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Sharing staff

Last year President Sonia Miller-Van Oort chaired the committee that put together the MSBA’s new three-year strategic plan. That plan was adopted by the Assembly on June 29, 2018. The five priorities, in no particular order, have been set as follows:

- The MSBA will expand upon and improve how it uniquely connects and provides a statewide network for all of its members.
- The MSBA will serve as the voice and spokesperson for the legal profession and justice system and proactively communicate its positions and actions to members.
- The MSBA will provide reliable practice tools and resources to practicing members that they cannot otherwise easily or economically obtain or access.
- The MSBA will make operational and administrative changes internally, and in collaboration with other bar associations, to realize greater efficiencies, cost-effectiveness, and better service to members throughout the state.
- The MSBA will incorporate diversity and inclusion best practices into the way the association operates, provides services, and develops leaders.

This month I want to bring you up to date on how we are approaching the goal of making operational and administrative changes to become more efficient and provide better service to all of our members. Five years ago, members of the executive committees and executive directors of the MSBA, HCBA, and RCBA got together to discuss ways we could all operate more efficiently. I am going to summarize five years of discussions in a few sentences—so forgive me, or thank me, if I leave out a few details.

Everyone agreed there were significant opportunities in this area. For example, if we have one team doing all of the publications for all three organizations it would be more efficient and produce a more cohesive product. It would work well if all three organizations would share staff to serve all of our members. The points of contention focused on organizational identity and mission. Each organization wanted to continue to provide its own unique programs and services. Needless to say, the talks stalled.

Now let’s fast forward five years. At the beginning of 2018, MSBA Associate Executive Director Nancy Mischel asked me, as the president-elect of the MSBA, if I was interested in the shared staff concept. When I thought about my response I knew two things. I knew talks on this subject had gone nowhere for years, and I knew that life is too short to work on projects that will never happen. So, I asked Nancy, “Why would I want to spend time on a project that is going nowhere?” That’s when she told me things had changed. She told me all three groups had come to the realization that we can share staff and maintain our individual organizational identities. When she told me that, I told her I was all in on the project.

At this point the project to form a shared staff has taken significant steps. The MSBA, HCBA, and RCBA have all adopted a resolution authorizing a “shared staff model” that combines the executive director and staffs of MSBA, HCBA, and RCBA into a single staff. We are now past the discussion phase and into the implementation phase. The resolution authorizes the formation of a Joint Coordinating Committee. Each organization has appointed three members to the committee. I will be on the committee along with two MSBA members from greater Minnesota, Dyan Ebert and Bob Enger. Dyan and Bob were specifically chosen to make sure our members from greater Minnesota will have representation during this entire process.

Now, and after the transition to a shared staff, the MSBA will serve all of our members throughout the state.

The charter for the Joint Coordinating Committee is to select one executive director for all three organizations. The committee will set the parameters of the search process, conduct a search, and make a recommendation to each board. The first meeting of the Joint Coordinating Committee is set for July 23, 2018. The goal is to have the new executive director in place by the time Tim Grossenhans retires in January 2019.

This shared staff system will be good for the MSBA and all of our members. It will allow us to provide member services and support in a more efficient manner. We will be able to eliminate overlapping programs, create flexibility, and maximize resources. I am excited to be part of this change.
EFFICIENCY IS KING

Working with businesses has always been attorney Bryan Zlimen's passion, and as a current and past small business owner he uses his experience to help guide clients to the best choices. As a recent law school graduate, he started his firm Zlimen & McGuiness, PLLC in 2008 with his close friend Patrick McGuiness and together they focus on working with businesses that have fewer than 50 employees.

Law firms that want to provide legal solutions that are a good fit for their clients must take the time to listen to the client explain how they understand their own issues and how they've been impacted by their challenges. Based on the understanding that legal solutions must be tailored, Bryan Zlimen has consistently practiced this model since he founded his law firm.

CASE STUDY
To learn more about Zlimen & McGuiness, creating tailored legal solutions, and law firm efficiency, read this case study:
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While discussing the substantive law and his insights about the choices and the process, Bryan highlightes the value of tools like the MSBA’s mndocs, which can help lawyers more efficiently deliver quality legal services.

Learn more about mndocs: www.mndocs.com
Update: Minnesota unbundled roster

The Minnesota Judicial Branch recently obtained $50,000 in grant funding from the National Center for State Courts to create an online roster of attorneys interested in providing unbundled legal services. At the request of the judicial branch, MSBA staffers Steve Marchese and Nancy Mischel, along with staff from the HCBA and RCBA, developed a proposal for creating an online unbundled roster. The group decided to build upon each association’s existing LRIS capacities with the goal of creating a single roster that would be accessible via website for clients and attorneys, refer clients to attorneys based upon pre-existing screening criteria (including subject matter and geographic location), and could track the outcomes of referrals.

Attorneys participating in the roster must complete training requirements (including attending a two-hour live kick-off CLE session on ethics and business models scheduled for August 14), carry malpractice insurance, have no more than one private admonition over their practice careers, and be willing to take at least four referrals from the roster over a year. The MSBA will also establish an online community for participants to share advice and practice tips.

Over 30 attorneys—some of whom currently provide unbundled services—have expressed interest by signing up to participate in the August 14 training. We anticipate the roster will go live this fall. In 2019, a statewide triage portal for all litigants (currently in development) will connect to the unbundled roster, thereby enabling potential clients to obtain referrals directly based upon screening criteria on the portal website.

Petition update: Rules for Admission to the Bar

The Minnesota Supreme Court is accepting comments on the MSBA’s Petition to Amend the Rules for Admission to the Bar to allow certain qualified law students to take the bar exam prior to graduation. Sixteen states already have provisions allowing for an early bar exam. The proposed changes to Rule 4(c) leave in the hands of the law school the decision to certify that a student meets the criteria and is prepared to take the exam early. The MSBA’s recommended amendments will allow students to start paying back student loan debt earlier by increasing their opportunities to begin paid employment immediately upon graduation. Because high student loan debt remains an extreme hardship for many students and attorneys, the MSBA believes it is important for the profession to help address the issue. The MSBA thanks attorneys Michael Boulette, Sarah Soucie Eyberg, and George Henry for drafting the petition.

The court is also accepting comments on the Board of Law Examiners’ (BLE) Petition to amend the Rules for Admission to the Bar with regard to admission on motion based on years of practice. The Court had earlier ordered the BLE to review its published policy interpreting “principal occupation” as full-time or substantially full-time practice of law; to review Rule 7A; and to make recommendations back to the court. The MSBA submitted comments to the BLE arguing that the current rule requires far greater capability than is required to pass the bar exam, and that the rule needs to consider the growing incidence of part-time practice. Many of the MSBA’s recommendations for changes to Rule 7A are incorporated in the proposed amendments now before the Court. The deadline to file comments in both these matters is September 17, 2018.

This month, learn to get more from your membership

From Fastcase to practicelaw, your MSBA membership entitles you to unlimited access to a number of free (or low-cost) resources. Learn more about these valuable practice tools during our Back To School Week webinar series from August 27-30. These free webinars help familiarize you with your member benefits and other tools to help you practice more efficiently and effectively.

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FREE FOR MEMBERS
What makes up a client’s file and how long do I need to keep it? These two questions have been asked frequently on our ethics hotline for decades. Minnesota’s ethics rules speak to the first question but offer no direct guidance on the latter. Let’s review the current lay of the land.

**File contents**

Calling it a client’s “file” is a bit of a misnomer from an ethics perspective. The ethics rules instead frame the question in terms of the “papers and property” to which the client is entitled.1 Surrendering such “papers and property” is part of a lawyer’s ethical duty upon termination of the representation, and it exemplifies our obligation to take steps, to the extent reasonably practicable, to protect a client’s interest after the representation ends.2

Somewhat helpfully, the rule describes what is included within “papers and property.”3 I say somewhat helpfully because while Rule 1.16(e) covers a decent bit of ground, it doesn’t answer every question that comes up when a lawyer is looking at her file and trying to figure out what should be “surrendered.”4 While your best bet is to read the rule, “papers and property” (paraphrased) includes, whether printed or stored electronically:

- everything provided by the client or on behalf of the client to the lawyer;
- pleadings and other litigation materials that have been served or filed, regardless of whether the client has paid for the services involved in creating those documents;
- correspondence exchanged with others; and
- for litigation, all items for which the lawyer has advanced costs and expenses regardless of reimbursement, such as depositions, expert opinions and statements, business records, witness statements, and other items of evidentiary value.

“Papers and property” do not include:

- in non-litigated matters, drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, and any other unexecuted documents that do not have legal effect, where the client has not paid for the services.5 This is the position taken by ABA Opinion 471 (based upon Model Rule 1.16(d)), has long been the position of the LPRB (see LPRB Opinion No. 13), and is generally encompassed within the rule’s mandate to “take steps to the extent reasonably practicable to protect a client’s interest.” Remember, the ethics rule is focused on protecting the client’s interest upon termination of the representation. Surrendering defined papers and property is just one aspect of the obligation. Protecting the client’s interest in a particular case may require you to provide more than just the defined papers and property.

Second, if you do withhold something as not the client’s “papers or property” because it is not paid for, you cannot then assert a claim for fees in drafting the documents.6 This is because Minnesota does not allow retaining liens, which is a lien allowing the attorney to retain a client’s papers or money until the client pays his bill.7 Basically, you cannot hold client documents hostage to get your bill paid. You may not have to give the documents for which payment has not been received to the client, but withholding them means you are relinquishing your right to payment for those items.

A few things are not expressly referenced in the rule. What about attorney notes and similar work product, like chronologies and legal research not reduced to memorandum? Such items appear well within the broadly worded “papers and property” for which the client has paid the lawyer’s fees” set forth in Rule 1.16(e)(1), MRPC. What about administrative documents in the file such as conflict checks, work-in-progress reports, or internal firm communications regarding account creation and creditworthiness? This is also not expressly addressed, but likely such documents would fall outside of “papers and property,” which is the conclusion reached by ABA Opinion No. 471.

**File retention**

Minnesota’s ethics rules are silent as to retention periods for client files. The only retention period referred to in the ethics rules is in Rule 1.15(h), MRPC, which requires that both operating and trust account books and records be retained for six years following the end of the tax year to which they relate or completion of the representation, as applicable.
In 2004, a former OLPR director wrote a column on file retention in this publication, which provides helpful guidance by identifying the issues you should keep in mind when determining what your file retention policies should look like. That article remains relevant today. Since then, however, several states have been amending their ethics rules to specify retention periods for client files.10

For example, Massachusetts’ Supreme Court just approved a comprehensive rule amendment that sets a default six-year retention period for most cases—with specific exceptions such as files involving minors (six years after the minor reaches majority)—and, quite helpfully, addresses file retention standards for criminal defense files, an often overlooked category of documents in writings on this topic. For criminal defense files, Massachusetts’ new rule requires retention for the life of the client if the matter resulted in a sentence of death or life imprisonment, with or without the possibility of parole, and in all other cases, allows destruction without notice to the client 10 years after the latest of: completion of the representation, the conclusion of all direct appeal, or the running of any incarcerated defendant’s maximum period of incarceration.

I really like the specificity of Massachusetts’ rule. It provides a lot of guidance on both file retention and file content. Food for thought for a potential rule change in Minnesota?

Lest I forget, if you do decide not to retain a client file, you should ensure file destruction is managed securely in order to protect client confidences.11

Don’t forget copying costs

In Minnesota, you can charge a client for the reasonable cost of duplicating or retrieving the client file only if the client has, prior to termination, agreed in writing to pay such a charge.12 Also remember that you cannot make the return of the client file contingent on advance payment of copying costs, just as you cannot make return of the file contingent on payment of your fee.13

Minnesota’s Rule 1.16(d) and (e) answer a lot of questions that arise when “surrendering” a client file. I also like what other states are doing to provide greater specificity and assistance to their lawyers. As always, if you have any ethics questions, please call our ethics hotline at 651-296-3952. ▲

Notes
1 Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).
2 Id.; see also Rule 1.15(c)(4), MRPC, “A lawyer shall promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.”
3 Rule 1.16(e), MRPC.
4 Another resource is LPRB Opinion No. 13, which provides a bit more guidance and is still an active opinion, notwithstanding the fact that much of its content has been expressly incorporated into Rule 1.16. Lawyers Professional Responsibility Board (LPRB) Opinion No. 13 (amended 1/22/2010).
5 See generally Rule 1.16(e)(1)-(3), MRPC.
6 LPRB Opinion No. 13; ABA Opinion No. 471 “Ethical Obligations of Lawyers to Surrender Papers or Property to which Former Clients is Entitled” (7/1/2015).
7 Rule 1.6(g), MRPC, “A lawyer shall not condition the return of client papers or property on payment of the lawyer’s fee or the costs of copying the lawyer’s file” LPRB Opinion No. 13; “Board Opinion No. 13 Revisited” by Timothy M. Burke, Minnesota Lawyer (6/12/2020), available on the OLPR website at www.lprb.mncourts.gov/articles.
8 See Village of New Brighton v. Jamison, 278 N.W.2d 321, 324 (Minn. 1979) (holding that legislative revisions to Section 481.13 of Minnesota statutes in 1976 abolished the retaining lien in Minnesota, leaving only a statutory charging lien on causes of action).
11 Rule 1.9(c)(2), MRPC.
12 Rule 1.16(f), MRPC.
13 Rule 1.16(g), MRPC.
E-discovery vs. forensics:
Analyzing digital evidence

Digital evidence continues to be a growing focus of the legal community. In a very real way, digital evidence and its utilization in court can be compared to the advances in the use of DNA science that our courts saw in the last century. In a ubiquitous digital world, digital evidence has applications in almost every case, both civil and criminal. Like DNA evidence, digital evidence has the potential to be absolutely critical in the unfolding of a case. Unlike DNA, it presents the legal community with a moving target. As technologies change, the law has to keep pace with a continually evolving digital landscape. Furthermore, given users’ individual usage patterns, no two cases involving digital evidence will ever be the same.

Internet-connected devices pose significant issues in using digital evidence and understanding the full scope of its applicability. We are no longer contending with just computers. Smartphones, cars, smart devices and appliances, software tools, the cloud, social media, fitness tools, and email are all kinds of data that may be utilized. With respect to all of these separate and yet interlocking technologies, the legal community is held to a very high standard in keeping up and making the most of all available information for their clients. One key aspect of the equation lies in deciding what route is best when it comes to collecting, storing, and ultimately presenting electronically stored information (ESI) in court.

E-discovery versus forensics
As of right now, e-discovery is the primary tool of courts and the legal community when it comes to the use of ESI in the courtroom. E-discovery procedures are quite different from digital forensic services. Each process is ultimately characterized by a different goal. Think of a filing cabinet that contains the files pertaining to your case. An e-discovery investigation is basically going to show what files are inside of the filing cabinet, in a broad format. A digital forensic investigation is going to identify the files as well. But, perhaps more importantly, a digital forensic investigation can also reveal the stories behind the files—who created the files and put them in the cabinet, what has happened to the files since being placed in the cabinet, when the files were created, who has accessed them, and whether any of the files placed in the cabinet are missing. In a digital forensic examination, this type of contextual information is paramount in the presentation of ESI as digital evidence.

This distinction in goals demonstrates the ultimate difference between the processes—namely, that digital forensic examinations seek to provide narratives of digital activity. E-discovery can offer legal teams a dump of digital information, but a forensic investigation offers an understandable, “translated” story. The best digital forensic experts are those who take the most complex technical findings and make them relatable within that framework. The power of the digital evidence will only be as strong as the testifying expert, whose job it is to construct a viable timeline out of objective ESI. E-discovery largely leaves the technical details and establishing the value of the evidence to legal teams.

While digital evidence can serve as a kind of objective witness, giving it a voice can be difficult. When the e-discovery process is chosen to gather such evidence, “getting it to speak” isn’t even a consideration. This job is largely left to the recipients of the information, legal teams that may or may not be well-versed in technical language and the underlying value or meaning of particular pieces of data in the overall timeline of a case. The continuously changing nature of technology and ESI makes this an even more fraught issue.

No fishing expeditions
In addition to the possibility of needing a testifying expert for litigation, digital forensic analyses are helpful in preventing the kinds of ESI “fishing expeditions” that e-discovery procedures often end up pursuing. Protocols for forensic investigations should consider the scope of the analysis, including the number and type of devices involved in a case. This consideration is critical at the outset of a case, since collection and preservation should be conducted immediately. Protocols should also stipulate proper collection techniques, mechanisms for privilege review, cost sharing amongst the involved parties, reporting timelines, and the ultimate disposition of the data.

E-discovery and computer forensics are already fixtures in our legal process. Increasingly, people and companies needing representation use technology in a way that can affect the outcome of litigation. When most of our lives are in some way documented, especially within organizational settings, digital evidence can often be the most salient source of objective information. Our changing technological climate has forced the legal community to adapt to new rules and standards regarding data collection, preservation, and use in court.

Legal professionals have been further charged with understanding how, and to what extent, people use technology, especially as internet-connected devices document a new degree of connectivity and communication. Once attorneys are capable of recognizing the issues pertaining to digital evidence, they are better equipped to leverage computer forensic examinations in building their clients’ cases. In some instances, forensics is becoming a necessity—a means of authoritatively establishing the arc of a case when human voices disagree or dissemble. Narratives of digital activity are much more valuable than heaps of unfiltered data.

MARK LANTERMAN

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

MARK LANTERMAN
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ON DEMAND CLE
Meet Emily Cooper:
‘I get to help people every day’

Why did you decide to go to law school?
I remember a friend looking at me curiously one day when I was in high school and saying, “You should go to law school and be a lawyer.” It’s one of those memories that stands out and shaped my later decisions. Going to medical school was out of the questions since it involves gore, which I cannot handle. Coming from a family with a librarian as a father meant higher education was very important. As a result, law school seemed the best fit for me and that’s what I did.

What resources have helped you build your practice?
I think the best resource has been colleagues, friends, and peers. Having people to talk to about issues in my practice, decisions I have to make, and goals is invaluable. My staff is also a great resource for insight and ideas. On the non-human side, I have used Clio for case management since my firm opened, and I can’t say enough about it when it comes to organization, billing, and data. Another resource that we implemented about a year ago is an answering service, and that has helped the productivity level in the firm tremendously. Some other techy things that we use in the firm are WordPress, Lexicata, Zapier, Google Apps, Dropbox, and Adobe Products. There are a ton more, but these are the main ones.

Your firm is dedicated to meeting the needs of low and moderate-income clients by offering sliding-scale fee services. What are some of the challenges and benefits to this unique structure?
My firm has two practice areas, family law and social security disability, so managing these distinct areas requires different skills and knowledge. Since my client base usually has little money, we also have to be creative in accessing and utilizing resources to facilitate cases. When your client has to decide between paying rent and paying for a custody evaluation that is needed to protect a child, we have to be innovative. The same for social security disability—my clients don’t have the funds to pay for testing and evaluations that might be needed for a claim, therefore we have to work within the parameters we have to find ways to get the evidence we need to get a positive resolution to the case or claim. On the business side, we have to run the firm in the most efficient and economical manner. The benefits definitely outweigh the challenges. I get to honestly say that I am acting on the idealism that many of us had in law school—that we were going into law to help people—and that many had to abandon to pay student loans or because there were no jobs available. I get to help people every day and I feel good about it.

What advice do you have for attorneys considering alternate fee structures?
Idealism and a desire to help people are not enough. You have to run your business like a business. This is true for all law firms, but for those working with moderate or low-income clients as I do, it is even more important.

What opportunities and resources do you find valuable as a member of the MSBA?
The MSBA has so many things available that people may not even realize what they are missing. The forums are a great place to get feedback and information—even if you just lurk and don’t post, you can get great information from other attorneys. Fastcase and practicelaw are amazing resources as well. The sections are a great way to meet and mingle with your peers, keep yourself from becoming isolated in your practice, and find ways to take on leadership roles in the legal community.

EMILY K. COOPER (Cooper Law LLC) is a 1996 honors graduate from the University of Minnesota Law School. In her 22 years of practice she has worked with clients and companies at all levels. She has practiced in the area of civil litigation and family law at a major law firm in Ohio and spent five years working as in-house counsel for a multi-billion dollar corporation, focusing on contract negotiations and drafting. As executive director of the Minnesota Volunteer Attorney Program, she worked to recruit attorneys to provide pro bono representation to low-income clients. She also worked for three years as a staff attorney for a legal aid organization.
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The concept of “risk assessment” in the justice system has proliferated alongside other terms such as “evidence-based practices,” “risk algorithms,” “big data,” and “machine learning.” While these terms and topics are related, they are not all synonymous. Not all risk assessments are created with the same algorithms or use advanced machine learning techniques. And while many criminal justice agencies like probation departments and treatment programs are moving toward evidence-based practices, using a risk assessment does not guarantee the agency has implemented evidence-based practices. The goal of this article is to define and explain risk assessment, summarize the research supporting risk assessment for correctional agencies, and explain the limitations and practical concerns that arise when risk assessment is used in the criminal justice system.
What is risk assessment and how are risk assessment tools created?

In the context of criminal justice, risk assessment generally refers to the measurement of someone’s likelihood of reoffending. However, “risk” is not necessarily linked to offense seriousness. A person who was convicted of a serious offense like murder might present a low risk to reoffend, and conversely, someone who was convicted of committing a low-level offense like theft might be highly likely to reoffend in the future. “Risk” refers to the potential harm posed to the community according to a person’s chances of committing a new offense—any offense—in the future.

Risk to reoffend is measured with a risk assessment tool. Generally these tools take the form of a questionnaire that is completed by the probation officer or other trained assessor either by interviewing the probationer, reviewing the probationer’s file, or both. Each item listed in the questionnaire is a risk factor associated with predicting recidivism. The officer or assessor will complete the questionnaire, scoring each item in accord with specific criteria outlined in a scoring guide. The score is then totaled, and the total score is associated with a risk level, such as low, moderate, or high risk. The risk assessment tool used by federal probation, the Post Conviction Risk Assessment (PCRA), includes 30 items, 15 of which are scored out. The Level of Service Case Management Inventory (LS/CMI), a tool used by community corrections agencies in Minnesota, follows a similar process and includes 43 items.

Risk assessment tools are developed through the statistical analysis of a large number of cases to identify significant correlates of recidivism—factors that have a statistically significant relationship with recidivism. Because large data sets and statistical analysis underlay the development of these risk assessment tools, you might sometimes hear the terms “big data” or “machine learning” to describe them. While risk assessments are developed using large datasets to identify predictors of recidivism, their development can involve selecting risk factors through correlations, analyzing regression models, or employing more advanced, machine learning techniques based on computer science. Not all of these methodologies are the same.

But despite these differences in how the tools are created, the overriding point remains the same: When a large dataset is used to create a risk assessment tool, it produces a statistically significant improvement in estimating risk. We make more accurate predictions using these tools than when we use our own unstructured, clinical judgment. The analysis of a large number of cases can identify common characteristics across people, jurisdictions, situations, and systems more reliably than one person working from a single vantage point: their own position, their own agency, their own professional experience. Using data rather than perceptions can also serve to remove bias, and the algorithms used to develop prediction models allow us to detect patterns more objectively. Even in other fields, research has supported the improvement in prediction that a data-based tool can make compared to unstructured decision-making alone.

How do risk assessments inform evidence-based practices in corrections?

Today, risk assessment tools used in corrections often measure both risk to reoffend and “criminogenic” needs (a term for dynamic risk factors that predict recidivism and can be changed). While older risk assessment tools measured only static risk factors like prior criminal history, newer tools include dynamic factors such as employment, substance abuse, and involvement with antisocial peers. The following section explains how targeting criminogenic needs can reduce someone’s risk and therefore, reduce the likelihood that person will commit a future offense.

Risk, need, and responsivity principles

Risk and needs assessment allows correctional agencies to target supervision and programming in a way that can reduce recidivism among the people they supervise. An extensive amount of research over the past three decades has identified three clear principles for reducing recidivism rates in supervised populations: risk, need, and responsivity.

The first principle, risk, includes a few components. One is that risk to reoffend can be predicted, and supervision intensity should be assigned according to risk. Minnesota community corrections agencies use the LS/CMI to identify the risk level of the offenders they supervise. Higher risk individuals receive more supervision and report more frequently to their probation officers. Similarly, treatment programs should calibrate programming intensity to risk by requiring high risk individuals to engage in more services.

For low risk offenders, conversely, we want to provide minimal interventions. We do not want to mix them with high risk offenders because doing so can actually increase their chances of committing a new crime by providing more exposure to criminal behaviors and techniques. Further, the very things that make someone low risk—such as having employment or family support and noncriminal friends—can be disrupted when excessive conditions and requirements are placed on them. If a low risk person has a job and is involved in their community, requiring them to report every week could jeopardize their employment or their ability to report as required. Risk assessments are crucial tools in helping correctional agencies adhere to the risk principle, because they are more accurate at sorting people.

The second principle is need, which refers to “criminogenic needs,” or those characteristics, traits, problems, or issues that directly relate to the individual’s likelihood to commit another crime. In the LS/CMI, criminogenic needs are categorized into seven areas: self-control/impulsivity issues; employment/education; substance abuse; peers/associates; thinking/values/attitudes; leisure/recreation, and family/marital. When corrections staff are able to target particular criminogenic needs, they are directly addressing factors that will reduce someone’s risk.

The needs information can inform the conditions that should be ordered at the time of sentencing. For example, if someone scored high in the area of substance abuse, the probation officer would want to refer that individual for substance abuse services, and would recommend that the court impose a special condition of probation requiring completion of substance abuse treatment. If that same person also scored high on the domain of companions, the officer would use supervision techniques to monitor the probationer’s associates while also working with that person to develop more positive relationships with noncriminal people in the community. The key for correctional agencies seeking to reduce risk is to use a tool that identifies the needs related to reoffending and then provide services and interventions to address those needs.
Finally, the last principle is responsivity, an important component of the research on risk and needs. One part of the responsivity principle focuses on how treatment is delivered, since there is significant evidence showing that interventions for offenders are most effective when delivered through cognitive-behavioral methods. The other part seeks to anticipate barriers that may prevent individuals from succeeding in treatment, even though these barriers might not be related directly to a person’s propensity to commit crime. Someone who does not have a car to drive to treatment, for example, may not complete it. So while transportation is not directly responsible for their criminal behavior or substance abuse, it presents a barrier to addressing their substance abuse issues.

It is important to stress that risk assessment tools must be accompanied by professional judgment. The professional experiences of people working in the system are still important in applying the principles of risk, need, and responsivity. Sometimes decision-makers and practitioners choose to override a risk assessment or diverge from assessment recommendations; they recognize that risk assessment tools do not account for all situations.

What are the limitations and issues concerning risk assessment?

Despite the research supporting the use of risk assessment for correctional agencies, judges and attorneys should be aware that there are limits to and concerns about their usefulness in other areas of the criminal justice system.

Risk assessment tools use actuarial methods, or group data, to predict risk. Risk assessment tools provide a total risk score and place people into a risk level according to their likelihood of committing a new offense, just as insurance companies use actuarial practices to create insurance rates. Neither can predict human behavior with certainty. Just because a particular person is a male teenager—to cite one particularly high-risk pool—it does not follow that he is going to have more accidents; it means that male teenagers as a group have more accidents. Similarly, a risk assessment may classify someone as low risk who nonetheless goes on to reoffend in the future. It is the low risk group as a whole that is less likely to reoffend in comparison to the other groups. While risk assessments create an improvement in predicting risk, the risk levels produced do not mean certainty at the individual level.

Risk assessment tools require effective implementation. Many of the risk assessment tools in common use require that the people administering the tool be trained and certified to use them. This is because the tool is only as reliable as the person scoring the tool according to a scoring guide protocol. There are always issues surrounding implementation. Some staff may vary in their expertise in using a tool, so agencies should provide ongoing training and coaching for staff. Agencies should also audit files and review data regularly to ensure staff are using the tool as the developers intended and according to the scoring criteria. Agencies may also struggle with issues like organizational culture and buy-in, creating situations where risk assessment tools are scored but not applied in agency decision-making. Sometimes we may find that a tool does not predict well—but we should remain mindful that the issue may reside with how the tool was implemented in that agency and not the tool itself.

Risk assessment tools must be validated. It is important to study the effectiveness of a risk assessment tool on the population for which it will be used. This is commonly referred to as a validation study, where a risk assessment is studied to determine how well it predicts risk in a jurisdiction or agency that is different from where the tool was originally created. The LS/CMI that is used in Minnesota was developed by Canadian researchers, but evaluators have reviewed the ability of the LS/CMI to predict recidivism in the U.S. For agencies that develop their own risk assessment tool or use an understudied tool, it is important to evaluate how well the tool predicts recidivism in the local population. We want to make sure that there is not something unique to that population, agency, or time period that impacts prediction. And it is important for researchers to provide transparency on the evaluations of these tools. Results of their validation studies should be shared publicly, and the tools should be reviewed by external researchers.

Risk assessments should be used for the purpose for which they were designed. Not all risk assessment tools are the same. This article has focused on tools such as the LS/CMI and PCRA, which are used by correctional agencies for community supervision case management purposes. But there are other risk assessment tools that may be used to make decisions at other points in the life of a criminal case or to predict other types of behavior. For example, pre-trial risk assessment is designed to aid the judge in determining whether or not a defendant should be released on bail. Pre-trial risk assessment tool predicts someone’s likelihood of committing a new offense or failing to appear while on pre-trial release. This type of tool is based on factors that are legally permissible to obtain at this stage and that predict both of those outcomes, whereas a risk assessment tool like the LS/CMI might not predict these outcomes at the pretrial stage, and should not be used for this purpose.

A related question is whether risk assessment should be used at the sentencing stage. In Minnesota, the LS/CMI is often completed at the time of the presentencing investigation (PSI), so does that mean that it should be used by the judge at sentencing? On the one hand, the LS/CMI and other risk assessment tools like it were not designed for the purposes of deciding sentences, especially where other considerations such as the severity of the offense, the harm inflicted on society, deterrence, or incapacitation may be paramount. However, because the tool identifies risk and needs, it can be helpful to the court in setting appropriate conditions of probation. For this reason, some jurisdictions have included the risk assessment score in the presentence report as an additional piece of information available for the judge to review. In fact, the two other states that have considered this issue directly—Indiana and Wisconsin—have concurred, holding that risk assessment tools may not be used by the court to determine whether the offender should be incarcerated or supervised in the community or to determine the length of the sentence, but generally may be used to determine the terms and conditions of probation.

There is concern that risk assessment tools might perpetuate racial disparity. Some critics, including former Attorney General Eric Holder, have argued that risk assessment might perpetuate racial disparities already prevalent throughout the criminal justice system. There is concern that risk assessment could contribute to disparity at sentencing: Risk assessments include criminal history as a factor in the tool, which—owing to potential systemic bias in policing and prosecution—might elevate risk scores for offenders who are black. A study examining the role of criminal history and racial bias acknowledges a complicated relationship between race, criminal history, and recidivism and suggests that criminal history might have more of an impact when risk assessment
is considered at sentencing rather than other stages.23

While more research is being conducted in this area, thus far the research suggests that risk assessments do not present evidence of racial bias.24 These studies have found that when comparing the predictive abilities of risk assessment on blacks as compared to whites, the tools predicted recidivism with similar accuracy for both groups.25 One salient caveat here involves using risk assessment for the purposes for which it was designed.26 Even Holder did not dispute the use of risk assessment for case management purposes; instead, he was concerned about using risk assessment to determine the type and severity of sentence. Thus, if there are concerns about perpetuating racial disparity, it may not be the risk assessment itself, but rather how risk assessment is used in the criminal justice system, that should be driving our concern.

Conclusion

Risk assessment is critical for correctional agencies tasked with reducing recidivism. Risk assessment allows them to prioritize resources objectively so as to promote reductions in recidivism. It has taken decades of research, training, and evaluation for correctional agencies to implement the tools and resources needed to reduce reoffending and reduce the likelihood of offenders returning to the criminal justice system. Risk assessment is an improvement over professional judgment alone, and it can be helpful to the court in setting the conditions of probation, but it must be implemented well and should be used in conjunction with the stage of the system for which it was designed. As research continues in this area, it is important that researchers engage in dialogue with other stakeholders about risk assessment to further understand its potential uses and limitations in the criminal justice system. ▲

Notes

4 Bonta, supra note 1.
6 Id.
7 Bonta, supra note 1.
15 Id.
17 Andrews, supra note 15.
20 Andrews, supra note 3.
21 See how the authors argue the importance of using risk assessment tools at the appropriate stage they are designed to predict: Anthony W. Flores, Kristen Bechtel, & Christopher T. Lowenkamp, False Positives, False Negatives, and False Analyses: A Rejoinder to “Machine Bias: There’s Software Used Across the Country to Predict Future Criminals. And It’s Biased Against Blacks”, 80 Federal Probation 38 (2016).
23 Id.
26 See, for example, Jesse Jannetta, Justin Breaux, and Helen Ho, Examining Racial and Ethnic Disparities in Probation Revocation: Summary Findings and Implications from a Multisite Study, Urban Institute (2014).
29 Id.
30 Id.
Sex Harassment Settlements
A new scarlet letter for employers?

How the movement to abolish NDAs and confidential settlements could produce unintended consequences.

BY ANTOINE MELTON-MEAUX

Prelude to a stigma
Nathaniel Hawthorne’s ageless novel The Scarlet Letter has surprising relevance to the current #MeToo/TimesUp movement. Hawthorne paints the story of Hester Prynne, a beautiful young woman presumed to be guilty of having a child while engaged in an extramarital affair. Hester’s acts are considered serious social and legal offenses in this 17th century Bostonian community rooted in Puritan values—so significant that they result in her imprisonment. Not satisfied with incarceration as the only form of punishment, the community requires Hester, upon her release from prison, to wear a brilliant red embroidered A on her breast as an enduring symbol of public shame for her immoral acts and her refusal to identify her child’s father. For the rest of her life, Hester strives valiantly to find normalcy and rehabilitate her tattered reputation in the community without divulging the details of her past.

#MeToo/TimesUp is bringing its own unique form of public reckoning by demanding that organizations of all stripes rethink their approach to sexual harassment and gender-related workplace conduct. However, there could be a powerful unintended consequence. Is #MeToo/TimesUp turning sex harassment settlements into a modern day scarlet letter H for employers?

Recent efforts by the media and advocacy groups to shine a light on (and, in some instances, to shame) organizations that have entered into confidentiality or non-disclosure agreements with workers as part of a larger sex harassment settlement are bringing unexpected visibility to disputes that employers believed to be resolved outside of the public eye. Not to be outdone, governments at every level are engaged in concerted efforts to prevent employers from using settlement agreements to “silence” workers who may have been subject to sex harassment or other gender-related misconduct—or at least create disincentives for them. How will this confluence of social and legal change affect workers and employers who may be considering a sex harassment settlement as a means of resolving their dispute?

The role of non-disclosures and confidentiality in employment settlements
Until recently, it has been common practice for settlement agreements in employment disputes to contain confidentiality and non-disclosure clauses. The importance of these provisions to the parties is significant. For the employer, these clauses protect the brand and reputation of the organization by preventing negative publicity and the prospect of further exposure in a lengthy public trial. In addition, maintaining confidentiality and preventing disclosure of the terms of the settlement minimizes any “slippery slope” perception that the employer is an easy target for additional claims.

Counsel representing employees, state attorneys general, and the National Labor Relations Board have challenged
these provisions. But the Supreme Court recently affirmed that mandatory arbitration clauses are typically enforceable.1

For an employee, there are also benefits to confidentiality and non-disclosure clauses. In some instances, an employee simply does not want his or her grievances or the terms of the settlement to be known to the public. Instead, an employee may wish to move on with life without being subjected to public scrutiny about the workplace incident. At times, employees even negotiate mutual non-disclosure or non-disparagement obligations to protect their personal reputations and future job prospects. Similarly, an employee may negotiate to receive a positive reference letter from the employer in exchange for agreeing to confidentiality and non-disclosure.

The Weinstein effect
The seismic impact of the Harvey Weinstein revelations in 2017 and the follow-up reporting from revered news sources such as the New York Times cannot be overstated. This reporting, and the social media response, are part of a larger and much overdue conversation on the systemic mistreatment of women in the workplace. In addition, the questions of how organizations proactively identify and resolve claims of sexual harassment are being openly challenged. News reports that organizations—including, but not limited to, Fox News and 21st Century Fox—have entered into multiple settlements with women to resolve claims of sexual harassment fueled the narrative that these organizations, and presumably many others, are utilizing non-disclosures and confidentiality clauses in settlement agreements to silence victims and protect perpetrators. As a result, companies that have been ousted as using confidentiality and non-disclosure clauses in sex harassment settlements have come under intense fire and unexpected public scrutiny.

The response of the government
In response to the media and public outcry for more transparency and accountability, governments at the federal and state level have engaged in a fast and furious effort to enact or propose legislation. The following is a brief synopsis of recent efforts.

In the 2017 Tax Cuts and Jobs Act, Congress eliminated the tax deductibility of settlements and associated legal fees for sex harassment claims with non-disclosure provisions.2 This legislation reduces the employer’s incentive to engage in sex harassment dispute resolution when there may be no cost savings from a tax perspective.

In February 2018, the state attorneys general in all 50 states, the District of Columbia, and U.S. territories wrote a letter to Congressional leadership seeking the elimination of arbitration clauses in employment agreements for sex harassment claims.3 In large part, the state AGs objected to the “veil of secrecy” created by arbitration, which prevents similarly situated individuals from learning about the harassment claims, thereby precluding them from also seeking relief. This letter dovetails with the introduction of the “Ending Forced Arbitration of Sexual Harassment Act of 2017” in the U.S. Senate.4 This legislation would prohibit the enforcement of an arbitration clause for claims based on sex under Title VII of the Civil Rights Act.

Currently, in the states of Arizona, California, New Jersey, Pennsylvania, South Carolina, and Virginia, the respective legislatures are considering curtailing, or banning outright, the use of non-disclosure agreements to resolve sex harassment claims.

The New York legislature recently passed a law that prohibits non-disclosure agreements involving sex harassment settlements (in all judicial and non-judicial settings) unless the employee makes a specific request for the settlement to be confidential and the employee does not change his or her mind during the course of 21-day review and seven-day revocation periods.5 The law also bans employers from requiring employees to enter into mandatory arbitration of sexual harassment claims. It is unclear whether the prohibition of mandatory arbitration is preempted by the Federal Arbitration Act.6

Workers, employers, and the practical impact of the H stigma
For now, parties can continue to engage in settlement agreements with confidentiality and non-disclosure clauses with confidence (short of a media exposé) that privacy will prevail and the clauses will be enforceable. But it is undeniable that employers and workers must be prepared for difficult decisions ahead. The recently enacted federal tax law preventing tax write-offs for sex harassment settlements and legal fees when non-disclosure provisions are involved is one current example. If the proposed legislation and continued media pressure are harbingers of the future, there could soon be a day when employers and employees will no longer have the option of keeping a sex harassment settlement confidential under any circumstance.

While transparency and accountability are laudable goals, the inability of parties to engage in private and confidential settlements may have unintended and negative results. Employers will be forced to make decisions with unappealing outcomes. If employers decide to settle a sex harassment claim, they expose their organization to the likelihood that it will be branded by the public and media as a harasser, the stain of which will be hard to remove. Instead of enduring the stigma of the scarlet letter H, employers may take more risks and continue litigation to verdict. The decision by employers to extend litigation would certainly raise the costs of sex harassment claims and impose an additional burden on the judicial system.

In addition, counsel who represent employees may react by being more cautious in deciding which sex harassment case to take given the increased costs and reduced prospects of settlement. As a result, only employees with compelling, easily proven, or high-value sex harassment claims may receive legal representation.

Certainly, this is not the desired outcome of the #MeToo/TimesUp movement or of governments, but it may be the most likely result if employers make a business and reputational decision to aggressively defend against being labeled with a scarlet H and becoming modern-day Hester Prynnes.

Notes
3 Letter from National Association of Attorney General, to Congressional Leadership, (February 12, 2018) (on file with author).

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Among property rights, the right to exclude is considered the most significant. Where a landlord/tenant relationship exists, the landlord’s right to exclude is predicated on the landlord’s obtaining a court order granting eviction against the tenant. Irrespective of the basis for eviction, the landlord must use court process (self-help is not allowed), incurring all of the corollary costs and delays that it entails. Importantly, however, many temporary lodging establishments are not subject to the landlord/tenant statutes. In particular, the landlord/tenant statutes do not apply to hotels, motels, resorts, boarding houses, bed and breakfasts, furnished apartment houses, or other buildings, so long as they are kept, used, advertised, or held out to guests “for transient occupancy.”

The difference in treatment between a landlord/tenant relationship and a relationship involving a temporary transient occupancy matters a great deal. Among other things, where the guest is a transient occupant, the establishment has the right to immediately eject the undesirable guest so long as certain criteria are met. This allows establishments housing transient guests to bypass the significant expense and lost rental income associated with formal eviction proceedings.

**Sole residence presumption**

Under Minnesota law, “transient occupancy” is defined as occupancy “when it is the intention of the parties that the occupancy will be temporary.” Perhaps surprisingly, where a unit is the guest’s sole residence, even if the lodging accommodation is a hotel or similar short-term lodging accommodation, the law presumes that the occupancy is not transient. In other words, where the unit is the sole residence of the guest, the burden of proof is on the lodging establishment to demonstrate the guest is not a tenant entitled to the protections of Minnesota’s landlord/tenant statutes.
There is a dearth of Minnesota authority analyzing the difference between a landlord/tenant relationship and a transient guest relationship. An action filed in Anoka County District Court in February 2018, *Lyles v. Woodspring Suites, LLC*, 02-CV-18-733, provides guidance concerning the factors courts consider when analyzing this issue. In *Lyles*, guests of an extended stay hotel brought suit alleging that they had a landlord/tenant relationship with the hotel. The plaintiffs filed a “lockout petition” requesting an order placing them back into possession of the hotel unit. Plaintiffs sued under Minn. Stat. §504B.375, which by its terms applies only to “residential tenant[s].” The hotel argued that the matter must be dismissed because plaintiffs were not residential tenants; to the contrary, the guests were transient occupants to whom the landlord/tenant statutes had no application.

The district court granted the hotel’s motion to dismiss, ruling that no landlord/tenant relationship existed. The court relied principally upon three factors. First, the plaintiffs had provided the hotel with a Minnesota identification card identifying what appeared to be a residential address. This cut against the notion that the hotel understood the plaintiffs were using the unit as their sole residence. Second, although the plaintiffs stayed at the hotel for slightly over a month, the original length of the plaintiffs’ stay was for a single night. Thereafter, extensions were granted on a weekly basis rather than the monthly basis generally associated with landlord/tenant relationships. Finally, each time the plaintiffs extended their stay, they executed an agreement stating that:

> I acknowledge and agree that I am a transient guest of this lodging establishment, and registration at this Hotel does not establish a permanent residence, household or dwelling unit. I further agree that no landlord/tenant relationship exists and landlord/tenant statutes are not applicable to my stay.

For these reasons, the court determined that a transient guest relationship existed between the plaintiffs and the hotel. As a fundamental component of plaintiffs’ claims was lacking (viz., plaintiffs were not residential tenants), the matter was dismissed with prejudice.

**Lessons for lawyers**

The decision in *Lyles* holds several important lessons for owners of overnight accommodations.

- Objective evidence of the parties’ intentions regarding the length of the guest’s stay will be given significant weight. In *Lyles*, the judge recognized that the objective evidence refuted the contention the plaintiffs were residential tenants. The plaintiffs provided a Minnesota identification card giving the landlord reason to believe the plaintiffs had a primary residence elsewhere. The lesson is that guests should be required to expressly identify their primary residence upon check in.

- In other cases, courts have ruled that agreements permitting a guest to reside in a unit for consecutive months counseled in favor of a landlord/tenant relationship. By contrast, in *Lyles*, the plaintiffs’ original stay was for a single night. Thereafter, only one-week extensions were permitted. The shorter the length of a residency extension, the less risk a court will later conclude that the extensions gave rise to a landlord/tenant relationship.

- While the plaintiffs argued they had a subjective intention to make the hotel their sole residence, the plaintiffs repeatedly signed agreements acknowledging that they were “transient guests;” that the hotel was not a permanent residence and that landlord/tenant statutes were not applicable. The lesson: Disclaimers will be enforced and should be made part of a guest’s overnight agreement.

Owners of temporary accommodations should assess whether their policies and practices could contribute to a finding that the accommodation is subject to Minnesota’s landlord/tenant statutes.

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Owners of temporary accommodations should assess whether their policies and practices could contribute to a finding that the accommodation is subject to Minnesota’s landlord/tenant statutes. The more explicit the intent to establish only a transient guest relationship, the more likely it will be that the owner can defeat any claim that landlord/tenant law applies. ▲
Once upon a time, it could reasonably be argued that trial preparation began when a case was filed, if not before. Today, however, with 90 percent of civil cases settling before trial, case preparation is often focused on achieving a positive settlement. At some point in the life of a case, that must change. Serious trial preparation should begin with the receipt of a trial notice or when it becomes likely that settlement efforts will fail. Even where successful mediation is still possible, delaying trial preparation to within two months of a trial date risks starting that trial with inadequate preparation. This article sets out best practices for trial preparation. Circumstances, such as schedules and economics, may dictate a departure from the ideal, but best practices should always be the goal. No matter how skilled and talented you are (or think you are), solid trial preparation will improve your work.

Getting a start on preparation

As you start to prepare, remind yourself—and keep reminding yourself—that the ultimate goal of preparation is to most effectively persuade a trier of fact of a limited set of facts. Remain focused on that goal and the larger principles that will help you attain it.

First, people learn best in different ways: oral information, written word, videos and graphics. Try to use as many different modes as reasonably fit the case. Second, the key to persuasion is interest. How do you avoid boring your trier of fact? A person whose attention wanders is hard to persuade. Eliminate irrelevant material, use different methods to convey information, verbally emphasize critical information, and highlight or call out important written information. Keep the trier of fact engaged and keyed in to what’s important. Third, people accept information from individuals and parties they trust and respect. Look for ways to build the credibility of your legal team, your client, and your witnesses. Finally, people learn by repetition. Plan to repeat, in a variety of ways, your presentation of factual material critical to the outcome while eliminating repetition of information provided for background, foundation, or technical purposes.
Addressing Administrative Issues

Before you dig into the substance of trial preparation, tackle the logistical issues. Check your calendar and your trial group for any conflicts with the assigned date. Confirm that all of your trial witnesses will be available to testify. Reconcile any conflicts or approach the other parties and the court for a change in the trial date if conflicts cannot be reconciled.

Consider whether there will be motions in limine that need to be scheduled before the trial date. You may need to check the scheduling order or confer with the court’s legal clerk to determine how the trial judge prefers to schedule and handle these motions.

Decide who on your trial team will be preparing each portion of the case. The scope of their trial preparation duties and their other responsibilities will dictate much of the trial preparation schedule. The schedule should include the following tasks with an approximate time allotted and due dates:

- Jury verdict form;
- Jury instructions or proposed findings of fact;
- Conclusions of law and order for judgment;
- Opening statement and closing arguments;
- Trial brief;
- Exhibit and witness lists (including creation of demonstrative exhibits);
- A master direct examination outline annotated with all exhibits;
- Individual outlines for direct and cross examination of each witness;
- Outline of Rule 50 motions or opposition if applicable;
- Memos on any significant evidentiary issues;
- Preparation of witnesses; and
- Practice for voir dire and opening statements.

Creating a schedule for all of these tasks will allow you to determine how far in advance of trial you need to start your preparation and how much help you will need.

First steps to prepare

Now that you have a team, a schedule, and a list of action items, begin preparation with a review of the pleadings. It may have been years since the pleadings were served. Refresh your memory: Particularly look for claims or defenses that have become apparent during discovery but may have been overlooked at the pleading stage. Do you need to amend the pleadings? Second, outline the claims and defenses that have survived discovery. For complete trial preparation, identify the elements of each viable claim and defense so that those elements can become a part of your master trial outline. Third, identify claims or defenses that never had a basis or have become moot during discovery. Request that your opponent dismiss these claims or defenses. If the opponent will not stipulate to dismiss these, determine how best to obtain a summary ruling from the court to dispose of these unsubstantiated issues.

Next, make sure that you are fully familiar with all procedures that will apply in the trial court. While the procedures are not all found in the rules of civil procedure and the rules of evidence, those are good places to start. In federal court, you will need to consult the local rules and any standing orders or published preferences of the trial judge. In state court, there may be statutes outlining some procedures, general or special rules, and a trial court standing order. Most trial courts issue a pretrial order that will contain mandatory service and filing dates for trial briefs, exhibit and witness lists, and jury instructions, among other items. Docket these dates, note them on your personal calendar, and build them into your preparation schedule. Finally, it is always worth a call to the court’s clerk to learn if the judge has any particular practices that do not show up in the documents. You might inquire, for example, what daily schedule the court follows; whether the court will conduct a pretrial conference just before the trial starts and what subjects will be covered; or does the court wish to be apprised in advance of significant evidentiary issues?

Focus on the issues to be tried

Trial presentations often lack focus, leading to jury confusion and poor results for the party unable to bring issues into sharp focus. Nothing focuses the factual issues better than preparing the jury verdict form and jury instructions or proposed findings of fact, conclusions of law, and order for judgment. Making these your first substantive task will allow you to focus the trial brief and witness preparation on the significant factual issues. As you prepare these documents, keep in mind that your opponent may have different or additional factual issues that they will argue must also be decided. By now, discovery should allow you to anticipate these points. Unfortunately, some of these disagreements are not resolved until late in the trial. As a matter of caution, your preparation must include all factual issues in controversy, so plan to build these disputed points into your witness outlines. They can always be eliminated if you convince the court that those points are not at issue.

Create a trial notebook

You don’t want to be poring through a stack of papers or searching your computer each time you start a new aspect of the trial. Whether in a hard copy notebook or in one folder (with subfolders) on your computer, create a trial notebook for everything you will need to organize yourself during the trial. This notebook should have sections for exhibit and witness lists, the trial brief, pretrial motions, voir dire, opening statement, witness outlines (for each witness on direct and cross), Rule 50 motions or responses, and final argument. The exhibit list should include a method to note whether an exhibit is offered and received at trial. All sections should be completed before the trial begins, and responsibility for each portion of the trial should be assigned if more than one attorney will participate at trial.
Another folder or notebook should contain copies of all your exhibits and your opponent’s likely exhibits. While hundreds of exhibits may seem important to you, remember that most trials end with a focus on 5-10 exhibits at most. As you organize, do your best to focus on these exhibits so they can be highlighted throughout the trial. Eliminate unnecessary exhibits so they don’t obscure those that are most important. Included with each of your exhibits can be a note of any likely objections and the basis for admission under the Rules of Evidence. Comments on the necessary foundation may be helpful where the foundation may be more complicated. Finally, your copy of each exhibit should show the material points so that you can quickly highlight those during examination. If some of your exhibits have no points to highlight, that suggests they have no real purpose. Include with your opponent’s exhibit set citations for any objections that may be appropriate.

A third set of folders will contain the outlines for direct and cross examination of each witness. These need not be scripts, because you don’t want to sound scripted. There should be enough detail so that you can quickly see subjects to cover and any corresponding exhibits. You will find that these outlines should be modified as the trial brings points and issues into sharper focus. For witness preparation it is useful to have a set of exhibits available that will be used with that witness, including those likely to be used on cross examination. The witness deposition transcripts should also be available with each witness outline. You should highlight portions of the transcripts to be reviewed with the witness. Portions of the transcripts that may be used by you to impeach adverse witnesses should also be annotated to each cross examination outline.

Preparation, like most aspects of trial work, is an art and not a science. You should tailor your preparation to the stakes in the dispute and the complexity of the issues. Nevertheless, an understanding of how to best organize your preparation will make the process much more efficient and likely much more effective. Along with this understanding, successful preparation requires a commitment to spend the time necessary to devote to each aspect of preparation. It is always the case that other clients and other cases will intrude on your preparation time. Plan for that to happen! Keep in mind throughout that your goal is to build credibility and effectively communicate the central points that will lead to the best result for your client.

Actually preparing yourself and your witnesses

By this point you have done most of the work of preparing yourself, but you may have become mired in the maze of detail that is a necessary part of trial preparation. Take the time to step back and review the central points you must establish to prevail. Start again with the questions the jury will ultimately answer. Focus on the key evidentiary points that will lead to the correct responses. Then, run through your voir dire and opening statement. Don’t try to memorize these line by line, but have the primary points in mind so you can discuss them extemporaneously with the jury.

Shortly before trial, you will be preparing your witnesses. It is a mistake to begin preparing witnesses before you are prepared with a master outline and a theme for the case. Preparing witnesses before you are prepared is likely to mean that you miss key points to review with the witness. By now you should know the strengths and weaknesses of your witnesses. Consider what type of preparation is most needed for each witness. If the witness has previously testified in court, you won’t need to spend time on courtroom procedure or the setting. With a nervous witness, you will need to provide assurance. With the overconfident witness, you will need to provide caution. The point is: Tailor the preparation to the witness. One-size preparation is not effective.

Have a plan for each witness. What will be a successful appearance for each witness? Focus the preparation on the testimony that will result in this success.

Concluding thoughts

Preparation, like most aspects of trial work, is an art and not a science. You should tailor your preparation to the stakes in the dispute and the complexity of the issues. Nevertheless, an understanding of how to best organize your preparation will make the process much more efficient and likely much more effective. Along with this understanding, successful preparation requires a commitment to spend the time necessary to devote to each aspect of preparation. It is always the case that other clients and other cases will intrude on your preparation time. Plan for that to happen! Keep in mind throughout that your goal is to build credibility and effectively communicate the central points that will lead to the best result for your client.
Landmarks in the Law

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

**COMMERCIAL AND CONSUMER LAW**

*JUDICIAL LAW*

**Alternative dispute resolution.**

Arbitration agreements in both consumer and commercial contracts are common and provide in many circumstances both a cheaper and a more rewarding and efficient method of dispute resolution than does litigation. Not surprisingly, trial lawyers may prefer litigation, and some individuals may later seek to evade the agreement they signed for a variety of reasons. A recent case, *Jones v. Samsung Electronics America, Inc.*, Case No. 2:17-cv-00571-MAP (W.D. Pa. 2018), illustrates a type of later challenge to an arbitration agreement.

In *Jones*, the arbitration clause was located in the “Manufacturer’s Warranty” section of a 64-page “Important Information Booklet” contained in the box in which the product, a phone, came. None of the section headings in the booklet referred to arbitration. When the phone allegedly exploded and caught fire, the plaintiff filed a class action, and Samsung moved to compel arbitration.

The court concluded that “[p]urchasers may be bound by what they have not read, but they may not be bound by what they cannot find, or what has been (negligently or by connivance) buried in the verbal underbrush.” “[I]f Samsung had actually desired to make its customers aware of the Arbitration Agreement, it would have been simple to bring the point home more clearly.”

Fine in theory, but let’s dig a little deeper. An arbitration agreement is not the only type of language that needs to be conspicuous under applicable law, here the Uniform Commercial Code (see UCC §1-201(b)(10)) to be legally effective. For example, disclaimers must be conspicuous under UCC §2-316. Procedural “unconscionability” under UCC §2-302 also may demand conspicuity. See UCC §1-201(b)(10) with respect to a limitation of damages or other remedy under UCC §§2-718 and 2-719. So may other clauses that a court might with hindsight deem to be important. At some point, if much must be conspicuous, nothing will be.

Second, if one reads an agreement, one necessarily must find what is in it, so where can a person stop reading so they cannot “find” a provision?

Finally, what is the basis for the court’s suggestion of “negligence” or “connivance” merely because something appears later rather than early in an agreement and in the same size type as other provisions?

In this author’s opinion, the court’s opinion is pure judicial legislation and, unlike a statute, provides little guidance for the future. A further recent case, *Cullinan v. Uber Technologies, Inc.*, No. 16-2023 (1st Cir. 2018), involves much the same issue although in the context of an online agreement. The court holds an arbitration clause, to be enforceable, must be “reasonably communicated and accepted” and found that was not the case in the circumstances of the case. Perhaps the context involved might make the decision arguably tenable—indeed the court noted that if “everything on the screen is written with conspicuous features, then nothing is conspicuous,” which makes a point against the Jones case’s approach, but moreover the test of “reasonably communicated” is ill-defined and provides little guidance.

That said, a word to the wise should be sufficient, and that word is, use a conspicuous heading (but not too many) and, in a lengthy document, perhaps use a table of contents or some other flag to what arguably might be considered important to a customer.

On the subject of the enforceability of arbitration agreements, other recent arbitration decisions worth thinking about are: (1) *Baynes v. Santander Consumer USA*, 2018 WL623582 (W.D. Pa. 2018) and (2) *Pacnowski v. Fin, L.P.*, 271 F. Supp. 3d 738 (M.D. Penn. 2017) (both ruling on who can enforce arbitration and concluding in Baynes that employees, agents, and representatives are...
The court of appeals finds first that the district court properly assigned two custody-status points for count one under the version of the sentencing guidelines applicable at that time (2011 version), because (1) the offense was committed while appellant was on probation, and (2) the new offense was a specific sex offense and was committed while he was under one of the custody statuses enumerated in section 2.B.2.a-d of the guidelines.

On count two, the 2012 revisions of the sentencing guidelines (effective 8/1/2012 to 8/1/2014) apply. The court of appeals concludes that the 2012 guidelines unambiguously provide for only one custody-status point on count two. The 2012 revisions provided that two custody-status points could be assigned only if the offender was under any of the listed custody statuses for another sex offense, which includes “probation,” but does not discuss an offender who has been discharged from probation. Computing the criminal history score of an offender no longer on probation is addressed in another section, which provides that only a single custody-status point should be assigned “if the offender is discharged from probation but commits an offense within the initial period of probation pronounced by the court.”

The district court erred in concluding that the 2012 revisions were ambiguous and by looking to the 2014 amendments to determine the intent underlying the 2012 revisions. Reversed and remanded for resentencing on count two. State v. Donald Andrew Oreskovich, Sr., No. A18-0193, __ N.W.2d __, 2018 WL 2770426 (Minn. Ct. App. 6/11/2018).

Sentencing/criminal sexual conduct: Blakely/findings required to vacate stay of adjudication, impose presumptively stayed sentence, and execute sentence.

Appellant pleaded guilty to one count of third-degree criminal sexual conduct, received a five-year stay of adjudication, and was placed on probation with conditions. Appellant violated a number of the conditions and the district court “revoked” the stay of adjudication, imposed the presumptively stayed 36-month sentence, and then executed the sentence. Appellant challenges the executed sentence, arguing it is an unauthorized upward dispositional departure.

Imposition of a presumptive sentence is mandatory, absent judicial findings, per Blakely, which requires that a jury find, or a defendant admit to, any fact, other than a prior conviction, that is necessary to support a sentence exceeding the presumptive sentence. Execution of a presumptively stayed sentence is a sentence requiring compliance with Blakely. The court of appeals rejects the district court’s finding that appellant had been “sentenced” when he received a stay of adjudication, a sentence within the guidelines. A stay of adjudication is not a sentence, because no conviction is entered or sentence imposed. Appellant had not been sentenced until the district court vacated the stay of adjudication. While the district court made some findings, consistent with State v. Austin, 295 N.W.2d 246 (Minn. 1980), at the hearing it treated as a probation violation hearing, it did not make sufficient findings to satisfy Blakely and support its upward dispositional departure. Reversed and remanded for imposition of the presumptive guideline sentence. State v. Joel Evan Greenough, A17-1915, __ N.W.2d __, 2018 WL 2770423 (Minn. Ct. App. 6/11/2018).

At-will employment; termination upheld. The termination of an executive with a manufacturing firm in Shakopee did not breach his compensation agreement. Affirming a ruling of Senior U.S. District Court Judge David Doty, the 8th Circuit Court of Appeals held that the arrangement did not modify the claimant’s status as an at-will employee who could be fired at any time for any reason. Ayala v. Cyber Power Systems, Inc., 891 F.3d 1074 (8th Cir. 6/6/2018).
1st Amendment retaliation; claim upheld. A county clerical employee was entitled to pursue a 1st Amendment retaliation claim after a lower court ruled against her claim. Reversing a lower court ruling dismissing the lawsuit, the 8th Circuit held that the employee's complaint was viable. The employee alleged that the county's policy against profanity in the workplace was unconstitutional and that her firing for using profanity was retaliatory. The court concluded that the employee had stated a viable claim under the 1st Amendment.

Retaliation dismissed; no jurisdiction. An employee's claim of retaliation for filing a civil rights charge was dismissed by the 8th Circuit. The employee had claimed that her employer retaliated against her for filing a complaint with the Equal Employment Opportunity Commission. The court held that the employee had failed to establish a prima facie case of retaliation.

Noncompete contract; inspection impermissible. The failure of a party seeking to enforce violation of a noncompete agreement to prove irreparable harm bars injunctive relief, though the contractual language recited that a breach would cause "irreparable" harm and warrant "an injunction." The state Supreme Court overturned an appellate court ruling and reinstated a lower court ruling that refused an injunction on grounds that the boilerplate language alone did not merit equitable relief. St. Jude Medical, Inc. v. Carter, 2018 WL 3131144 (S.Ct. 6/27/2018).

Noncompete breach; forfeiture upheld. A retired partner of a Minnesota-based accounting firm forfeited his lucrative future deferred compensation payments of nearly $11 million over the next decade, along with damages in excess of $2 million, for violating a post-retirement noncompete agreement that he helped draft. The court of appeals affirmed a ruling that the forfeiture was not "unjust." Lapidus v. Lurie, LLC, 2018 WL 3014698 (Minn. App. 6/18/2018).

Arbitration appeal; reinstatement reversed. An arbitration ruling reinstating the warden of the men's prison in Stillwater, who was fired for inappropriate sexual remarks and behavior, was reversed by the Minnesota Court of Appeals because the warden's conduct violated prison policies. It marked the second time in two months that the appellate court overturned an arbitral award reinstating a public sector employee to a job, following a reversal involving a discharged Richfield police officer this spring in City of Richfield v. LELS, 910 N.W.2d 465 (Minn. App. 4/9/2018). Department of Corrections v. Hammer, 2018 WL 2769165 (Minn. App. 6/11/2018).

Unemployment compensation; quitters lose. A temporary staffing employee lost an appeal for unemployment compensation benefits because she was deemed to have quit her job by not asking for a new assignment within five days after completion of her prior one, as required by Minn. Stat. §268.095, subd. 2(c). The appellate court upheld the denial of benefits and rejected a constitutional challenge to the statute. Fisher v. TCG, Inc., 2018 WL 2470364 (Minn. App. 6/4/2018).

Unemployment compensation; cell phone violation. An employee who violated company policy by repeatedly using his cell phone at work was denied unemployment benefits. The appellate court ruled that the employee's non-compliance with the policy against cell phone use constituted disqualifying "misconduct." Kutschke v. O'Reilly Automotive, Inc., 2018 WL 2470364 (Minn. App. 6/4/2018).

Unemployment compensation; profane language loses. An employee who used profanity in front of customers was denied unemployment benefits. The court of appeals ruled that the profanity violated company policy and, thus, constituted disqualifying "misconduct." Erickson v. OT Management, LLC, 2018 2018 WL 3014579 (Minn. App. 6/18/2018).

ENVIRONMENTAL LAW

PUC approves Enbridge Line 3. On June 28, the Minnesota Public Utilities Commission (PUC) approved Enbridge Energy’s certificate of need and proposed route for its Line 3 pipeline in northern Minnesota. The PUC voted 5-0 in approving Enbridge’s certificate of need and voted 3-2 in approving the proposed route. The proposed route was approved with one alteration that will move the pipeline farther away from Big Sandy Lake. In approving company’s route, the PUC rejected the April 2018 recommendation of an administrative judge who had advised replacing the pipeline using the existing Line 3 route. Stillwater, who was fired for inappropriately using his cell phone during a productive period for a computer programmer, was? The county Supreme Court reversed its prior ruling finding that the developer of Sandy Lake. In approving company’s route, the PUC rejected the April 2018 recommendation of an administrative judge who had advised replacing the pipeline using the existing Line 3 route. The PUC found that Enbridge was able to prove two crucial elements were met: (1) the reliability of the oil supply would be harmed if the pipeline wasn’t built; and (2) the social and economic impacts of constructing the new pipeline outweighed the possible harms associated with both the new and old lines. Although the certificate of need and proposed route were both approved by the PUC, several steps remain before Enbridge can begin construction on the new Line 3. In addition to potential lawsuits challenging the PUC’s decision, the PUC approved Enbridge Energy’s certificate of need and proposed route for its Line 3 pipeline in northern Minnesota. The PUC voted 5-0 in approving Enbridge’s certificate of need and voted 3-2 in approving the proposed route. The proposed route was approved with one alteration that will move the pipeline farther away from Big Sandy Lake. In approving company’s route, the PUC rejected the April 2018 recommendation of an administrative judge who had advised replacing the pipeline using the existing Line 3 route. Stillwater, who was fired for inappropriately using his cell phone during a productive period for a computer programmer, was? The county Supreme Court reversed its prior ruling finding that the developer of Sandy Lake. In approving company’s route, the PUC rejected the April 2018 recommendation of an administrative judge who had advised replacing the pipeline using the existing Line 3 route. The PUC found that Enbridge was able to prove two crucial elements were met: (1) the reliability of the oil supply would be harmed if the pipeline wasn’t built; and (2) the social and economic impacts of constructing the new pipeline outweighed the possible harms associated with both the new and old lines. Although the certificate of need and proposed route were both approved by the PUC, several steps remain before Enbridge can begin construction on the new Line 3. In addition to potential lawsuits challenging the PUC’s decision,
Enbridge must still obtain state, local, and federal permits before it can begin construction. The company must also provide a PUC-mandated corporate guarantee to cover damage associated with any spills and must await a tribal cultural survey of the approved pipeline route being led by the Fond du Lac Band of Lake Superior Chippewa.

EPA issues no-action assurance letter to manufacturers of glider vehicles. On July 6, 2018, EPA issued a no-action assurance letter relating to those small manufacturers that either are manufacturing or have manufactured glider vehicles in calendar year 2018 and to those companies that sell glider kits to such small manufacturers. A glider vehicle, or “glider,” is a truck that utilizes a previously owned powertrain but which has new body parts. When these new body parts are put together to form the “shell” of a truck, the assembly of parts is referred to collectively as a “glider kit.” The final manufacturer of the glider vehicle, i.e., the entity that takes the assembled glider kit and combines it with the used powertrain salvaged from a “donor” truck, is typically a different manufacturer from the original manufacturer of the glider kit.

Pursuant to an October 2016 EPA final rule specifying that glider vehicles were “new motor vehicles” within the meaning of 42 U.S.C. §7550(3), small manufacturers of glider vehicles, beginning January 1, 2018, have been precluded from manufacturing more than 300 glider vehicles per year unless they use engines that comply with the greenhouse gas and fuel efficiency emission standards applicable to the model year in which the glider vehicle is manufactured. 81 Fed. Reg. 73,478 (10/25/2016). For 2017, the rule provided an interim allowance, permitting a manufacturer to produce glider vehicles in the amount of the greatest number it produced in any one year during the period of 2010–2014.

In November 2017, EPA published a notice of proposed rulemaking, proposing to repeal the emissions standards and other requirements of the 2016 rule on the basis of a revised interpretation of the statute holding that glider vehicles are not “new motor vehicles.” 82 Fed. Reg. 53,442 (11/16/2017). EPA has not yet finalized the rule, citing the need for further review of public comments. In the meantime, the agency noted in the 7/6/2018, no-action letter, many small manufacturers, in reliance on EPA’s 2017 proposed rule, have reached the 300-vehicle manufacturing limit for 2018 and must cease production for the remainder of the year, threatening job losses and the manufacturers’ viability. Accordingly, in the 7/6 letter, EPA announced that it will exercise its enforcement discretion and take no action against small manufacturers (and the suppliers that sell them glider kits) that in 2018 and 2019 produce up to the level of the interim allowance that was available to them in calendar year 2017. EPA’s no-action assurance will remain in effect until the earlier of 7/6/2019, or the effective date of a final rule EPA intends to promulgate extending the 2016 rule’s compliance date to 12/31/2019.

FWS issues guidance documents limiting key aspects of Migratory Bird Treaty and Endangered Species Acts. In April 2018, U.S. Fish and Wildlife Service (FWS) Principal Deputy Director Greg Sheehan issued two separate guidance documents that limit the agency authority under the Migratory Bird Treaty Act (MBTA) and the Endangered Species Act (ESA).

The MBTA was signed into law in 1918 with the purpose, inter alia, of making it “unlawful...to pursue, hunt, take, capture, kill, attempt to take, capture, or kill,” hundreds of species of migratory birds. 16 U.S.C. §703(a). Until recently, the MBTA covered both intentional and unintentional harm to migratory birds. However, in December 2017, the U.S. Department of Interior (DOI) issued a memo that concluded the MBTA only prohibits “affirmative actions” with the purpose of taking or killing a migratory bird; thus, the MBTA does not prohibit an “incidental take.”

On 4/11/2018, FWS issued a guidance document implementing the DOI memo. The guidance document clarified that MBTA enforcement applies only when the purpose of an action is to take migratory birds, and that a taking of a bird resulting from an activity whose purpose was not to take the bird, is not prohibited by the MBTA.

Similar to the MBTA, the ESA prohibits the “take” of listed species, which means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct.” 16 U.S.C. §1532(19). However, the ESA allows for FWS to issue permits for an “incidental take” of a listed species which might occur during an otherwise lawful activity. 16 U.S.C. §1539(a)(1)(B).

On 4/26/2018, FWS issued a guidance document clarifying when the need may arise to apply for an incidental take permit (ITP). The guidance clarifies the definitions of “harass” and “harm” of an ESA-listed species. The guidance states that harassment is prohibited under the ESA, but only applies to “intentional or negligent actions” resulting in the actual injury of a listed species by “significantly disrupting normal behavior patterns (e.g. breeding, feeding or sheltering, etc.).” As for the definition of “harm,” the guidance emphasizes that habitat modification alone may not necessarily “harm” a listed species to trigger the need for an ITP. The guidance establishes these three factors that must be met in order for habitat modification to qualify as “harm”: i) the modification of habitat must be significant; ii) the modification must significantly impair an essential behavior pattern of a listed species; and, iii) the significant modification that significantly impairs the listed species must likely result in the actual killing or injury of the wildlife. According to the guidance, unless all three components are met, an ITP is not required for the proposed project.

These April FWS guidance documents seem likely to result in the acceleration of environmental review and project approvals. “Guidance on the Recent M-Opinion Affecting the Migratory Bird Treaty Act” (Greg Sheehan, 4/11/2018); “Guidance on Trigger for an Incidental Take Permit Under Section 10(a)(1)(B) of the Endangered Species Act” (Greg Sheehan, 4/26/2018).

FEDERAL PRACTICE

JUDICIAL LAW

Deadlines for claim-processing rules; equitable exceptions; certiorari. The Supreme Court will review a 9th Circuit decision which held that Fed. R. Civ. P. 23(f)’s 14-day deadline for filing a petition for permission to appeal an order granting or denying class certification is subject to equitable exceptions. The 2nd, 3rd, 4th, 5th, 7th, 10th, and 11th Circuits all have held that Rule 23(f)’s deadline is not subject to equitable exceptions. Lambert v. Nutraceutical Corp., 870 F.3d 1170 (9th Cir. 2017), cert. granted, ___ S. Ct. ___ (2018).

District court’s denial of motion to intervene for lack of standing reversed.
The 8th Circuit reversed and remanded a district court’s denial of a motion to intervene in the long-running St. Louis school desegregation litigation, finding that the proposed intervenors had pleaded all of the elements of standing, and remanding the case to allow the district court to address the merits and timeliness of the intervenors’ motion. Liddell v. Special Admin. Bd. Of the Transitional School Dist., ___ F.3d ___ (8th Cir. 2018).

Class certification and settlement in Target security breach class action affirmed. After rejecting Judge Magnuson’s prior certification of a settlement class in the Target security breach class action, the 8th Circuit affirmed Judge Magnuson’s grant of a renewed motion for class certification, commending his “carefully reasoned and complete analysis” of the relevant settlement factors. In Re: Target Corp. Customer Data Sec. Breach Litig., 892 F.3d 968 (8th Cir. 2018).

Writ of mandamus granted; dissent. In a suit brought against members of the Arkansas Supreme Court by an Arkansas trial judge, the 8th Circuit granted a writ of mandamus and reversed a district court’s denial of the justices’ motion to dismiss. A dissent by Judge Kelly argued that the petitioners had not exhausted other procedural options, and that mandamus was inappropriate. In Re: Kemp, ___ F.3d ___ (8th Cir. 2018).

Claims of alleged FINRA arbitrator bias rejected. Affirming an order by Judge Magnuson, the 8th Circuit rejected claims of bias arising out of an arbitrator’s failure to disclose his involvement in a prior mediation involving the defendant, where the plaintiff was unable to establish the “evident partiality” of the arbitrator. Ploetz v. Morgan Stanley Smith Barney, LLC, ___ F.3d ___ (8th Cir. 2018).

Motion to amend scheduling order and add defendant based on newly discovered evidence rejected. Magistrate Judge Rau rejected the plaintiffs’ motion to amend the scheduling order to allow them to file an amended complaint and add a new defendant, finding that the plaintiffs could not establish the “good cause” necessary to support their motion where a delay of more than six months before bringing their motion meant that the plaintiffs had not acted diligently. MCI Communications Servs., Inc. v. Maverick Cutting and Breaking, LLC, 2018 WL 3000339 (D. Minn. 6/15/2018).

Motion to dismiss for improper venue denied; estoppel. Where the plaintiff filed an action in the Tennessee courts, the defendants moved to dismiss the action and argued that Minnesota was the proper venue for resolution of the dispute, the plaintiff eventually voluntarily dismissed the Tennessee action and filed a similar action in the District of Minnesota, and the defendants then moved to dismiss, arguing that Tennessee or Mississippi was the proper venue for the action. Magistrate Judge Menendez found that the defendants were estopped from opposing venue in Minnesota. MoneyGram Payment Sys., Inc. v. Bullfrog Corner Express, LLC, 2018 WL 2392010 (D. Minn. 5/25/2018).

Fed. R. Civ. P. 41(a)(2); motion for voluntary dismissal without prejudice granted. Finding that the purpose of Fed. R. Civ. P. 41(a)(2) is to “prevent voluntary dismissals which unfairly prejudice the other side,” Judge Doty granted one plaintiff’s motion for voluntary dismissal, finding that his arguments for dismissal were “compelling,” and that the defendants could not establish any prejudice resulting from the dismissal. G.C. v. South Washington Cty. School Dist. 833, 2018 WL 2694503 (D. Minn. 6/5/2018).

Motion to confirm arbitration award denied. Judge Montgomery denied a motion to confirm an AAA arbitration award that was filed one day after the entry of the award, finding that the motion was “premature” where it was filed prior to the deadline for moving to vacate, modify, or correct that award. Unison Co. v. Juhl Energy Devel., Inc., 2018 WL 2926495 (D. Minn. 6/11/2018).

Taxation of costs; video deposition. While rejecting most of the plaintiff’s multiple challenges to the clerk’s taxation of costs in favor of the prevailing defendant, Judge Doty found that the video deposition of the plaintiff was not “reasonably necessary” where the defendant failed to offer “specific evidence” that the plaintiff would be unable to testify at trial. Smith-Bunge v. Wisconsin Central Ltd., 2018 WL 2926497 (D. Minn. 6/7/2018).

Attorney’s request for subpoena-related compensation denied. Where the defendants asserted an advice of counsel defense, thereby waiving attorney-client privilege with their former counsel, plaintiffs served a subpoena on the former counsel, and the former counsel objected to the subpoena and sought compensation at his regular hourly rate of $450/hour for time spent responding to the subpoena, Magistrate Judge Menendez denied the compensation demand, finding that responding to the subpoena would involve neither “significant expense” nor “undue burden.” Cedar Rapids Lodge & Suites, LLC v. Seibert, 2018 WL 3019899 (D. Minn. 6/18/2018).

Personal jurisdiction; text messages. Granting defendants’ motion to dismiss for lack of personal jurisdiction, Judge Doty held that text messages sent by the defendants were insufficient to establish personal jurisdiction. Frank v. Gold’s Gym of North Augusta, 2018 WL 3158822 (D. Minn. 6/28/2018).

28 U.S.C. §1292(b); motion to certify interlocutory appeal denied. Judge Nelson denied the defendant’s motion to certify her partial denial of its FLSA decertification motion, agreeing that her ruling involved a controlling question.

SOCIAL SECURITY DISABILITY INITIAL APPLICATION THROUGH HEARING

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of law, but finding that there were no substantial grounds for difference of opinion and that an interlocutory appeal would not materially advance the ultimate termination of the litigation. *Shoots v. iQor Holdings US Inc.*, 2018 WL 2383158 (D. Minn. 5/25/2018).

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## IMMIGRATION LAW

### JUDICIAL LAW

**Supreme Court upholds Travel Ban 3.0.** On 6/26/2018, the U.S. Supreme Court issued a 5-4 decision in *Trump v. Hawaii*, upholding President Trump’s 9/24/2017 Proclamation 9645 (aka Travel Ban 3.0). The proclamation, in its third incarnation, sought to improve vetting procedures for foreign nationals seeking entry into the United States from certain countries failing to provide sufficient information necessary for assessing whether those individuals present a national security threat. The eight countries designated as deficient in providing the information were Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. (Chad was later removed from the list following a review of that country’s improved practices.)

Chief Justice Roberts’ majority opinion (joined by Justices Kennedy, Thomas, Alito, and Gorsuch with concurring opinions by Justices Kennedy and Thomas): The majority opinion upheld the proclamation based on an analysis of the following:

- 8 U.S.C. §1182(f): This provision of the law gives broad discretion to the president to suspend the entry of foreign nationals into the United States. In fact, according to the Court, §1182(f) “exudes deference to the President in every clause.” Thus, the president need only find the admission of certain foreign nationals into the United States to be detrimental to its interests to call for suspension of entry “for such period as he shall deem necessary.” And the Court finds the Department of Homeland Security’s worldwide review and recommendations provide sufficient grounds to warrant such a finding by the president. In sum, the “Plaintiffs have not identified any conflict between the Proclamation and the immigration scheme reflected in the INA that would implicitly bar the President from addressing deficiencies in the Nation’s vetting system.”

  **Establishment clause of the 1st Amendment: The** issue here involves the significance of a president’s statements, sometimes inflammatory, by way of speeches, tweets, and other avenues, in relation to a presidential directive which, on its face, is neutral and issued within the traditional core of executive responsibility.

- Applying a rational basis review, the Court asks if the proclamation is “plausibly related” to the government’s objective of protecting the United States and improving the vetting process for issuance of visas to foreign nationals seeking entry into the United States. While acknowledging the president’s outside statements, the Court discounts their significance and insists a presidential directive should be upheld “so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” Somewhat forebodingly, the Court notes, “The upshot of our cases in this context is clear: ‘Any rule of constitutional law that would inhibit the flexibility’ of the president ‘to respond to changing world conditions should be adopted only with the greatest caution,’ and our inquiry into matters of entry and national security is highly constrained. *Matthews*, 426 U.S., at 81–82.”

- At the same time, the Court notes that the proclamation does not universally ban foreign nationals from those countries since it makes allowance for exceptions (e.g., lawful permanent residents and those granted asylum or refugee status) and waivers, following review on a case-by-case basis.

- In sum, the Court finds the proclamation to be based on legitimate objectives involving national security interests and to “say[] nothing about religion.”

**Justice Breyer dissent (joined by Justice Kagan):** Much of the dissent is devoted to whether waivers are actually being granted as provided for by the proclamation or instead used in the proclamation as mere window dressing. Citing data suggestive of the latter, the dissent notes that, according to State Department reports, two waivers were approved out of 6,555 applications during the first month. Similarly, while refugees are exempted by the proclamation, few have been allowed into the United States. According to the State Department, 13 Syrian refugees (with 3 from Iran, 1 from Libya, 0 from Yemen, and 122 from Somalia) have arrived since January 2018. In light of this information and more, the dissent urges a remand for further fact-finding on the waiver process while leaving the injunction in place. “If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias… a sufficient basis to set the Proclamation aside.”

**Justice Sotomayor dissent (joined by Justice Ginsburg):** The dissent contends that the proclamation clearly violates the establishment clause’s guarantee of religious neutrality.

- The proclamation, now in its third guise, fails to remove the discriminatory intent of the President’s outside statements. The Proclamation “was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications.”

- The dissent also criticizes the majority for failing to recognize the government’s asserted national security rationale as nothing more than a “religious gerrymander.” The Department of Homeland Security’s worldwide review fails to “break the clear connection between the Proclamation and the President’s anti-Muslim statements.” In fact, the majority “empowers the President to hide behind an administrative review process [rational basis review] that the Government refuses to disclose to the public.”

- The dissent notes the irony of the majority’s 6/4/2018 opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* “where a state civil rights commission was found to have acted without the neutrality that the Free Exercise Clause requires,’ [but] the government actors in this case will not be held accountable to breaching the First Amendment’s guarantee of religious neutrality and tolerance.”

- Citing the Court’s 1944 decision in * Korematsu v. United States*, upholding Executive Order 9066—a 1942 decree effectively allowing for Japanese Americans to be removed from designated “military areas” and surrounding communities and placed into internment camps—the dissent notes the government continues its reliance on national security interests to justify government action that is, at its heart, discriminatory. “By blindly
accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploy the same dangerous logic underlying Korematsu and merely replaces one ‘gravely wrong’ decision with another.”


INTELLECTUAL PROPERTY

JUDICIAL LAW

Patents: Recovering damages for foreign lost profits. The United States Supreme Court recently held that a plaintiff, having proven patent infringement, could recover lost-profit damages for sales lost in foreign countries. WesternGeco sued ION Geophysical Corp. for infringement of U.S. patents related to surveying the ocean floor. A jury found ION liable and awarded WesternGeco $12.5 million in royalties and $93.4 million in lost profits. The lost profits award included profits from 10 service contracts performed abroad. ION moved to set aside the jury’s verdict, arguing that the lost-profit damages were improper because U.S. patents have no force beyond U.S. borders and, thus, there can be no damages on sales abroad.

The district court denied the motion. The Court of Appeals for the Federal Circuit reversed, however, and held that the lost-profit damages were improper because U.S. patents related to surveying the ocean floor. A jury found ION liable and awarded WesternGeco $12.5 million in royalties and $93.4 million in lost profits. The lost profits award included profits from 10 service contracts performed abroad. ION moved to set aside the jury’s verdict, arguing that the lost-profit damages were improper because U.S. patents have no force beyond U.S. borders and, thus, there can be no damages on sales abroad.

The Supreme Court disagreed. In determining whether a statute has been improperly applied in an extraterritorial way, a court, first, identifies the statute’s “focus” and, second, asks whether the conduct relevant to that focus has occurred domestically or extraterritorially. If the conduct occurred domestically, the statute is not being given improper extraterritorial effect. The Supreme Court held that the statutory focus of the patent damages statute, §284, is “the infringement.” Next, the Court held that the statutory focus of the infringement statute in this case, §271(f)(2), is the act of “supplying a component of a patented invention]... in or from the United States.” By its plain language, the conduct occurs domestically. Accordingly, the jury’s award of lost profits for sales in foreign countries was not an improper extraterritorial application of U.S. patent law. WesternGeco LLC v. ION Geophysical Corp., 585 U.S. ____ (2018).

Patents: Issue-preclusive effects of PTAB proceedings. Judge Frank recently denied a motion for summary judgment, finding a claim was not precluded based on an intervening judgment at the Patent and Trial Appeal Board (PTAB). Wilson Wolf Manufacturing sued Corning alleging that Corning acquired information about Wilson Wolf’s proprietary technology under a confidentiality agreement and subsequently (i) misappropriated Wilson Wolf’s trade secret technology, (ii) breached the confidentiality agreement, and (iii) filed patent applications on Wilson Wolf’s technology, improperly identifying Corning employees as the inventors. Corning moved for summary judgment, arguing that all of Wilson Wolf’s claims should be precluded by an intervening PTAB decision in which the PTAB invalidated most of the claims in one of Wilson Wolf’s patents. According to Corning, the technology covered in the invalidated patent was the same technology that was at issue in the lawsuit. Thus, under Corning’s theory, this “generally known” technology could be neither trade secret nor confidential. The court ruled, however, that the doctrine of issue preclusion did not apply. The Patent Act provides that patent claims shall be canceled when there has been “a final judgment adverse to a patentee from which no appeal or other review has been or can be taken.” The court rejected Corning’s issue-preclusion argument because Wilson Wolf could still appeal the PTAB’s decision, meaning that the claims had not yet been “finally” canceled. Accordingly, the court denied Corning’s motion for summary judgment. Wilson v. Corning, No. 13-210 (DWF/FLN), 2018 Dist. LEXIS 88173 (D. Minn. 5/25/2018).
**PROBATE & TRUST LAW**

**JUDICIAL LAW**

**Statute of limitations.** In August 2009, decedent agreed to sell certain real property to the City of Vadnais Heights. Decedent died in November 2009 and respondent was appointed special administrator. In April 2010, the real estate purchase agreement was amended to provide that forecasts were to be provided to ensure that the city would be able to make the debt service payments to decedent’s estate. No such forecasts were provided, but the sale nevertheless closed in April 2010. Based on revenue shortfalls, the city stopped making the debt payments to decedent’s estate in August 2012.

In January 2017, appellants brought breach of fiduciary duty and unjust enrichment claims against respondent alleging that it failed to obtain the required forecasts. The district court held that appellants claims were barred by the six-year statute of limitations period set forth in Minn. Stat. §541.05, subd. 1. At issue was whether the limitations period began to run when the sale closed in April 2010 or when the city stopped making payments in August 2012.

The court of appeals held that Minnesota follows the damage-accrual rule whereby the statute of limitations begins to run once any compensable damages occur. This rule is known as the “some damage rule.” The court held that appellants suffered some damage at the time the sale closed because they lost the opportunity to demand the forecasts, renegotiate the terms of the purchase agreement, or to cancel the purchase agreement. Hansen v. U.S. Bank, NA, 2018 WL 3213105 (Minn. Ct. App. 7/2/2018).

**Minn. Stat. §524.3-101.** Decedent purchased a house and financed it with a mortgage. Decedent’s will devised a quiet title action. The district court held that the statute of limitations began to run once any compensable damages occurred. This rule is known as the “some damage rule.” The court held that the statute of limitations began to run when the sale closed because they lost the opportunity to demand the forecasts, renegotiate the terms of the purchase agreement, or to cancel the purchase agreement. Hansen v. U.S. Bank, NA, 2018 WL 3213105 (Minn. Ct. App. 7/2/2018).

**TAX LAW**

**JUDICIAL LAW**

**Sales and use tax: Intervention of right permitted.** Proceedings before the Minnesota Tax Court are subject to the Minnesota Rules of Civil Procedure "where practicable." Minn. Stat. §271.06, subd. 7 (2016). Those rules provide that intervention of right is permitted provided the party seeking to intervene meets the four-part test set out in Minn. R. Civ. P. 24.01. (1) The intervener must submit a timely application; (2) the intervener must have an interest relating to the property or transaction which is the subject of the action; (3) the circumstances must demonstrate that the disposition of the action may as a practical matter impair or impede the party’s ability to protect that interest; and (4) the intervener must show that he or she is not adequately represented by the existing parties. In this sales and use tax dispute involving TBA Enterprises, Inc., the tax court granted the intervention petition of a former shareholder and officer of TBA Enterprises, Gayle Gaumer. The court was satisfied that Gaumer met each of the four factors set out in Minn. R. Civ. P. 24.01. Her application was timely, and because Gaumer is potentially personally liable for unpaid business taxes, she has an interest in the action. The court also readily found the third and fourth factors met. With regard to Gaumer’s ability to protect her interest, the court “simply conclude[d] that the disposition of this matter may, as a practical matter, impair or impede Gaumer’s ability to ef-
effectively challenge her personal liability for such tax, penalty, or interest in any subsequent litigation.” Finally, TBA Enterprises appears in the underlying dispute through its sole shareholder, and has not retained counsel. Although the interests of TBA Enterprises and Gaumer overlap at the moment, the court noted that those interests could become adverse at some point in the proceedings, and therefore the existing party does not adequately represent Gaumer’s interests. TBA Enterprises, Inc. v. Comm’r of Revenue, No. 9113-R, 2018 WL 2709267 (Minn. T.C. 5/23/2018).

Individual income tax: Summary judgment proper where taxpayer cannot provide documentation of dependents. Taxpayer Ethel Arita claimed head of household status as well as a Minnesota Working Family Credit via Schedule MI WFC; she also claimed to have two dependent children. The commissioner reviewed Arita’s return and requested more information on her claimed dependents. Arita supplied one birth certificate and later also supplied a divorce decree to the commissioner. The divorce decree, however, did not reference children between the parties, and in fact noted that no children had been born to or adopted by the parties during the marriage. As a result, the commissioner determined that Arita had improperly claimed head of household filing status, two personal exemptions, and the Minnesota Working Family Credit. Arita administratively appealed the commissioner’s determination, following which the commissioner filed for summary judgment. In granting the commissioner’s motion for summary judgment, the court began by noting that assessments made by the commissioner are presumed correct and valid. Minn. Stat. §270C.33, subd. 6 (2016). This presumptive validity imposes on the taxpayer the burden of going forward with evidence to rebut or meet the presumption. Conga Corp. v. Comm’r, 868 N.W.2d 41, 53 (Minn. 2015). Here, summary judgment was proper, the court reasoned, because despite multiple opportunities, the taxpayer was unable to supply information that the claimed dependents met the statutory requirements of a qualifying relative or qualifying child under I.R.C. §152(c) or (d). Without the dependents, Arita’s head of household status, personal exemptions, and Minnesota Working family credit could not be sustained. Arita did not oppose the summary judgment motion in writing and did not appear at the hearing. Finding no evidence that the commissioner’s order was erroneous, the court affirmed it. Arita v. Comm’r, No. 9072-R (Minn. T.C. 6/14/2018).

Utility Appeal Statute: Interpretation of Subdivision 2(b), 2(c) appeals. Appellant, Minnesota Valley Electric Cooperative (MVEC), filed a tax court appeal challenging the estimated market value of its electric utility operating property and alleging unequal assessment. MVEC filed its appeal pursuant to Subdivision 2(c) of Minn. Stat. §273.372 (2016) (Utility Appeal Statute). As the court explained, “[t]he Utility Appeal Statute sets forth special procedures for challenging the Commissioner’s utility assessments.” Subdivision 2 of the statute provides procedural instruction as to how to appeal to the tax court and it sets out two paths: Subdivision 2(b) sets the path to chapter 271, while Subdivi-
Notes&Trends  | TAX LAW

sion 2(c) directs the taxpayer to chapter 278. The relationship between those two subdivisions of the Utility Appeal Statute was at issue in the decision. In particular, the commissioner contended that MVEC was required to appeal under Subdivision 2(b) and was not permitted to proceed under Subdivision 2(c). Applying familiar canons of statutory interpretation, the tax court held that the taxpayer is not so limited, and in fact “nothing in the Utility Appeal Statute indicates—or even suggests—that any particular substantive claim is barred unless it is pursued by invoking a particular appeal procedure.”

The commissioner’s motion to dismiss was denied. Minn. Valley Electric Coop. v. Comm’r, No. 9047-R (Minn. T.C. 5/1/2018). (The court applied its decision in MERC to another utility property tax appeal announced the same day, Wright Hennepin Coop. v. Comm’r, No. 9048-R (Minn. T.C. 5/1/2018). In the later decision, the court also rejected the commissioner’s claim that the petition was untimely filed.)

Property tax: Pipeline valuation dispute continues. Valuing billions of dollars’ worth of oil pipelines is not for the faint of heart. Enbridge Energy, LLP (EELP) owns pipelines that run through 13 greater Minnesota counties. The pipeline not only runs through Minnesota, but also extends to other states and Canada to form the “longest liquid petroleum pipeline system in the world.” Id. at 3. Valuing such property is challenging, and the responsibility for valuing pipelines in Minnesota falls on the Commissioner of Revenue instead of local assessing authorities. Pipeline valuation is also distinctive in that pipeline personal property is not assessed where its owner resides, but in the county, town, or district where that property is usually kept. Finally, the commissioner assesses pipeline property under the unit method—which, in general terms, attempts to ensure pipeline property under the unit method—which, in general terms, attempts to capture the fair market value of oil pipelines from the sum of its parts, but from the integrated use of the parts to carry traffic, render public service, and from the investors’ standpoint, generate income.” Id. at 9 (quoting Burlington N. R.R. v. Bair, 815 F. Supp. 1223, 1227 (S.D. Iowa 1993)).

In this valuation dispute, which has spanned five years, six amended scheduling orders, a stay, and various other procedural machinations, the tax court issued its Findings of Fact and Conclusions of Law on 5/15/2018. In its 98-page order, the tax court systematically reviewed and analyzed the fair market value of the pipeline operating system. The court declined to use either the sales comparison approach or the cost approach to valuation in this instance. Instead, the court utilized the income approach to value the property. In the course of its order, the court discussed the interplay of Minnesota property taxation statutes and Minnesota Rule 8100. The court ultimately concluded that the commissioner overstated the system unit of value for EELP’s pipeline operating system for each of the three valuation dates at issue. The tax court’s thorough and extensive order did not, however, resolve all issues in dispute. In particular, the court’s order valued EELP’s pipeline system as a unit but did not determine the appropriate allocation between the system’s value as a whole and the portion of that entire valuation that is appropriately allocated to Minnesota. The court invited input from the parties on the appropriate allocation method. The court’s order contemplated additional proceedings on that issue, and a scheduling conference was ordered.

Shortly after the tax court issued its Findings of Fact and Conclusions of Law, the commissioner petitioned the Minnesota Supreme Court for discretionary review. The commissioner asks the court to “require the Tax Court to apply Minnesota Rule 8100 in determining the fair market value of the pipeline property.” Petition for Review at 1. EELP opposes the interlocutory appeal. See Response of Enbridge Energy, Limited P’ship to Petition for Discretionary Review at 1. In opposition, EELP notes that interlocutory appeals are disfavored, and articulates a number of reasons why it should not be granted in this dispute. EELP’s arguments include that the tax court did not ignore Minn. Rule 8100, but that the court properly exercised its discretion in interpreting that rule and harmonizing the dictates of Minnesota statute with the administrative rule. EELP further argues that the tax court’s valuation conclusions are unlikely to be impacted by the relief requested by the commis-

Property tax: Prosecution without payment permitted. Carol Matheys Center for Children & Families (the center) provides early-childhood care and education to families in Washington and surrounding counties. The center challenged the assessment of real property taxes due and payable in 2018, and sought permission to continue prosecution of its property tax petition without payment. Minnesota statute permits the tax court to permit prosecution without payment if the court is satisfied that three factors are met. First, the proposed review must be taken in good faith; second, there must be probable cause to believe that the property may be exempt from the tax levied; and finally, the court must be satisfied that it would work a hardship on the petitioner to pay the taxes due. Minn. Stat. §278.03 (2016). The center submitted a verified petition and supporting affidavit; the county did not dispute any of the facts asserted in either document and therefore the court assumed those facts for the purposes of the motion. Turning to the factors, the court reasoned that because the property had been exempt from property taxation for many years when it was church-affiliated and then for several tax years after the center took over, the center had a good faith basis for seeking review. Interpreting “probable cause” to mean “reasonable cause” or “reasonable grounds,” the court also found this second factor met. The center articulated two relevant exemptions: first, that the property is exempt as a “seminary of learning” and next, that the center is an “institution of purely public charity.” Minn. Stat. 272.02, subd. 5, 7 (2016). The court focused on the “seminary of learning” exemption, and reasoned that the center demonstrated it has reasonable grounds to be exempt from taxation as a “seminary of learning.” Finally, the court held that payment of the disputed tax would be a hardship to the center given its other significant financial liabilities. In so holding, the court rejected the county’s argument that the property tax increase must be unanticipated to constitute a hardship. Carol Matheys Ctr. for Children & Families, Inc. v. Washington Co., No. 82-CV-17-4474 (Minn. T.C. 5/14/2018).
Unemployment insurance taxes and visa holders. Appellant Svihel Vegetable Farm, Inc. (SV Farm) has employed visa employees on its farms, but has never paid unemployment-insurance taxes on the wages it pays to its visa employees. The Department of Employment and Economic Development audited SV Farm and determined the farm owed $154,726 in unemployment-insurance taxes on the visa employee wages. SV Farm appealed the assessment and the unemployment law judge affirmed. The Minnesota Court of Appeals faced two issues: first, “[d]oes the exclusion of agricultural labor performed by visa employees from the federal definition of employment exclude that labor from being agricultural employment subject to unemployment-insurance taxation under Minnesota law?” The court answered this question in the negative: The cultivating of strawberries, cabbages, tomatoes, peppers, and melons does not cease to be agricultural labor simply because it is performed by visa employees. The court then held that the evidence in the record reasonably tends to support the ULJ’s conclusion that the J-1 employees did not meet the educational-employment exception to covered employment. The reviewing court noted that although there was some testimony that J-1 employees come to the United States to learn about the business, there was no evidence that any educational institution certified any of the several requisite facts that would make this exception applicable (e.g., institution must certify that there is a regular faculty and curriculum and a regularly organized body of students). Svihel Vegetable Farm, Inc. v. Dept of Empl. & Econ. Dev., 2018 Minn. App. LEXIS 239 (Minn. Ct. App. 5/7/2018).

Contract interpretation. Plaintiff sued the defendant for breach of contract. Prior to and during trial, the district court held that contractual provisions were ambiguous and that parol evidence would be admitted to explain the intent of the parties. In its instructions to the jury, over plaintiff’s objection, the district court stated: “If you find the contract is ambiguous, you should determine the intent of the parties. When contract language is reasonably susceptible to more than one interpretation, the ambiguous contract terms are to be construed against the drafter.” After the jury found in favor of plaintiff, the defendant appealed claiming the district court improperly instructed the jury on contract meaning. The court of appeals reversed and remanded for a new trial.

The Minnesota Supreme Court affirmed the decision of the court of appeals. The Court first held that the district court erred in instructing the jury to determine whether or not the contractual provisions were ambiguous. The Court reasoned that whether or not the contract terms were ambiguous was a question of law for the court, and, indeed, a question that had already been decided by the district court. Therefore, the district court should have instructed the jury that the contract terms were ambiguous. Second, the court held that the district court erred in its instruction on contra proferentem because it must be applied only as a last resort—after an attempt is made to determine the parties’ intent behind the ambiguous terms using extrinsic evidence. Because the instructions failed to tell the jury which task must be completed first, the case was remanded for a new trial. Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc., No. A16-1146 (Minn. 6/27/2018). https://mn.gov/law-library-stat/archive/supct/2018/OPA161146-062718.pdf

Legal malpractice; standing. Defendant law firm drafted a will and revocable trust agreement for decedent in 2009. A provision in the will directed that a substantial portion of the estate be distributed to a beneficiary who was more than 37.5 years younger than the decedent, subjecting the distribution to a generation-skipping transfer tax totaling about $1.654 million. Following the decedent’s death, plaintiff, who was appointed trustee and personal representative of the estate, filed suit against defendant for malpractice. The district court granted defendant’s motion for judgment on the pleadings, finding that plaintiff lacked standing. The court of appeals reversed and remanded.

The Minnesota Supreme Court reversed the decision of the court of appeals. Initially, the Court rejected plaintiff’s argument that a legal-malpractice claim need not accrue during a deceased client’s lifetime to allow the personal representative to pursue it after the client’s death. In so holding, the Court relied on the plain language of Minn. Stat. §524.3-703(c), which provides that personal representatives have the “same standing to sue... as the decedent had immediately prior to his death.” The Court went on to hold that plaintiff lacked standing as personal representative because no claim for malpractice accrued prior to decedent’s death—i.e., “some damage” did not occur until after death. Finally, the Court held that plaintiff lacked standing to sue in its capacity as trustee of the revocable trust because no attorney-client relationship existed between defendant and plaintiff or the trust, and neither was a direct and intended beneficiary of defendant’s services. Security Bank & Trust Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd., No. A16-1810 (Minn. 6/27/2018). https://mn.gov/law-library-stat/archive/supct/2018/OPA161810-062718.pdf

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Robert C. Boisvert was elected as a fellow of the College of Labor and Employment Lawyers. Boisvert is an attorney at Fredrikson & Byron, where he counsels employers and executives on a wide range of employment issues.

Christopher D. Pham was welcomed as a member of the board of trustees of Mitchell Hamline School of Law. Pham is an attorney at Fredrikson & Byron and co-chairs the firm’s sports & entertainment group.

Erik Drange joined Christensen Fonder Dardi Herbert PLLC as a partner. Drange most recently served as senior intellectual property counsel for a Minnesota-based, Fortune 100 global technology company.

Stephan C. Fiebiger received the John Coskran Volunteer Award from the Burnsville-Eagan-Savage school district. Fiebiger led the creation of the district’s education foundation and served as its board president for 13 years. Fiebiger practices civil litigation and appeals in state and federal courts in Burnsville.

Clifford Greene will bring four decades of courtroom experience to the classroom when he joins the Mitchell Hamline faculty as a distinguished practitioner in residence. Greene, who co-founded the Minneapolis law firm Greene Espel PLLP 25 years ago, will teach civil procedure when the fall semester begins. Greene will continue to be a member of Greene Espel.

James Dickey has joined Bernick Lifson, PA as an associate attorney with the commercial litigation group. Dickey will be representing firm clients in all facets of commercial litigation.

Adine S. Momoh became the 100th president of the Hennepin County Bar Association (HCBA) on July 1. Momoh is a partner at Stinson Leonard Street. Also serving on the 2018-19 HCBA executive board are: President-elect Jeffrey Baill (Yost & Baill); Treasurer Esteban Rivera (Rivera Law Firm); Secretary Brandon E. Vaughn (Robins Kaplan); and New Lawyers Representative Stephanie R. Willing (Ogletree Deakins). The past president is Thaddeus R. Lightfoot.

Kelly J. Keegan has formed Keegan Law Office, practicing in criminal defense, expungement, and firearms rights law. Keegan has been in practice for 12 years and was a partner at her previous firm. The office is located in the Uptown neighborhood of Minneapolis.

Sonia Miller-Van Oort presented the MSBA President’s Award to Michele L. Miller (Johnson, Killen & Seiler, PA) and Jennifer A. Thompson (Thompson Tarasek Lee-O’Halloran PLLC) at the Minnesota State Bar Association Convention in June. The President’s Award is given annually to recognize an MSBA member’s outstanding support and assistance to the MSBA and its mission. Recipients are personally selected by the outgoing president of the MSBA.

Larry McDonough has been appointed by the Minnesota Supreme Court to the Minnesota Judicial Branch Triage Portal Advisory Committee (TPAC). The TPAC will serve as a governance structure to coordinate the work already being done to redesign the civil legal aid online intake system with additional court self-help, ADR, and private bar resources and ensure there are sufficient resources for the long-term success of the Justice for All project.

McDonough is pro bono counsel at Dorsey & Whitney LLP.

Mary Pat Byrn joined Virtala Law Office as a partner. After 10 years as a professor of constitutional and family law, Byrn is now practicing in the areas of estate planning, family law, and advising businesses and non-profits.

Nicole Kettwick joined Brandt Criminal Defense as a partner. Kettwick dedicates her practice to helping those who find themselves on the wrong side of the law. Her passion and energy for helping people contribute to her fulfilling career as an advocate for criminal defendants.

Tony R. Krall has joined Meagher & Geer. Krall has spent a large part of his career handling large loss and catastrophe litigation, including fires and explosions, product liability, and property and casualty litigation.

Joseph F. Lulic joined Brownson • Norby, PLLC as a senior attorney. Prior to joining the firm, Lulic was a founding partner of a Minneapolis litigation firm. Lulic has a substantial background in all facets of civil litigation, with experience in insurance coverage, property and casualty insurance-related matters, and complex multi-party insurance-related subrogation and defense matters.

Gow. Dayton appointed Jacob C. Allen as a district court judge in Minnesota’s 3rd Judicial District. Allen will be replacing Hon. Jeffrey D. Thompson and will be chambered at Rochester in Olmsted County. Allen currently serves as the managing attorney of the 3rd Judicial District Public Defender’s Office.
Court judges in Minnesota’s 4th Judicial District. They will be replacing Hon. Mel I. Dickstein and Hon. Daniel H. Mabley and will be chambered in Minneapolis. Gaitas is an attorney at Matonich Law, where she represents plaintiffs in medical malpractice actions. West is an assistant public defender at the 4th Judicial District Office of the Public Defender.

Patrick S. Collins and Vicki A. Hruby have become partners of Jardine, Logan & O’Brien, PLLP. Collins practices primarily in civil litigation defense and government liability in Minnesota and Wisconsin. Hruby joined the firm in 2011 and practices principally in employment law, government liability, health law, and civil litigation defense.

Marshall H. Tanick of Meyer Njus Tanick was named Citizen of the Year by Rotary International. He was cited for his community activities and charitable work in Golden Valley and surrounding communities.

Marc Johannsen has been elected president of Lommen Abdo. Johannsen has been with the firm since 1991 and practices in the area of family law. Newly elected members of the board include Kathleen Loucks, Mike Glover, and Keith Broady. Barry O’Neil and Bryan Feldhaus were each re-elected.

Chris J. Henjum joined Kennedy & Graven, Chartered. Henjum practices public finance law.

Brittany Bachman Skemp has joined Bassford Remele as an associate. She focuses her practice in the areas of employment law and commercial litigation, and she defends businesses and professionals against liability and malpractice claims.

Bench & Bar accepts press releases and announcements regarding current members of the MSBA for publication, without charge.

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**DUNLAP & SEEGER**, PA, a 25-attorney law firm located in Rochester, Minnesota, is seeking associates. Candidates should have strong academic credentials, excellent writing skills and the ability to build client relationships. Please send your resume and cover letter to: Dunlap & Seeger, PA, PO. Box 549, Rochester, Minnesota 55903, or email to: info@dunlaplaw.com.

**LEGAL SERVICES of Northwest Minnesota** seeks attorney for its Bemidji office to represent low income clients. Poverty law and family law experience preferred. Salary range: DOE, plus benefits. Send resume and three references to: Anne Hoefgen, Executive Director, Legal Services of Northwest Minnesota, PO. Box 838, Moorhead, MN 56561. Legal Services of Northwest Minnesota is an EO/AA employer.

**MEAGHER & GEER, PLLP** has an immediate opening for an associate attorney with two to four years of litigation experience to work in its Minneapolis office. Candidates must be admitted to the Minnesota bar, possess excellent academic credentials with exceptional writing, persuasive speaking, and analytical skills, and have a drive for excellence. Please email a letter of application, resume, law school transcript, and writing sample to: recruitment@meagher.com.

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Grant J. Merritt
Iron and Water: My Life Protecting Minnesota’s Environment
(University of Minnesota Press, $24.95)

This memoir chronicles a life’s work on behalf of Minnesota’s people and environment and also the story of a family significant in the state’s history. The complex tale begins with the adventure of discovering iron ore and building the mines, railroads, and docks to move it, then delves into the intrigues of business partnerships gone bad and attempts by John D. Rockefeller to defraud the Merritts.

What follows is an engrossing account of Grant Merritt’s years in the halls of state politics and the trenches of environmental activism in defense of Minnesota’s North Shore and Lake Superior’s waters. The author’s tenure as head of the Minnesota Pollution Control Agency under Gov. Wendell Anderson and his service on the first board of the Minnesota Environmental Quality Council take us behind the scenes of landmark legal cases and crucial moments in Minnesota history—particularly the Reserve Mining case, in which the company was found liable for serious environmental and health threats on the shores of Lake Superior and ordered to be shut down.

Paul Collins
Blood & Ivy: The 1849 Murder that Scandalized Harvard
(W.W. Norton & Co., $26.95)

In November 1849, in the heart of Boston, one of the city’s richest men simply vanished. Dr. George Parkman, a Brahmin who owned much of Boston’s West End, was last seen that afternoon visiting his alma mater, Harvard Medical School. Police scoured city tenements and the harbor, and offered hefty rewards as leads put the elusive Dr. Parkman at sea or hiding in Manhattan. But one Harvard janitor held a much darker suspicion: that their ruthless benefactor had never left the Medical School building alive.

His shocking discoveries in a chemistry professor’s laboratory engulfed America in one of its most infamous trials: The Commonwealth of Massachusetts v. John White Webster. A baffling case of red herrings, grave robbery, and dismemberment of Harvard’s greatest doctors investigating one of their own, for a murder hidden in a building full of cadavers it became a landmark case in the use of medical forensics and the meaning of reasonable doubt. Paul Collins brings nineteenth-century Boston back to life in vivid detail, weaving together newspaper accounts, letters, journals, court transcripts, and memoirs from this groundbreaking case.

Rich in characters and evocative in atmosphere, Blood & Ivy explores the fatal entanglement of new science and old money in one of America’s greatest murder mysteries.

Dan Abrams and David Fisher
Lincoln’s Last Trial: The Murder Case That Propelled Him to the Presidency
(Hanover Square Press, $26.99)

At the end of the summer of 1859, twenty-two-year-old Peachy Quinn Harrison went on trial for murder in Springfield, Illinois. Abraham Lincoln, who had been involved in more than three thousand cases—including more than twenty-five murder trials—during his two-decades-long career, was hired to defend him. This was to be his last great case as a lawyer.

The case posed painful personal challenges for Lincoln. The murder victim had trained for the law in his office, and Lincoln had been his friend and his mentor. His accused killer, the young man Lincoln would defend, was the son of a close friend and loyal supporter. Lincoln’s Last Trial captures the presidential hopeful’s dramatic courtroom confrontations in vivid detail as he fights for his client—but also for his own blossoming political future. It is a moment in history that shines a light on our legal system, as in this case Lincoln fought a legal battle that remains incredibly relevant today.

Khaled A. Beydoun
American Islamophobia: Understanding the Roots and Rise of Fear
(University of California Press, $26.95)

The term “Islamophobia” may be fairly new, but irrational fear and hatred of Islam and Muslims is anything but. Though many speak of Islamophobia’s roots in racism, have we considered how anti-Muslim rhetoric is rooted in our legal system?

Using his unique lens as a critical race theorist and law professor, Khaled A. Beydoun captures the many ways in which law, policy, and official state rhetoric have fueled the frightening resurgence of Islamophobia in the United States. Beydoun charts its long and terrible history, from the plight of enslaved African Muslims in the antebellum South and the laws prohibiting Muslim immigrants from becoming citizens to the ways the war on terror assigns blame for any terrorist act to Islam and the myriad trials Muslim Americans face in the Trump era. He passionately argues that by failing to frame Islamophobia as a system of bigotry endorsed and emboldened by law and carried out by government actors, U.S. society ignores the injury it inflicts on both Muslims and non-Muslims. Through the stories of Muslim Americans who have experienced Islamophobia across various racial, ethnic, and socioeconomic lines, Beydoun shares how U.S. laws shatter lives, whether directly or inadvertently. And with an eye toward benefiting society as a whole, he recommends ways for Muslim Americans and their allies to build coalitions with other groups. Like no book before it, American Islamophobia offers a robust and genuine portrait of Muslim America then and now.

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