizen defendant about the immigration consequences of pleading guilty, and in particular, the risk of removal. If the applicable immigration law is “succinct and straightforward,” counsel must affirmatively advise a defendant that the plea will subject them to automatic deportation. If the law is unclear, counsel must advise their client that the charges may carry a risk of adverse immigration consequences.

The Court declines to decide whether counsel must review only the relevant immigration statutes, or also all relevant court decisions and administrative interpretations of the statutes in determining if the law is clear or not, because the Court concludes that the immigration consequences of appellant’s conviction were not truly clear under either view. The immigration statutes render a noncitizen presumptively deportable for the commission of an “aggravated felony,” but are not clear about which offenses qualify as aggravated felonies. It is not clear whether third-degree criminal sexual conduct falls within the statute’s broad classification of “sexual abuse of a minor.” Looking to case law and administrative interpretations of the statute does not provide the necessary clarification. Therefore, appellant’s trial counsel was not required to do more than provide a general warning about the immigration consequences of entering a plea, which he did. Affirmed. Francisco Herrera Sanchez v. State, Sup. Ct. 2/22/2017.

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ Due process; failure to exhaust remedies. The director of a wellness program at the University of Minnesota failed in his assertion of violation of procedural due process after he was investigated for a complaint of sexual harassment. The 8th Circuit Court of Appeals, upholding a decision by U.S. District Court Judge Donovan Frank in Minnesota, ruled that the claimant did not exhaust his administrative remedies to entitle him to injunctive relief. Raymond v. Bd. of Regents of the Univ. of Minn., 847 F.3d 585 (8th Cir. 2017).

■ Reprisal claim; poor performance bars lawsuit. The general manager of a fast food store in Vadnais Heights lost his discharge case based upon alleged retaliation under the Minnesota Human Rights Act, because the record reflected that the employer’s dissatisfaction with his job performance preceded any protected activities by the manager. The 8th Circuit, affirming a decision by U.S. District Court Judge Joan Erickson in Minnesota, also ruled that there was no genuine issue of material fact whether the termination was pretextual, which warranted granting summary judgment. Siden v. Chipotle Mexican Grill, Inc. 846 F.3d 1013 (8th Cir. 2017).

■ FMLA, retaliation claims; insufficient evidence of pretext. An employee who claimed discrimination in violation of the Minnesota Human Rights Act and retaliation under the Family & Medical Leave Act (FMLA) had the claims dismissed on grounds that there was insufficient evidence that his termination, due to poor performance, was pretextual. The Minnesota Court of Appeals, upholding a decision of the Ramsey County District Court, ruled that a supervisor statement provided some “weak” evidence of discriminatory motive, but there was insufficient evidence that the determination was pretextual in light of the poor work performance, and there was no evidence that other employees were treated more favorably in light of the two customer complaints against him. Clarke v. Northwest Respiratory Servs., LLC, 2017 U.S. App. LEXIS 93 (8th Cir. 01/30/2017) (unpublished).

■ Sex and age discrimination; claims dismissed, sanctions reversed. A claim by a Minnesota Department of Commerce employee of sex and age discrimination due to her dismissal was properly dismissed, although sanctions imposed against her attorney were reversed. The appellate court upheld the determination by the Ramsey County District Court that there was insufficient evidence of pretext, but sanctioning her attorney constituted an abuse of discretion and was overturned. Kandt v. Minn. DOC, 2017 U.S. App. LEXIS 101 (8th Cir. 01/30/2017) (unpublished).

■ Unemployment compensation; “medical necessity” inapplicable. An employee who quit her job due to a medical condition was denied unemployment compensation benefits on grounds that the “medical necessity” provision of the unemployment compensation law, Minn. Stat. §268.095, subd. 1(7), did not apply. The appellate court, upholding the decision of the Department of Employment & Economic Development (DEED), held that the medical section provision did not apply because the employee had not requested an accommodation for her medical condition and her request for time off was granted before she quit. Johnson v. Viking Magazine Servs., 2017 U.S. App. LEXIS 104 (8th Cir. 01/30/2017) (unpublished).

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ENVIRONMENTAL LAW

ADMINISTRATIVE ACTION

■ Trump orders change to the Clean Water Rule. President Donald Trump issued an executive order (EO) on 2/28/2017 directing the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers to review and rescind or revise the Clean Water Rule: Definition of “Waters of the United States” (WOTUS). The Clean Water Rule at issue was promulgated under the Obama administration on 6/29/2015 and adopted the assertion of jurisdiction over waters of the United States based on mere hydrologic connection to navigable waters, which was a significant expansion of the definition of WOTUS under the Clean Water Act. The rule arguably eliminated any constraints that the term “navigable” placed on the EPAs and the Corp’s jurisdiction previously. Critics said this meant that few, if any, waters would fall outside federal control.

The rule was challenged in court repeatedly in different jurisdictions and ultimately was suspended in 2016 by a nationwide stay imposed by the 6th Circuit. Opponents included business interests such as farmers, oil and gas producers, fertilizer and pesticide producers, and land developers.

Calling the Clean Water Rule “one of the worst examples of federal regulation, and it has truly run amok,” President Trump is requiring review of the rule to consider the ruling in Rapanos v. United States, 547 U.S. 715 (2006). Because five of the justices in that opinion rejected the broad assertion of jurisdiction adopted by the Obama administration’s rule, Trump’s EO requires review in light of the plurality opinion in that case.

The process for reviewing the rule could take years. Legal experts also predict that a rescinded or revised rule resulting from this EO will be subjected to just as many legal challenges as the previous rule, so it may be many years before the issue is settled.

■ EPA to reconsider greenhouse gas emission standards. One of the last moves of the Obama Administration’s EPA was to issue a determination in January 2017 to not change the greenhouse gas (GHG) emission standards for cars and light-duty trucks in model years 2022-2025. The standard was set to increase fuel economy to the equivalent of 54.5 mpg for cars and light-duty trucks by model year 2025.

Trump’s EPA countered this move by announcing on 3/15/2017 that it will work with the U.S. Department of Transportation to review this determination. EPA Administrator Scott Pruitt stated, “These standards are costly for automakers and the American people. We will work with our partners at DOT to take a fresh look to determine if this approach is realistic. This thorough review will help ensure that this national program is good for consumers and good for the environment.”

The deadline for the reconsideration is April 2018. If the EPA chooses to change the approach of the previous administration as a result of the reconsideration, a public comment period for the new proposal will be required.

■ EPA and OSHA raise civil penalties maximums. In mid-January, the U.S. EPA raised the civil penalties for violations of environmental compliance programs for the second time in six months. The EPA used to adjust these penalties once every four years, but under a new federal program the adjustment is done annually. The new maximums are as follows:

- RCRA Hazardous waste storage, management, and disposal: $71,264 per day, per violation;
- Clean Air Act: $95,284 per day, per violation;
- Clean Water Act: $1,386,525 per day, per violation;
- NPDES permit: $35,571 per day, per violation;
- NPDES effluent limitation guidelines: $14,228 per day, per violation;
- RCRA Corrective action: $35,571 per day, per violation.
Clean Water Act: $52,414 per day, per violation;
Safe Drinking Water Act: $54,789 per day, per violation;
TSCA Chemical Regulations: $38,114 per day, per violation;
EPCRA and CERCLA Chemical Emergency Preparedness and Reporting: $54,789 per day, per violation;
FIFRA Pesticide Regulations: $19,057 per day, per violation.

The Occupational Safety and Health Administration (OSHA) likewise increased its penalties as follows:
Serious or Other-Than-Serious Conduct, Failing to Abate: $12,675 per violation;
Willful or Repeated Conduct: $126,749 per violation.

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Family Law

Standard for modifying parenting time. In a published decision, the Minnesota Court of Appeals held that parenting time may be modified based on the child’s best interests and without showing a change in circumstances if the modification does not amount to a restriction of parenting time.

The parties’ stipulated dissolution decree, entered in May 2013, granted them joint legal and joint physical custody of their children. Father worked as an airline pilot and the decree provided that he would have parenting time when he was not working and that the parties would have equal parenting time. In September 2015, mother brought a motion seeking an order granting her parenting time on two weekends per month. She alleged that father had bid his work schedule in a way that allowed him to work during the week, resulting in mother not having any weekend parenting time with the children. The district court granted mother’s motion and father appealed.

Father argued that the district court had erred in modifying parenting time without first finding that a change in circumstances had occurred. Mother argued that this was not the legal standard and that she did not need to show any change in circumstances, only that the modification she requested would serve the children’s best interests. Citing the language of Minn. Stat. §518.175, subd. 5, the court of appeals agreed with mother and held that no showing of changed circumstances is required and that parenting time may be modified based on the child’s best interests.
on a best interest determination so long as the modification does not constitute a restriction on parenting time. Father also argued that the parenting time provisions of the decree should have been accorded greater deference because they were the result of the parties’ agreement. The court of appeals rejected this argument, reasoning that once the stipulation was adopted by the district court it merged into the dissolution judgment and thus was treated as a judgment and not as a contract. *Shearer v. Shearer*, ___ N.W.2d ___ (Minn. Ct. App. 2017).

### Calculation of child support; PICS; health insurance plans; dependency exemption allocation

The court of appeals issued a published decision that provides guidance on three discrete aspects of calculating child support: the application of the guidelines where the parties’ monthly combined parental income for child support (PICS) exceeds $15,000; evaluating the cost of competing health insurance plans; and allocating dependency exemptions.

In adjudicating child support, the district court found that the parties’ monthly combined PICS was $16,868 and used that figure in applying the guidelines to determine basic support. This resulted in father owing mother basic support of $424 per month. Father challenged this on appeal, arguing that the district court erred by failing to limit the combined PICS amount to $15,000. The court of appeals affirmed because, while there is a statutory cap on the amount of basic support to be apportioned between parents—$1,883 per month—there is no limit on the combined PICS. Father’s argument was illogical because using the actual combined PICS amount was necessary to allow the district court to properly allocate between the parties their respective shares of the combined basic child support amount of $1,883 per month.

Father also challenged the district court’s decision that the child would be covered by mother’s insurance policy instead of father’s policy. The parties agreed that their policies provided comparable coverage and their dispute centered on which policy was more affordable. Father’s insurance premium was $64 per month while mother’s insurance premium was $127 per month. However, mother’s deductible was only $150 while father’s deductible was $3,000 (but it could be reduced to $1,450 through employer and employee contributions). The district court reasoned that each policy’s affordability would be driven by the child’s health needs and that mother’s policy would be less expensive if the child’s medical expenses were high. On appeal, father argued that the district court’s consideration of co-pays and deductibles was speculative. The court of appeals noted that under the statute, insurance coverage is affordable if it is reasonable in cost. Thus, the district court properly exercised its discretion in evaluating costs based on not only the monthly premiums, but also co-pays and deductibles.

The parties were granted joint legal and physical custody and equal parenting time. The district court initially granted each party the right to claim various tax benefits for the child in alternate years. But after motions for amended findings, the district court ordered that the dependency exemption would be claimed by whichever parent did not qualify to file as head of household. On appeal, father argued that the district court had exceeded its authority because father earned a higher income than mother and had equal parenting time.

The court of appeals disagreed with father for a variety of reasons and affirmed the district court. Under the Internal Revenue Code, the custodial parent is the parent who has custody of the child for a greater portion of the year. But the Code permits the custodial parent to waive the right to claim the dependency exemption in favor of the noncustodial parent. The court of appeals noted that Minn. Stat. §518A.38, subd. 7(a) reinforces this as well by permitting district courts to allocate the right to claim the dependency exemption between parents. The district court correctly determined that it was not possible to know which parent would qualify to file as head of household in a given year because the order for equal parenting time did not necessarily mean that each parent would actually have the child in their care for the same number of overnights. The district court considered the value to each party in claiming the dependency exemption and in filing head of household and concluded that, under the circumstances, it would be best to allow each parent to enjoy some tax benefit each year. The district court made findings to support its decision based on the four factors at Minn. Stat. §518A.38, subd. 7(b).

The court of appeals rejected father’s argument that the Code preempted Minnesota law. Minnesota law clearly permitted the district court to allocate dependency exemptions to the noncustodial parent. And the district court’s methodology requiring the parties to determine which one of them would be able to file head of household did not violate the Code or Minnesota law: *Hansen v. Toden*, ___ N.W.2d ___ (Minn. Ct. App. 2017).

### Child care support; prospective child care expenses

The parties’ 2012 dissolution judgment reserved the issue of child care support for the parties’ two children. In 2015, mother brought a motion in district court to establish father’s child care support obligation and submitted a child care plan and rate sheets for various child care options. The district court heard arguments on mother’s motion and then referred the dispute to the CSM. Mother supplemented her motion by submitting to the CSM checks and receipts relating to the child care expenses she incurred since filing her initial motion. Regarding summer child care expenses, mother submitted (1) a spreadsheet of care options; (2) a rate sheet for a summer camp; (3) a signed statement from an in-home childcare provider stating the provider’s rate and two cash receipts showing past payments; (4) a copy of deposit checks for two summer camps; and (5) a copy of a check mother wrote to her own mother for watching the children for a week. Regarding school-year child care expenses, mother submitted a spreadsheet showing care options and a school-registration form showing the cost of the program.

The CSM denied mother’s motion because it found that mother had provided rate sheets and estimates but no documentation showing the amount she had spent on actual childcare expenses. The district court denied mother’s motion for review and mother appealed.

Father argued on appeal that Minn. Stat. §518A.40, subd. 3(a) requires documentation of child care expenses already incurred and that the lower court correctly denied mother’s motion because she had only presented documentation reflecting the cost of prospective child care options. The court of appeals disagreed and reversed the district court. The statutory reference to “documentation of child care expenses” was not limited to past child care expenses and could also encompass prospective child care expenses. Additionally, requiring an obligee to incur and pay child care expenses before seeking reimbursement would not necessarily be feasible for some obligees and would be inconsistent with public policy and would be inefficient for the judiciary. The CSM’s determination that documentation of child care expenses is limited to past expenses was error, as was the CSM’s finding that mother had not provided documentation of amounts she had actually paid for child care. The court of appeals remanded the case for further proceedings based on its decision. The court of appeals also specifically instructed the CSM to address various arguments father had
made relating to the weight and credibility of mother's documentation. This was because the CSM had not expressly addressed father’s arguments and it was unclear to the court of appeals whether the CSM had considered and rejected father’s arguments or whether it had not addressed them because it determined mother’s motion was defective on other grounds. Beckendorf v. Fox, ___ N.W.2d ___ (Minn. Ct. App. 2017).

Domestic abuse; application of hearsay rule. In a published decision, the Minnesota Court of Appeals reversed a district court’s issuance of an order for protection (OFP) that was based solely on hearsay.

Mother obtained an ex parte OFP on behalf of her two children, ages ten and eight, against their father based on her petition containing the following allegations: (1) the children began crying when mother told them they would be going to father’s home and one of the children hyperventilated; (2) mother brought the children to see a therapist who, after meeting with the children alone, advised mother that the children should not go to their father’s home because he did not understand the children’s issues and was having an impact on their mental health; (3) the ten-year-old told the therapist and mother that father slapped the eight-year-old across the face and tells the children that there will be “severe consequences” if the children report father’s behavior. Mother’s petition also alleged that she had reported father’s slapping the eight-year-old to child protection but that no action was taken because the slap did not leave a mark. Mother also alleged in her petition that father had spanked the ten-year-old when the ten-year-old was a baby and had initially lied about the incident.

A hearing was held in which father’s attorney argued that the case should be dismissed because the allegations were hearsay and did not constitute domestic abuse. Mother, appearing pro se, presented a letter from the children’s therapist. Father objected to the letter as hearsay and the district court sustained the objection. Mother’s testimony at the hearing was very limited. The district court invited her to talk about anything that was not already in her petition and she did not offer any testimony other than describing her efforts to work out the issue with father.

The district court issued the OFP and specifically found that father had struck at least one of the children on at least one occasion, that father threatened the children with severe consequences, that
mother observed concerning behaviors in
the children, and that the children had
been emotionally abused by their father.

The court of appeals reversed and
remanded for further proceedings.
The court noted that the Minnesota Rules
of Evidence apply in actions under the
Minnesota Domestic Abuse Act. No
evidence had been presented that would
have allowed the district court to make its
factual findings of abuse; such find-
ings could only have been based on the
hearsay allegations in the petition. No
hearsay exceptions applied and it was er-
ror for the district court to rely on hear-
say in making its finding that domestic
abuse had occurred. Olson v. Olson, ___

FEDERAL PRACTICE

JUDICIAL LAW

Certiorari granted; 28 U.S.C. §1367(d);
effect of statutory toll. The Supreme
Court has granted certiorari in a case
that raises the issue of whether the
tolling provision in 28 U.S.C. §1367(d)
suspends the limitations period for
supplemental state law claims while the
claims are pending in federal court
and for 30 days thereafter, or whether
the tolling provision only provides 30
days for the plaintiff to refile following
dismissal. Artis v. District of Columbia,
135 A.3d 334 (D.C. 2016), cert. granted,

There is a stark divide among the
courts that have decided this issue, with
the Minnesota Supreme Court previ-
ously holding that 28 U.S.C. §1367(d)
results in a suspension of the statute of
limitations while the federal action is
pending. Goodman v. Best Buy, Inc.,
777 N.W.2d 755 (Minn. 2010).

Certiorari granted; timeliness of ap-
§2107(c). The Supreme Court has granted
certiorari in case which raises the issue of
whether Fed. R. App. P. 4(a)(5)(C) can
deprive a court of appeals of jurisdiction
over appeals that are statutorily timed.

While the 8th Circuit has not ad-
dressed this issue, four circuits have held
that Fed. R. App. P 4(a)(5)(C) deprives
courts of jurisdiction over appeals that are
timely under 28 U.S.C. §2107(c), while
two circuits have held that Rule 4(a)(5)
(C) is a non-jurisdictional claim process-
ning rule. Hamer v. Neighborhood
Housing Servs., 835 F.3d 761 (7th Cir. 2016),

Class action; attorney’s fees; fund
administration costs. The 8th Circuit
held that a district court did not abuse
discretion in basing an attorney’s fee
award in a class action on the total value
of a settlement fund which included
more than $3 million in fund administra-
tion costs. Huyser v. Buckley, ___ F.3d
___ (8th Cir. 2017).

Fed. R. Civ. P. 23.1; proper treatment of
motion to terminate litigation. Affirming
an order by Chief Judge Tunheim that
terminated a shareholder derivative
action on the basis of a special litigation
committee’s report, the 8th Circuit held
that the “closest fit” for such motions is
Fed. R. Civ. P. 23.1(c) rather than
Fed. R. Civ. P. 12(b)(6) or 56, and that
district court rulings on motions to ter-
minate litigation are to be reviewed for
abuse of discretion. Kokocinski ex rel.
Medtronic, Inc. v. Collins, ___ F.3d ___
(8th Cir. 2017).

Inadequate privilege log leads to
waiver of attorney-client privilege.
Overruling objections to an order by
Magistrate Judge Brisbois, Judge Mont-
gomery applied the five-part test govern-
ing claims of attorney-client privilege in
a corporate setting, and found that the
plaintiff had failed to meet its burden
to establish that an allegedly privileged
document had not been shared with
those without a “need to know.” Judge
Montgomery also rejected the plaintiff’s
attempt to expand the record with an
additional declaration that explained
the role of each of the individuals it had
failed to identify earlier. Peerless Indem.
Ins. Co. v. Sushi Avenue, Inc., 2017 WL
631547 (D. Minn. 2/15/2017).

Fed. R. Civ. P. 26(b)(4)(B); discovery of
expert’s materials. Judge Nelson found
that an annotated bibliography complied
by the plaintiffs’ expert that was refer-
enced in the expert’s report was a draft
not subject to discovery pursuant to Fed.
R. Civ. P. 26(b)(4) (B). In re NHL Play-
ers’ Concussion Injury Litig., 2017 WL
684444 (D. Minn. 2/21/2017).

Motion to remand; amount in
controversy; contractual attorney’s
fees. Judge Frank denied the plaintiff’s
motion to remand, finding that the
amount in controversy including
contractual attorney’s fees exceeded
$75,000, and rejecting the plaintiff’s
argument that only statutory attorney’s
fees could count toward the amount
in controversy threshold. Geronimo
Energy, LLC v. Polz, 2017 WL 758924
(D. Minn. 2/27/2017).

Certiorari granted; 28 U.S.C. §1404(b); motion for intra-
district transfer denied. Overruling
the bulk of the parties’ objections to
an order by Magistrate Judge Brisbois,
Chief Judge Tunheim affirmed the denial
of the plaintiffs’ motion to transfer an
action from the Sixth Division in Fergus
Falls to the Fourth Division in Minne-
apolis, and also found that an argument
not raised by the plaintiffs before the
magistrate judge was “unconvincing.”
Bombardier Recreational Prods., Inc. v.
Arctic Cat Inc., 2017 WL 690186 (D.
Minn. 2/21/2017).

Opposition to summary judgment;
failure to include citations to the record.
Granting the defendants’ motion for
summary judgment in an employment
discrimination case, Judge Kyle criticized
the plaintiff’s “repeated[... ] factual as-
sertions without citation to the record,”
and considered “only those portions of
the record cited by [the plaintiff].”
Mears v. Flint Hills Resources, LLP,

INTELLECTUAL PROPERTY

JUDICIAL LAW

Licensing: Doctrine of merger does
not apply. The United States Court
of Appeals for the 8th Circuit recently
held that the doctrine of merger did not
apply to intellectual property licenses.
ACI Worldwide filed a declaratory
judgment action against Churchill Lane
in the District of Nebraska arguing that
it validly amended and terminated a
licensing agreement. ACI licensed a suite
of credit card fraud detection software
from the predecessor of Churchill
in 2001 in which ACI agreed to pay
royalties on sublicenses granted by ACI
even if the licensing agreement was later
terminated. In 2014, ACI acquired the
rights to the licensed software and the
licensing agreement from a group that
purchased the rights from a receivership
after Churchill’s predecessor became
insolvent. ACI then unilaterally
terminated the licensing agreement and
ceased paying royalties. ACI argued
that Churchill was only entitled to the
royalties due the licensor and that the
licensor had been extinguished through
merger. In this way, ACI attempted
to apply the doctrine of merger from
real property easements to licensing
of intellectual property. No case authority,
however, was found applying the
doctrine of merger to licenses of patents or other intellectual property. The court further noted that the doctrine of merger does not apply when merger would impair the intervening rights of a third person, in this case Churchill. The court concluded that because merger does not apply, Churchill is still entitled to royalties for all sublicenses ACI granted before the termination date. ACI Worldwide Corp. v. Churchill Lane Assocs., No. 16-1736, 2017 U.S. App. LEXIS 1489 (8th Cir. 1/27/2017).

Patent: Evidence of intent for induced infringement. Judge Nelson recently granted summary judgment of no induced patent infringement. Luminara Worldwide sued Canadian company Abbott for infringement of flameless candle patents. Luminara initially accused Abbott of inducing infringement (35 U.S.C. §271(b)). A claim of induced infringement requires a patent owner to prove an “accused inducer took an affirmative act to encourage infringement with the knowledge that the induced acts constitute patent infringement.” A cease-and-desist letter can be used to establish knowledge of infringement. Luminara had sent a cease-and-desist letter to Abbott in February 2012. As proof of inducing acts, Luminara claimed that it had purchased an infringing candle from one of Abbott’s third-party retailers. The purchase, however, occurred before the February 2012 cease-and-desist letter and, therefore, could not be evidence of inducement because the purchase was made prior to Abbott having the required knowledge of the patent and infringement. Luminara also argued that a January 2012 Facebook response to a customer’s inquiry as to when the infringing candles would be available in the United States that said “...look for an infringing candle in Canada that ships to the U.S.” constituted active inducement. The court found that the comment did not rise to the “sort of specific intent to cause direct infringement” as is required to prove inducement. The court also found that the Facebook post was not evidence of inducement because it too occurred prior to the February 2012 cease-and-desist letter. Therefore, Luminara had not established material facts that Abbott had the necessary intent to induce infringement. Luminara Worldwide, LLC v. Liown Elecs. Co., No. 14-cv-3103, 2017 U.S. Dist. LEXIS 17132 (D. Minn. 2/6/2017).

PROBATE & TRUST LAW

ADMINISTRATIVE ACTION

IRS notice confirms transcripts may serve as alternative to estate closing letters. IRS Notice 2017-12 announces that an estate account transcript with a transaction code of “421” can serve as the functional equivalent to an estate closing letter. Transaction Code 421 on a transcript means the estate tax return (Form 706) has been accepted as filed or that the examination is complete. The description for Code 421—“Closed examination of tax return”—will be the same in all instances, regardless of whether the return was accepted as filed or closed upon completion of audit. Tax professionals may utilize the IRS online procedure to register to obtain estate account transcripts from the Transcript Delivery System (TDS). You must first register for IRS e-Services in order to enroll in TDS. Requests for transcripts will only be processed if a properly executed Form 2848, Power of Attorney, or Form 8821, Tax Information Authorization, is already on file with the IRS. Transcripts can also be requested by fax or mail using Form 4506-T, Request for Transcript of Return. The IRS will only issue a closing letter upon request of the taxpayer. Authorized representatives of the estate may call the IRS at (866) 699-4083 to request an estate tax closing letter four months or more after filing the estate tax return. Requests for transcript (whether through TDS or use of Form 4506-T) or closing letter should not be submitted until at least four months after filing the estate tax return. Additional information, including instructions on how to register for TDS and how to complete requests for transcripts using TDS or Form 4506-T, can be found at https://www.irs.gov/businesses/small-businesses-self-employed/transcripts-in-lieu-of-estate-tax-closing-letters.

TAX

JUDICIAL LAW

Charitable contributions: Tax court serious about substantiation requirements. The United States Tax Court denied a taxpayer’s claimed charitable deduction for his alleged gift to a charitable organization of a partial interest in a 40-year-old airplane. The taxpayer acquired the airplane in 2007, when he and an LLP each paid $21,000 for a 50% undivided interest. In 2010, he filed a
return and did not claim any deduction. In 2016, however, the taxpayer filed an amended petition alleging that on December 31, 2010, he had donated his 50% interest in the airplane to an eligible organization (the court had given the taxpayer permission to amend). Taxpayer alleged that his 50% interest had been appraised at $338,080. The relevant section of the Code requires specific substantiation for charitable contributions of used vehicles, including airplanes, if the claimed value exceeds $500. IRC 170(f)(12). The substantiation requirement is a strict one, and the doctrine of substantial compliance does not apply to excuse the failure to meet the statutory requirements. In this case, the tax court determined that none of the taxpayer’s proffered documents satisfied the contemporaneous written acknowledgement requirement (CWA). First, the taxpayer did not attach a Copy B of Form 1098-C to his amended return because the donee organization did not complete or file a 1098-C in connection with the alleged gift. A thank you letter the taxpayer included did not meet the CWA standard because it was not addressed to the taxpayer and did not include required categories of information. Although the taxpayer included an “Aircraft Donation Agreement” akin to a deed of gift, the aircraft donation agreement did not qualify as a CWA in this instance, again, because it did not contain sufficient relevant information. A skeptical court declined to “read together” multiple documents offered several years after the alleged gifts; further, even if the court were willing to “read together” the documents, there was “no contemporaneous document” sufficient to satisfy the CWA requirement. Izen v. Comm’r, No. 28358-12, 2017 WL 809946 (T.C. 3/1/2017).

Responsive petitioner. Appellant Axelson appealed the Minnesota Commissioner of Revenue’s determination on administrative appeal that assessed over $70,000 in additional Minnesota individual income tax, penalties, and interest for tax years 2009 through 2013. On appeal, Axelson asserted he had documents demonstrating expenses to reduce his net income and tax liability. However, appellant, a pro se litigant, failed to respond to commissioner’s discovery requests and subsequent letters for this documentation. In response, the commissioner filed for summary judgment. Prior to the hearing for the commissioner’s motion, appellant retained counsel. The summary judgment hearing was deferred to give appellant’s counsel time to prepare. Later, appellant’s counsel withdrew without responding to the motion. Because Axelson failed to produce any evidence to rebuts the commissioner’s assessment, he failed to overcome the prima facie validity of the commissioner’s order. Thus, the motion for summary judgement was granted. Axelson v. Comm’r of Revenue, No. 8839-R (Minn. T.C. 2/28/2017).

Personal income tax and child tax credit. In this Minnesota Court of Appeals case, two divorced parents were in dispute over the allocation of certain child tax benefits; this summary addresses only the tax benefit claims, although there were several issues on appeal. The district court ordered that the parent who did not qualify for the head of household status for a given year be entitled to claim the dependency exemption. The court of appeals held that the district court properly evaluated the relative resources of the parties and the potential benefits and affirmed the district court’s decision.

The parenting plan between Mr. Hansen and Ms. Todnem gave both parents joint legal and joint physical custody along with equal parenting time. Mr. Hansen had a higher income than Ms. Todnem. The district court ordered that the parent who did not qualify for the head of household status for a given year be entitled to claim the dependency exemption. Ordinarily, a parent receives head of household status and a dependency exemption if a qualifying child has his or her principal place of abode for more than one-half of the taxable year at that parent’s house. See I.R.C. §§2(b)(1) (2012), 151(a)-(c). In this case, the child spent exactly half the year with each parent. Federal law provides a tie-breaker in §152(c)(4)(B): The child is treated as the qualifying child of “(i) the parent with whom the child resided for the longest period of time during the taxable year, or (ii) if the child resides with both parents for the same amount of time during such taxable year, the parent with the highest adjusted gross income.”

The district court did not apply the tie-breaker rule and instead chose to use an order and waiver process, pursuant to I.R.C. §152(e), to allocate the dependency exemption to the parent who was not able to claim head of household status. Section 152(e)(2) provides that the custodial parent is entitled to the dependency exemption unless the custodial parent signs a written declaration waiving the right to claim the child for the taxable year and the noncustodial parent attaches a copy of that waiver to his or her tax return.

The court of appeals determined that allocating the head of household and dependency exemption between the two parties was the most equitable result because each parent would receive some benefit. The court of appeals denied each of Mr. Hansen’s arguments: (1) that the Internal Revenue Code requires the party with a higher gross income to receive the benefits, (2) that the district court was preempted from deciding the issue, (3) that the district court failed to make appropriate findings to support its decision.

Under federal law, the implied conflict preemption doctrine provides that federal law preempts a state law if “it is impossible for a private party to comply with both the state and federal requirements” or if “the state law stands as an obstacle to the accomplishment and execution of the purpose and objective of Congress.” Gretsch v. Vantium Capital, Inc., 846 N.W.2d 424, 433 (Minn. 2014). The court of appeals determined that the district court’s order did not violate either test because federal law allows for allocation. Congress also intended reduced involvement by the IRS in dependency disputes between parents.

Finally, Hansen argued the district court failed to make appropriate findings to support its decision as required under Minnesota law. The court of appeals considered the four-factor test under Minnesota law: (1) the financial resources of each party; (2) a parent’s ability to provide for a child if not awarded the exemption; (3) whether one party or both parties would receive a tax benefit from the exemption; and (4) the impact of the exemption “on either party’s ability to claim a premium tax credit or a premium subsidy.” See Minn. Stat. §518A.38, subd. 7(b)(1)-4 (2016). The court of appeals held that the district court properly evaluated the factors by considering the relative resources of the parties and the potential benefits that will result from the exemption. Hansen v. Todnem, 2017 Minn. App. LEXIS 28 (Minn. Ct. App. 2017).

Looking Ahead

Changes to health care law potentially impact 2016 filing. The U.S. House Republican health care plan released in early March—the American Health Care Act—does away with the individual mandate and employer mandate. The proposed plan would make the repeal retroactive to January 2016. For the moment, though, current law requires coverage and neither the Service nor the Legislature has issued any guidance that...
would permit taxpayers subject to the mandate penalty to avoid penalties for noncompliance.

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TORTS & INSURANCE

JUDICIAL LAW

No-fault; amount of claim for jurisdictional requirement. Plaintiff was injured in an automobile accident. At the time of the accident, plaintiff was insured under a policy issued by defendant providing for $20,000 in coverage for no-fault medical-expense benefits. After defendant had paid $14,548.26 in benefits, plaintiff commenced litigation seeking additional benefits as a result of $30,942.15 in unpaid medical bills. Defendant moved for summary judgment, alleging that the district court lacked jurisdiction because the amount in controversy did not exceed the $10,000 jurisdictional limit provided in Minn. Stat. §65B.525, subd. 1. The district court denied the summary judgment motion.

The Minnesota Court of Appeals reversed. The court noted that the Minnesota No-Fault Automobile Insurance Act provides for mandatory arbitration “of all cases at issue where the claim at the commencement of arbitration is in an amount of $10,000 or less against any insured’s reparation obligor for no-fault benefits.” The court rejected plaintiff’s contention that the amount of her “claim” was the total amount of unpaid medical expenses. While the statute does not define “claim,” the court reasoned that it could be no more than $5,451.74—the amount remaining under the insurance policy issued by defendant. In the words of the court: “While [plaintiff] may be ‘asking for’ more than $10,000 in medical expenses, she cannot ask for more than $5,451.74 from [defendant] because her policy provides $20,000 in coverage... In other words, [plaintiff] has no ‘right enforceable by a court’ to recover any more than the $5,451.74 in no-fault medical-expense benefits remaining under her insurance policy.” Jansen v. State Farm Mut. Auto. Ins. Co., A16-0916 (Minn. Ct. App. 2/21/2017). http://mn.gov/law-library-stat/archive/ctappub/2017/OPa160916-022117.pdf

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In Memoriam

JAMES M. CAMPBELL, age 67, of St. Paul, passed away on February 10, 2017. Jim was a graduate of William Mitchell Law School ('75). He joined the Attorney General’s staff under Warren Spannaus and worked for the state as a prosecutor for several years. In 1988, he was appointed to the Ramsey County bench by Gov. Rudy Perpich and retired in 2002.

TOM GRUNDOEFER died unexpectedly on February 19, 2017. He was 60 years old. He spent 30 years with the League of Minnesota Cities, rising through the ranks to become the league’s general counsel, manager of its research department, and associate executive director.

GEORGE M. KENEALEY SR., age 85, passed away on March 1, 2017. Kenealey practiced law in Minneapolis until his retirement in 2010. He had a great passion for law and proudly served as an attorney for the Knights of Columbus in Bloomington, the American Legion in Richfield, and the VFWs in Richfield and Bloomington, among other treasured clients.

CARTER JAY BERGEN, age 64, died on March 5, 2017. He attended law school at William Mitchell College of Law. He was an attorney in Woodbury and a football coach at Woodbury High School.

LISA K. PLUTO, age 48, of Dodge Center, died on March 8, 2017. She practiced with Pluto Legal, PLLC, focusing on medical assistance and estate planning. Lisa left three children of school age. A fund has been established to pay for their college education.

Donate: Anyone who would like to contribute to this fund may send a contribution by check payable to the Pluto Children Education Fund c/o Pluto Legal, PLLC, 100 E. Highway 14, Tyler, MN 56178.

STEVEN M. RINGQUIST and BRADLEY M. SCHAEFFER joined Hellmuth & Johnson as associates. Ringquist’s practice covers corporate law, finance, securities, and real estate law. He has over a decade of legal and business experience, and is admitted to practice in both Minnesota and Texas. Schaeff’s practice includes real estate and business law. He holds certification as a MSBA Board Certified Real Property Law Specialist.

MELISSA MURO LAMERE has been appointed to the Board of Directors of the Minnesota Infinity Project. The Infinity Project’s mission is to increase the gender diversity of the state and federal bench to ensure the quality of justice in the 8th Circuit. Muro LaMere is an attorney in the litigation group at Maslon LLP.

AUDREY FENKIE has joined Stinson Leonard Street LLP as a partner in the employee benefits group. Fenke counsels publicly and closely held clients on compensation and benefits matters both in the U.S. and abroad.

KEVIN DOOLEY joined the Minneapolis office of Dorsey & Whitney LLP as a partner in the business department. Dooley advises institutional providers of debt and equity capital in connection with private middle-market mergers, acquisitions, divestitures, and recapitalizations.

MELISSA MURO LAMERE

NICHOLAS O’CONNELL was elected as a partner of Meagher & Geer. O’Connell represents corporate entities and their insurers in commercial litigation, including employment, product liability, professional liability, construction, coverage, extra-contractual/bad faith, and personal injury defense.

MICHAEL D. HOWARD is now a qualified neutral under Rule 114 of the Minnesota General Rules of Practice. Howard is the chair of the business and corporate department at Hellmuth & Johnson. Supplementing his practice, Howard’s mediation work will focus on corporate, commercial, and bankruptcy mediations.

DAVID D. CHERNER joined the creditors’ remedies and bankruptcy team at Moss & Barnett, A Professional Association. Cherner counsels creditors, debt buyers, collection law firms, collection agencies, and other businesses engaged in accounts receivable management on compliance with federal, state, and local credit and collection laws.

Robins Kaplan LLP announced that principal attorney BRANDON VAUGHN was named to the 2017 Leadership Council on Legal Diversity (LCLD) fellows program, which identifies, trains, and advances the next generation of leaders in the legal industry. Additionally, associate attorney AMELIA EL SHAKEEF was selected to the 2017 class of Pathfinders, an LCLD program designed to train early-career attorneys in critical career development strategies.
David Aafedt

David Aafedt was elected chairman of the board of directors and president for the Federation of Regulatory Counsel (FORC). He has been a member of FORC since 2008, and has been a board member since 2013, including serving as vice-chairman of the board in 2016. Aafedt is a shareholder and board member at Winthrop & Weinstine, PA.

Charissa Perzel Hall

Charissa Perzel Hall joined Jeffrey P. Scott & Associates, LLC as an associate attorney. Hall graduated magna cum laude from University of St. Thomas School of Law in 2015. She will practice in the areas of estate planning, elder law and probate.

Dorsey & Whitney LLP

Dorsey & Whitney LLP announced that Rebecca Bernhard will serve as the firm’s new diversity co-chair. Along with co-chair Cornell Leverette Moore, Bernhard will oversee the firm’s efforts to promote diversity and inclusion in its lawyers and staff around the world. Bernhard is a partner at the firm, focusing her practice in labor & employment.

David L. Hanson

David L. Hanson has been appointed Clearwater County Attorney. He will fill out the remainder of the term vacated by Rick Mollin, who retired March 10, 2017. Hanson is a 2007 graduate of the University of St. Thomas.

Kevin M. Busch and Timothy L. Gustin

Kevin M. Busch and Timothy L. Gustin were reelected to three-year terms as members of the board of directors of the law firm of Moss & Barnett, A Professional Association. Busch serves as the firm’s chief operating officer, is chair of the firm’s commercial department and the banking and commercial transactions practice area. Gustin serves as the chair of the board, and is the chair of the firm’s multifamily and commercial real estate practice area.

Lousesen M. Hoppe

Lousesen M. Hoppe is among the 11 new board members named to the National LGBT Bar Association and Foundation, the country’s largest organizations of lesbian, gay, bisexual, transgender, and allied legal professionals. Hoppe will serve a two-year term. Hoppe is a litigator and criminal defense attorney at Fredrikson & Byron PA.

Tom Vasaly

Tom Vasaly, executive secretary of the Board on Judicial Standards, will retire on June 30 after 43 years in the practice of law. He will continue to provide services to the Judicial Board and other organizations on a contract basis.

The Ramsey County Bar Association

The Ramsey County Bar Association honored retired Judge Joanne Smith and Curt Goering with the 2017 Law Day Awards presented at the RCBA Judges’ Dinner on March 23 at the Town & Country Club. Hon. Smith, retired Ramsey County judge, received the Distinguished Humanitarian Service Award and Goering, executive director of Center for Victims of Torture, received the Liberty Bell Award.

Robins Kaplan LLP

Robins Kaplan LLP named partner Jason Pfeiffer as chair of its business litigation practice group. Based in the firm’s Minneapolis office, Pfeiffer represents a broad range of clients, both defendants and plaintiffs, in commercial and product litigation cases. Additionally, the firm has announced its 2017 executive board. Martin Lueck has been re-appointed chairman of the executive board, and Steven Schumester has been re-appointed managing partner.

Best & Flanagan LLP

Best & Flanagan LLP announced that Gregory Perleberg and Norman Taple have joined the firm as partners and John Sullivan has joined as an associate attorney. Perleberg joined the intellectual property and business law practice groups, Taple is a member of the real estate and business law practice groups, and Sullivan has joined the litigation practice group and supports the intellectual property, construction, and employment practice groups.

Kevin P. Goodno

Kevin P. Goodno was recently appointed to the Bush Foundation’s board of directors. The board comprises up to 15 leaders from across the region who bring a wealth of experience and expertise in the public, private, and nonprofit sectors. Goodno is a shareholder at Fredrikson & Byron PA and serves as government relations counsel for clients in the areas of health care, social services, and tax policy.

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ASSOCIATE. You are smart and worked hard in law school and undergrad to get good grades. You worked real jobs in your life so you know how good lawyers have it. You want to be the best player on the team, but you know that the team comes first. You are smarter than most people around you, but smart enough not to tell them that you believe that. You want to do complex and interesting deals, but don’t want be someone’s lackey for ten years first. You don’t need to park downtown Minneapolis and look out the window of the 40th floor to have confidence. You like to be close to the Cities for weekend dinners and events, but you don’t want to spend two hours in traffic every time it snows ½ an inch. Transactional real estate, business, tax or estate planning law interests you. And, you have the ability to see that a law firm is a business that you could have a part of growing. If this sounds like you, then you should work with us. Send your resume to: Rinke Noonan, ATTN Ann Entenmann, P.O. Box 1497, St. Cloud, MN 56302. For more information, please review the firm’s website at: www.rinkenoonan.com/careers/

ASSOCIATE attorney position general practice for our Little Falls Office. Negotiable compensation and partnership potential in an active practice. Please send resume by email or U.S. Mail as follows: tpearson@gqlaw.net, Mail: Gammello, Qualley, Pearson and Mallak, 14275 Golf Course Drive, Baxter, MN 56425.

ATTORNEY 1. The Minnesota Department of Revenue is seeking qualified individuals to fill an Attorney 1 position. This position will provide legal counsel to the Collection Division. How to Apply: To view the job posting, go to the State Careers website at: www.mn.gov/careers, then enter Job ID 12118 in Keywords search. Your application must contain sufficient detail to determine qualifications. If you are unable to apply online, please contact the job information line at: (651) 259-3637.

JUDICIAL Board. The Minnesota Board on Judicial Standards seeks applicants for the position of executive secretary following the announcement of the pending retirement of current Executive Secretary Thomas C. Vasaly. Applications are due by April 28, 2017. By law, the executive secretary must be licensed to practice law in Minnesota and have at least fifteen years of experience in the practice of law, including any service as a judge. The current salary is $125,300 plus state employee benefits. The position is full-time. For more information, including a position description and application directions, visit the Board’s website at: www.bjs.state.mn.us. For questions, contact Board Search Committee Chair, William J. Wernz at: Wernz, William@dorseyalumni.com, (612) 340-5679, or by mail at: 50 South Sixth Street, Minneapolis, MN 55402.

BERNICK LIFSON, PA, a business law firm, is looking for an associate attorney with three to five years’ experience in commercial litigation, with an emphasis on representation of creditors as well as landlord tenant law. The right person for our firm is smart, practical and results-oriented with the capacity to serve existing clients, as well as a desire to develop and grow their own practice, and be comfortable in the court room and handling all aspects of litigation independently. We offer a competitive compensation and benefits package in an atmosphere of respect and support. Please send cover letter, resume and professional references to Laurie Blum at: lblum@bernicklifson.com. No phone calls, please.

FREDRIKSON & BYRON, PA has an immediate opening in its Intellectual Property Litigation department for an associate with two to four years of litigation experience. The ideal candidate will have IP-specific litigation experience. A technical background is helpful but not required. We seek highly motivated individuals with excellent interpersonal, analytical, and writing skills, along with strong academic and professional credentials. Apply online at: www.fredlaw.com/careers. EEO/AA

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**Messerli & Kramer** PA is a mid-sized downtown Minneapolis law firm. We have an associate attorney opportunity in our business services group focusing on banking and creditors rights, including foreclosures. Our team is growing and we’re looking to train you. Ideal candidate will have two to three years of experience in commercial lending transactions. This will include: drafting loan documentation, title and survey review and reviewing due diligence materials. Experience with the mortgage foreclosure process, by advertisement and action, post-sheriff’s sale procedures such as redemption period reduction actions, proceedings subsequent and eviction proceedings a plus. Must have solid organizational skills, the ability to prioritize and multitask, ability to interface with clients, and work independently with minimal supervision. Please contact Michelle Bunde: mbunde@messerlikramer.com

**Osseo Area** Schools seeks general counsel to contribute to strategic and tactical organizational leadership by providing legal services and advice to the Superintendent, School Board and School District administrators. [www.mnbenchbar.com/2017/03/general-counsel/](http://www.mnbenchbar.com/2017/03/general-counsel/)

**Paralegal / Jr. Attorney** - Stearns Bank NA, St. Cloud, MN, is seeking a paralegal or junior level, in-house Corporate Attorney. The ideal candidate has practiced law or worked for two to three years with law firm of 50+ attorneys, with background in corporate law, secured transactions, commercial transactions and litigation, collections, creditors’ rights and bankruptcy. Banking law experience and representation of lenders and financial institutions a plus. Duties: Support Assistant General Counsel and General Counsel in managing a comprehensive range of legal matters. Provide direction, guidance and assistance on legal matters to Assistant General Counsel, General Counsel and management. Research legal issues and statutes/regulations, and brief Assistant General Counsel, General Counsel and management on research and recommendations. Provide recommendations and legal support in potential litigation and loan documentation, secured transactions, and lender rights, remedies and recourse. Engage and manage outside counsel. Qualifications: Juris Doctor (JD) from an accredited law school or paralegal degree. Licensed to practice in Minnesota (if attorney). Strong critical thinking and analytic skills. Ability to synthesize information and communicate efficiently and effectively. Top-notch legal research and writing skills. Extremely resourceful and ability to prioritize and manage a large workload of diverse matters. Email resume to: Resumes9@stearnsbank.com. For more information about Stearns Bank please visit our website - [www.stearnsbank.com](http://www.stearnsbank.com). EOE/AAP

**Reichert Wenner**, PA a general practice law firm in St. Cloud, MN has immediate openings for two associate attorneys with at least two years’ experience. One associate position would be handling civil litigation, personal injury and workers’ compensation matters. The other associate position would be handling corporate, business and real estate matters. The Candidates should have strong research, writing, and client communication skills. Submit cover letter, resume and writing sample to: lmiller@reichertwennerlaw.com.

**The Office** of the Minnesota Attorney General is accepting resumes from attorneys with civil litigation experience and exceptional writing and communication skills. The office represents the state of Minnesota and its citizens in complex and important lawsuits. Our lawyers get both significant “hands on” litigation experience and the chance to positively impact Minnesota. Qualifications: Our selection process is competitive. Applicants should have successful civil litigation experience, academic credentials, outstanding research and analytical abilities, sound judgment and character, and a good work ethic and professional deportment. Applicants must have the talents and motivation to effectively represent the public with a high level of professionalism and to put forth the very best work for the people of Minnesota. Employment with this Office may make applicants eligible to have student loans forgiven after a period of service and payments. Applications: You may submit a cover letter and resume that includes your relevant academic and legal experience as follows: Office of the Minnesota Attorney General, Attention: June Walsh, Suite 900, 445 Minnesota Street, St. Paul, MN 55101, ag.jobs@ag.state.mn.us. The Office of the Attorney General is an equal opportunity employer. If you need reasonable accommodation for a disability, please call June Walsh at: (651) 757-1199 or (651) 297-7206 (TTY).

**This Position** with the Metropolitan Council will manage the Office of General Counsel, and provide legal counsel and representation to the Council and staff; will direct and supervise legal staff; and retain and supervise outside counsel for specific assignments as needed. This is an appointed position and serves at the pleasure of the Metropolitan Council. Applications received on or before APRIL 10, 2017, will be given preference. Education and Experience: Juris Doctor degree from an American Bar Association accredited institution; currently licensed to practice law in Minnesota; has never been suspended or disbarred from practice of law in any jurisdiction; 10 or more years of experience practicing law including substantial experience as legal counsel for a large governmental entity preferred; directly related real estate, government contracts, construction, environment, transit labor & employment law experience is highly desirable; and experience hiring, developing, and managing legal staff including outside counsel. To apply: Applicants must submit the Metropolitan Council’s online employment application – more information and application instructions at: [www.metrocouncil.org](http://www.metrocouncil.org).

**Waycrosse**, a single-family office located in a western suburb of Minneapolis, is seeking an attorney with a JD Degree and five years of experience in corporate, business law and/or securities law. The attorney will be responsible for trust and estate planning, securities and investments, foundation management and compliance, and business contract work. Experience assisting with entrepreneurial efforts including business formation, tax implications and strategic planning preferred. Interested applicants who meet the minimum qualifications may apply by submitting a resume to: humanresources@waycrosse.com.
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ADJUNCT FACULTY positions available. Mitchell | Hamline School of Law is currently hiring for adjunct faculty to teach the Lawyering: Advice and Persuasion skills course starting in fall 2017 and ending in April 2018. This is a six-credit, two-semester, graded course that students take in their first year of law school. Teaching occurs in small classes taught on a part-time basis by practicing lawyers and judges serving as adjunct professors. We are looking for both writing and representation professors in our weekday, evening, weekend, and hybrid programs. Please submit resume, cover letter, and writing sample to MHSL’s Lawyering Program, Attn: Ms. Paro Pope, 875 Summit Avenue, #254, St. Paul, MN 55105; or by email to: paro.pope@mitchellhamline.edu. Candidates participating in the selection process may be asked to complete a marking exercise. Knowledge of course management systems helpful. Members of under-represented groups are encouraged to apply. AA/E OE. The application deadline is May 1, 2017.

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of Iowa College of Law is seeking a Career Services Administrator. This position will provide leadership, direction, and coordination for the Career Services office, reporting directly to the Collegiate Dean. Key areas of responsibility include professional leadership, strategic planning, communication and outreach, career counseling, administrative, financial and human resources responsibility, and operations management. JD and seven years of post-graduate professional experience are required. For more information and to apply for this position go to: http://jobs.uiowa.edu Requisition #70595.

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ATTORNEY COACH / consultant Roy S. Ginsburg provides marketing, practice management and strategic/succession planning services to individual lawyers and firms. www.royginsburg.com, roy@royginsburg.com, (612) 812-4500.

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NEW RELEASES

- **The Oxford Handbook of U.S. Health Law** covers the breadth and depth of health law, with contributions from the most eminent scholars in the field. The handbook paints with broad thematic strokes the major features of American health care law and policy, its recent reforms (including the Affordable Care Act), its relationship to medical ethics and constitutional principles, and how it compares to the experience of other countries. It explores the legal framework for the patient experience, from access through treatment, to recourse (if treatment fails), and examines emerging issues involving health care information, the changing nature of health care regulation, immigration, globalization, aging, and the social determinants of health. This handbook provides valuable content, accessible to readers new to the subject, as well as to those who write, teach, practice, or make policy in health law.
  (Oxford University Press, $175, global.oup.com)

- **Al-Tounsi** is the debut novel by the award-winning playwright, Anton Patigorsky, and tells the story of the US Supreme Court’s handling of a landmark case involving the rights of detainees held in a US military base. The novel follows the case as it maneuvers through the minds and hands of the justices and their own personal lives and crises. It explores in detail how the personal stories and life dramas, career rivalries, and political sympathies of these titans blend with their philosophies to create one of the most important legal decisions of our time.
  (ABA Books, $26.95, shopaba.org*)

- **While the right to have one’s day in court is a cherished feature of the American democratic system, claims that the United States is hopelessly litigious and awash in frivolous claims have become so commonplace that they are now a fixture in the popular imagination. According to this view, litigation wastes precious resources, stifles innovation and productivity, and corrodes our social fabric and the national character. Calls for reform have sought, often successfully, to limit people’s access to the court system, most often by imposing technical barriers to bringing suit. Alexandra Lahav’s *In Praise of Litigation* provides a corrective to this flawed perspective, reminding us of the irreplaceable role of litigation in a well-functioning democracy and debunking many of the myths that cloud our understanding of this role.**
  (Oxford University Press, $29.95, global.oup.com)

- **Legal Asylum** is the latest novel by Paul Goldstein, author of *Secret Justice*. It is a satiric tale of the lengths an ambitious law school dean, Elspeth Flowers, will go to in order to secure her school into the top 5 of the US News and World Report annual ranking of the nation’s best law schools. Success means securing a spot in history as no state law school has ever made it to the top, but at what cost to Dean Flowers, to her somewhat bumbling but well intentioned assistant dean, Jimmy Fleenor, and to the future of the university itself?
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