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Ciresi Conlin is pleased to welcome

Bob King brings more than 35 years of extensive litigation experience to Ciresi Conlin, where he will continue to represent individuals and families in complex personal injury cases, medical negligence and product defects, alongside partners Michael Ciresi and Mathew Korte. He also handles commercial, insurance, trust and estate and class action lawsuits, and is a welcome addition to Ciresi Conlin’s litigation practice.

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Unmet legal needs aren’t going away

In the spring of 2018 I was asked to appear in front of the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure. Our MSBA President, Sonia Miller-Van Oort, was not available, so the task fell to me. The purpose of my appearance was to support the MSBA’s request to amend the rules to require 50 percent of cy pres funds in state court class actions to go to civil legal services. The proposal was unanimously supported by the MSBA Assembly in 2016. The Court amended the rule to require notice to qualified legal services programs and gave the district court judges the authority to notify other potential recipients.

In order to prepare for the meeting I met with Cathy Haukedahl, who was then the executive director of Mid-Minnesota Legal Aid. She provided me with an education on the unmet legal needs in our state.

At that point I had been practicing in the areas of workers compensation and insurance defense for 34 years. In almost every case I defended, the plaintiff was represented by an attorney. When I encountered the occasional pro se plaintiff, it was clear they faced severe challenges navigating our legal system. Cathy told me that 60 percent of clients who qualified for legal aid were turned away. They weren’t turned away because their case lacked merit. They were turned away based on lack of capacity. If they got turned away by legal aid, what do you think the chances are they hired a private attorney? We all know the answer to that question is zero.

Civil Gideon?

But even if they are not represented, they still need to deal with their legal issue. This means that they go it alone. This explains, in large part, why our courts are flooded with pro se litigants. This brings me to a question that we as lawyers need to answer. How do we provide legal representation to everyone in our legal system? Put another way, do we need the civil version of Gideon vs Wainwright?

From 2015 to 2018, the MSBA asked two task forces to look for ways to provide services to people who can’t afford a lawyer and don’t qualify for legal aid. In the spring of 2018 proposals to allow Designated Practitioners (AKA Legal Practitioners) or Limited Liability Legal Technicians came before the MSBA Assembly. (You can read the task force report at www.mnbar.org/ALM.) After a long and spirited debate, the proposals were voted down. Issue resolved, right? Wrong.

The need persists

At the MSBA convention in June 2018, Chief Justice Gildea gave her State of the Judiciary speech. She is so concerned about the number of pro se litigants in the judicial system that she wants to take another look at alternative legal models to solve that problem. Just because we declined to move forward on two proposals does not mean others will sit still and refrain from providing their own solutions for the problem. It could be in the form of Limited Liability Legal Technicians, or computer-based legal services, or mandatory pro bono services, or increased lawyer registration fees dedicated to legal aid.

I do not have a solution to this problem. I am writing this article to make everyone in our bar association aware of the issue. Our system has a problem. I hope that our members can lead the way in finding creative solutions before solutions are thrust upon us.
The business case for D&I

In September, the MSBA Council approved the Diversity & Inclusion Council’s Statement of Commitment for the Business Case, Value Proposition, and Professional Obligation. (You can read it by visiting www.mnbar.org/diversity.) This document outlines the professional obligation that all attorneys have to advance diversity and inclusion as part of our dedication to equality and the rule of law. In summary, “Without diversity and inclusion, our nation’s commitment to the rule of law will ring hollow, our system of justice will be in jeopardy, and our economic system will not only fail to thrive, it will be threatened by inequality and unfairness…. Our duty along these lines is not satisfied by aspirations alone; it is a duty of action and results. It is our obligation, and our duty, to strengthen the rich equality that comes from meaningful diversity and inclusion, at every turn.”

The new MSBA website is live

We’re excited to announce that the MSBA’s new website—featuring a cleaner, more contemporary design and simpler, more intuitive user navigation—went live on October 23! Visit soon if you haven’t already—and let us know what you think (feedback@mnbar.org).

MN Unbundled project launches

The Minnesota Unbundled Law Project—a collaboration between the MSBA and the Hennepin and Ramsey County Bar Associations—went live last month at www.MNunbundled.org. Staff from each of the bar organizations worked over the past six months to develop the roster, design a training program, recruit attorneys, and begin promoting the website. The bar associations received funding from the Minnesota Judicial Branch as part of its Justice for All implementation grant from the National Center for State Courts.

Participating attorneys offer unbundled (limited scope) legal services via direct referrals of potential clients through the website. The website is easy to use and allows potential clients to search by geographic area and type of legal matter. When there is a match, potential clients receive the names of up to three attorneys and can contact one, or ask to be contacted, through the site.

Since this a pilot project, both participating attorneys and clients will be asked for their feedback. We continue to seek attorneys for the project; applicants must meet training, lawyer grievance, and experience requirements. Interested attorneys should contact the project via email at MNunbundled@mnbar.org.

Did you know?

60% of U.S. adults don’t have a will or living trust.

New estate tools at mndocs

The MSBA recently added basic estate planning to its document assembly product, mndocs. The market is ripe: 60 percent of adults in the U.S. currently lack a will or living trust. For Millennials that figure jumps to 78 percent without an estate plan. And 93 percent of American households have a net worth of less than $1 million.

To help our members better serve this segment of the market, the MSBA has also added an Estate Planning Starter Kit, which lets members try out mndocs and generate basic estate planning documents for their clients for only $5 a month. Visit try.mndocs.com for details. To learn more about the new estate planning forms in mndocs, check out our CLE at noon on Tuesday, November 20. Go to www.mnbar.org/cle-events to sign up.
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When someone else pays your bill

I love our ethics hotline. Not only are we helping lawyers every day to navigate their ethical responsibilities, but oftentimes the questions present themes that make perfect subjects for this column. Lately I’ve answered several calls that involve issues arising because someone else was paying the lawyer’s bill. This can arise in lots of different practice areas: family, criminal, immigration, estate planning, employment, and insurance defense, to name a few. Much has been written on this subject in matters of insurance defense, so I would like to set that specific practice area aside and focus more on when friends or relatives are footing the bill. Let’s begin, as always, with the rules.

A lawyer’s independence

One of the most important hallmarks of an attorney-client relationship is the lawyer’s loyalty to the client. Preservation of this duty is furthered by compliance with the rules involving confidentiality, conflicts of interest, and professional independence. Two rules in particular are implicated when someone else pays the bill for legal services: Rule 1.8(f) and Rule 5.4(c), Minnesota Rules of Professional Conduct.

Specifically, Rule 1.8(f) says:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client gives informed consent or the acceptance of compensation from another is impliedly authorized by the nature of the representation;
2. there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
3. information relating to the representation of a client is protected as required by Rule 1.6.

The related Rule 5.4(c) says:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

Informed consent

The first step in a third-party payor relationship is informed consent of the client. Of course, there is sometimes a caveat: In a limited subset of cases this is not the first step, such as for public defenders, other court-appointed counsel, or legal aid, where payment of the lawyer’s fee by another is inherent in the nature of the representation. In all other cases, however, informed consent is your first stop. Why is this?

This is the first step because the issue is fundamentally one of conflicts. You need to determine if there are or could be differing interests between your client and the third-party payor, and whether your responsibilities to your client may be materially limited by your responsibility to a third party, or your own interest in having your bill paid. Too often lawyers forget this important step because on initial consultation, everyone seems aligned, and you are just glad someone with money can pay you. You really do not know if the parties are aligned, however, unless you have a conversation on the topic. This is particularly true if the third-party payor is also a client.

Things to consider include but may not be limited to these questions:

- What are the objectives of each relating to the representation?
- Are there limits to what and how much the third party is willing to pay?
- If so, how will that impact the representation?
- What happens if the third party stops paying the bill?
- What amount of information will be shared with the third-party payor?
- How will that impact the attorney-client privilege? (hint: likely waiver)
- Who is entitled to a refund if one is due?
- Does the third party understand they are not the client?

If you discuss these matters with the parties, you will be better able to ascertain if there is a risk from someone else paying the fee and how material the risk may be. Explaining the risks and alternatives to your client enables them to give informed consent as required by Rule 1.8(f)(1). This consent does not need to be confirmed in writing, unless the third-party payor is already a client (then you have a Rule 1.7 concurrent conflict you need to analyze as well), but your client must give informed consent. If you don’t have a conversation on the topic at all, it is hard to say (or to prove, if a complaint is raised) that the client gave informed consent.

The best practice is to discuss these issues with your client and reflect the results of the conversation in your engagement letter. I also recommend you have a separate written agreement with the third-party payor. This helps to reiterate that the third-party is not the client, which can be confusing to some if the payor is signing the engagement letter too.
No interference

Lack of interference by the third-party payor is so important that it is mentioned twice in the ethics rules, in Rule 1.8(f)(2), and Rule 5.4(c), MRPC. It is human nature for individuals who are paying the bill to want to have a say in how their money is spent. While those individuals can certainly share their opinion, that opinion cannot interfere with the independent exercise of your professional judgment. A good way to prevent this from occurring is to make sure the client and payor understand this important fact as part of the informed consent process, and to reiterate the requirement in the engagement letter and third-party payor agreement you use.

Confidentiality

Only in limited circumstances may an attorney reveal client confidences to a third party. In fact, everything relating to the representation is confidential (remember, this is broader than the attorney-client privilege) and should not be shared except under specified circumstances. You should discuss with your client the level of information it is permissible to share with the third party, and the risk of doing so. Most importantly, you should discuss with your client the impact of sharing information on the attorney-client privilege, particularly if waiver of the privilege may prejudice your client. Rule 1.8(f)(3) expects you to protect client confidences no matter who is paying, and the client must give informed consent to any disclosures.

A final caution: One recent hotline call I received concerned a lawyer who had fallen into the bad habit of talking primarily to, and taking direction from, the concerned family member paying the bill because the family member was more attentive and accessible than the client. Please do not do fall into this habit. Even if the client has consented to the disclosure of information and the waiver of privilege has been addressed, your ethical duty is to abide by your client’s decisions regarding the representation, and to consult with your client regarding the means to accomplish those objectives. Do not abrogate that responsibility because of the ease of working with the person who is paying your bill.

Hiring a lawyer can be expensive. Some are fortunate to have a friend or relative who agrees to assist in that situation. For this to work, however, you need to have a good discussion with your client, preferably documented in writing, which will enable your client to give informed consent to the risks and advantages of this often conflict-ridden course of action.  

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1 Also known as our Advisory Opinion service; senior staff attorneys can be reached daily at 651-296-3952, or via email at www.lprb.mncourts.gov.
3 See also Kenneth L. Jorgensen, “When a Friend or Relative Pays the Client’s Legal Fee,” Bench & Bar (February 2005).
4 See Rule 1.6, MRPC. Rule 1.6(a) broadly defines the information that should be kept confidential as all “information relating to the representation.” Rule 1.6(b) describes the specific circumstances in which a lawyer may reveal information relating to the representation. https://media.gettyimages.com/photos/three-invoices-all-with-paid-stamp-picture-id900553128
Don’t forget the inside threat

Judging by the types of breaches we regularly hear about in the news, from the recent Facebook hack to China’s secret implantation of spy chips inside motherboards (which I’ll be discussing in my next article), it would seem that the biggest threats to our digital security are primarily external. Social engineering attacks such as phishing scams are especially prevalent and tend to stem from outside perpetrators with financial or political motives. Considering our near-constant exposure to these types of attacks, it may be hard to believe that the greatest cybersecurity risk an organization faces originates internally.

The fact is, the state actors and nefarious basement-dwelling hackers we typically visualize are a less likely threat than the human risks to security that exist within our own organizations. Employees, partners, and third-party vendors introduce two very distinct, though equally damaging, types of threats to your firm’s cybersecurity posture: unintentional and malicious. Unintentional threats may include an employee falling prey to a phishing scam, a browser exploit, or some other kind of hack that compromises the data to which they have access. Wi-Fi attacks and the possibility of having a device stolen are also very dangerous and common, especially as people spend a greater amount of time working remotely.

I once had a frantic phone call from a young attorney who had left their laptop in their car overnight. The next morning it was gone. Luckily, the laptop had been encrypted, so the potential for damage was somewhat minimized. However, it is clear that unintentional threats pose great risk and can be very costly to a firm financially, reputationally, and operationally. Typically, diligent employee education programs and regular training (especially following regularly scheduled security assessments) can improve defense strategies and establish reliable reporting mechanisms when unintentional security issues arise. Communication within organizations is key when it comes to responding to these instances head on.

Insider attacks

Conversely, malicious insider threats are impervious to training efforts and may actually prove more severe if an employee has extensive IT knowledge. A fairly consistent trend I have observed in conducting routine organizational security assessments is that management issues with access controls are fairly common. When too many people have too much on-demand access to too much information, there is more room for things to go wrong (and more seriously wrong). The more access a disgruntled employee has, the more successful their attack is going to be.

In one unfortunate instance, a concerned firm contacted me with the suspicion that a former employee was continuing to access their systems remotely. Furthermore, it was suggested that perhaps this employee had also been sending confidential information to a private email account in the months leading up to their departure, with the intent to begin a competing firm. The person was also suspected of downloading data beyond the scope of their own active cases to a USB device. Upon reviewing the details of the case, it turned out that this firm had not collected the employee’s devices upon their termination, and that the employee had continued...
access to the firm’s confidential client and case information. In spite of unusual network activity leading up to the former employee’s departure, nothing was done to discover what was being downloaded en masse, and the employee’s access controls remained the same even after they had announced their intention to leave the firm.

**Internal oversight is critical**

This lack of oversight and clear termination protocols opened the firm up to a host of security issues that upper management had not anticipated. Client data was compromised and the firm’s reputation was marred by the incident. In instances of malicious insider threats, no amount of firewall protection or penetration testing can safeguard a firm from attacks that require no hacking at all. Unregulated access controls, lack of network monitoring, and weak termination policies work together to create a prime space for these threats to flourish—and often it’s too late once the damage is noticed.

From accidentally clicking a link in a phishing email to purposefully stealing confidential data, the insider threat is the most dangerous security issue your firm faces. While these attacks can be very severe in and of themselves, the relative ease with which these threats can be brought to fruition makes them especially scary. For unintentional threats, as I’ve noted in previous articles, education is key. Knowing what a scam email looks like, knowing to whom information can safely be given, and recognizing the typical threats are critical to mitigating the risk. Employees who are unaware of recent cybersecurity trends are not well-equipped to handle them when they arise. But malicious threats require diligence on the part of IT departments and upper management. Having appropriate protocols in place for potentially disgruntled employees, termination practices, and access controls are all important elements of protecting key data and assets. Acknowledging the insider threat is may be even more important than staying apprised of external threats to your firm. ▲
Administration’s ‘Culture of No’ undermines immigrant workers, employers

In the past two years, the Trump administration has issued a series of policy memoranda that are quietly changing the landscape of employment-based immigration, and not for the better. Seemingly every time employers adjust their practices and create new strategies, the U.S. Department of Homeland Security (DHS) publishes another news release describing another obstacle in the adjudication of immigration petitions filed by U.S. employers on behalf of their foreign workers.

**Buy American Hire American**
There is no doubt that the theme of the current administration is to put America first. Focusing attention on the business community, Trump’s Buy American and Hire American executive order directs the immigration agencies to “rigorously enforce and administer the laws governing entry into the United States of workers from abroad;” to “propose new rules and issue new guidance to protect the interests of United States workers in the administration of our immigration system;” and to “suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.” In practice, these mandates have resulted in the federal immigration agencies seeking to delay, deny, and otherwise complicate the employment of foreign nationals looking to live and work legally in the United States, as described below.

**Upticks in Requests for Evidence (RFE) pertaining to H-1B specialty occupations**
In March 2017—the day before employers filed 199,000 H-1B petitions subject to the annual H-1B cap—U.S. Citizenship and Immigration Services (USCIS), the adjudicatory (and not, until recently, enforcement) arm of DHS released a memorandum entitled “Rescission of December 22, 2000 Guidance Memo on H-1B Computer Related Positions,” reversing a long-standing interpretation of H-1B petitions for computer-related occupations. The memo rescinds guidance acknowledging that certain computer-related occupations qualified for H-1B classification because they were considered specialty occupations. As a result, many positions previously held to be specialty occupations were no longer classified as such. This change in interpretation was drastic, and because it was issued so close to the annual filing deadline, employers had insufficient time to amend or address this change in their petitions.

Following the issuance of this memo, USCIS felt emboldened to challenge other specialty occupations, including such solid categories as engineers and physicians. The number of RFEs issued in 2017 H-1B lottery cases grew by 44 percent, and denials increased by approximately 10 percent.

**Eliminating deference to prior determinations**
Further complicating the tendency of a temporary visa holder’s status in the United States, USCIS issued another memo in October 2017 (“Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status”). This memo directs the agency to no longer grant deference to its own past decisions. This means that a foreign worker who is already in the United States on an H-1B visa, for example, cannot count on an approval of an extension, even if the terms and conditions of the employment in the initial petition and extension petition are identical.

With this change, predictability in successive immigration filings no longer exists.

**Contracts and itineraries requirements for H-1B petitions involving third-party workites**
In February 2018, USCIS issued a policy memo that makes it more difficult for employers to place H-1B employees at third-party sites. The memo requires such employers to provide additional detailed information about the terms and length of employment, the vendor(s) involved with the employment, and the employer’s relationships with its end clients. Specifically, employers who anticipate third-party placements will be asked to provide contracts with end-clients (as well as all other companies involved in the assignment, including contractors and sub-contractors); itineraries that include exact dates of each service or engagement; the contact information of vendors and end clients, location of the placement(s), as well as the duration of the placement(s); and detailed documentation of work assignments. Further, such employers filing H-1B extension petitions must not only document future third-party assignments, but will also need to document that the foreign worker’s previous placements met H-1B requirements throughout the previous employment period.

**In-person interviews for adjustment of status**
The administration’s restrictionist perspective is not limited to temporary workers. In August 2017, the Trump
administration directed USCIS to conduct mandatory, in-person interviews\(^5\) for all employment-based permanent resident applicants. Historically, USCIS waived the interview for employment-based applicants to marshal resources for higher-risk cases, especially since the employment-based process is a multi-year process that includes a number of built-in mechanisms to address many of the issues that in-person interviews are meant to address. This is why the in-person interviews for employment-based immigration cases are redundant and unnecessary.

Nevertheless, now that every employment-based applicant must be interviewed, USCIS has tens of thousands of interviews to add to its already delayed docket.

**Accrual of Unlawful Presence and F, J, and M Nonimmigrants Memo**

In May 2018, USCIS released a policy memo\(^6\) that substantially changes the rules pertaining to unlawful presence for foreign students (F and M visa status holders), and exchange visitors (J visa status holders). To understand the new rule, which went into effect on August 8, 2018, it is helpful to distinguish between a status violation and unlawful presence. The most important distinction between the two is that unlawful presence can result in a three-year or ten-year bar to admissibility, whereas a status violation does not. Typically, F, J, and M nonimmigrants are admitted until an undetermined date, represented on their entry record as “D/S” (which stands for Duration of Status). The existing rule states that those admitted for “D/S” only begin to accrue unlawful presence if there is a formal finding by either an immigration judge or by the Board of Immigration Appeals (BIA). The new memo changes this rule. Under the new memo, F, J, and M nonimmigrants begin to accrue unlawful presence on the earliest of any of the following:

- the day after they no longer pursue a course of study or the authorized activity, or the day after they engage in an unauthorized activity;
- the day after completing the course of study or program (including any authorized practical training plus any authorized grace period);
- the day following the expiration date listed on the entry record (for individuals admitted in F, J, or M status to a specific date); or
- the day after being ordered excluded, deported, or removed.

One of the main concerns with this new policy is that a student can begin to accrue unlawful presence without intending to and without realizing it. For example, if a student is authorized to work 20 hours per week and accidentally works 21 hours, then that student begins to accrue unlawful presence. Another example would include an individual working pursuant to Optional Practical Training (OPT) where the USCIS later determines that the position is not sufficiently related to the student’s degree, even if the university from which the student graduates has already made that determination. This policy makes foreign students more vulnerable to permanent removability and ineligibility for changing their status to a different category.

**Request for Evidence and Notice of Intent to Deny (NOID) policy**

In a July 13, 2018 memo,\(^7\) USCIS instructed its adjudicators to deny certain applications, petitions or requests without first issuing an RFE or Notice of Intent to Deny (NOID). The RFE and NOID offer the petitioner a chance to respond to any shortcomings in a case.

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that is filed with USCIS but not readily approvable. This memo rescinded 2013 guidance that instructed USCIS officers to issue RFEs and NOIDs to allow employers to provide additional information necessary to approve a case. The new memo now grants USCIS adjudicators full discretion to immediately deny cases without affording the employer petition or foreign employee to submit further evidence. This new policy, which went into effect in September 2018, is expected to result in an increase in denials of otherwise approvable petitions.

Updated guidance for the referral of cases and issuance of Notices to Appear

Perhaps the most dramatic of the recent policy changes is the Notice to Appear (NTA) policy, issued on June 28, 2018 (“Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens Policy”). An NTA is a notice document given to an alien that instructs them that charges are being made against them by DHS and they must appear before an immigration judge. This policy requires the USCIS to issue an NTA in a wide variety of cases where a denial is issued, even if the denial is completely unjustified or inconsistent with immigration law. At the time of publication of this article, the USCIS has stated that it will use an incremental approach to implementing this policy, causing practitioners to believe that it is just a matter of time before the policy is applied to employment-based petitions and applications.

Summary

Collectively, the current administration’s changes in policy guidance and adjudication have created an atmosphere of fear and uncertainty for U.S. employers and the foreign workers they wish to hire. These actions undermine the ability of U.S. employers to attract and retain the best and brightest by removing any predictability or reliability in the immigration process. These policies are part of a larger system that will create a new class of undocumented immigrants: individuals who have maintained lawful status since their entry but now, solely based on shifts in policy or procedure, run the risk of losing that status forever.

Notes

7 https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_RFEs_and_NOIDs_FINAL2.pdf
J ustice G. Barry Anderson was appointed to the Minnesota Supreme Court in 2004. Prior to joining the Supreme Court, he was a judge on the Minnesota Court of Appeals, to which he was appointed in 1998. Before becoming a judge, Justice Anderson had a general law practice with a focus on civil litigation and served as city attorney for the City of Hutchinson.

Including his time on the Court of Appeals and Supreme Court, Justice Anderson has nearly 40 years of experience, a record of public service, and a passion for the law. We recently discussed his time on the Court, the administrative responsibilities that come with being a justice, and his prediction on whether the Vikings will ever win a Super Bowl.
**AN INTERVIEW WITH JUSTICE G. BARRY ANDERSON OF THE MINNESOTA SUPREME COURT**

**JON SCHMIDT:** In which of your prior jobs do you feel you learned the most about your decision-making abilities?

**JUSTICE G. BARRY ANDERSON:** Does this include my first job as a handyman at the Cliff Keyes Motel in Mankato? I survived a week there before the owner correctly decided there was nothing “handy” about me and suggested I move on to other summer employment. The 11 years I spent representing the City of Hutchinson as one of my clients in private practice were instrumental in so many ways. There were lots of complicated, fascinating legal issues, lots of competing interests, a collegial and informed staff, but, ultimately, a decision had to be made. Admiring the problem forever was not an option.

**SCHMIDT:** What do you like most about your job? And what do you like least about your job?

**JUSTICE ANDERSON:** The Court has a strong collegial atmosphere, an important quality in dealing with difficult issues. This is one of the best careers in the legal business anywhere; I don’t have any complaints.

**SCHMIDT:** You wrote a book review column for the Hutchinson Leader for a number of years. Do you have any book recommendations?


**SCHMIDT:** Besides being a justice on the Minnesota Supreme Court and a judge on the court of appeals, what was the job that you found to be the most fun?

**JUSTICE ANDERSON:** It has been a wonderful experience to serve on both courts. This a great opportunity for me to put a plug in for the court of appeals. The Minnesota Court of Appeals is a crown jewel among intermediate appellate courts around the country. I learned a great deal in my six years on the court of appeals from terrific colleagues and staff.

**SCHMIDT:** When you were appointed to the Supreme Court, a reporter asked you about your approach, and you noted that you tend towards “judicial restraint.” But you added: “We’re going to have to wait and see how decisions turn out and how time passes, and what I have to say about issues from time to time as those issues are shaped by other opinions, the opinions of my colleagues, and other published decisions.” As time has now passed, how would you describe your approach today?

**JUSTICE ANDERSON:** That’s quite the word salad I delivered there, wasn’t it? That question is probably better addressed by an academic with nothing else useful to do who has read everything I’ve written over 14 years. That said, I do like the formulation that Chief Justice Roberts uses of “judicial modesty.” We have only the case before us, and the arguments the parties in that case (plus any amici, of course) chose to make. The further afield we wander, the more likely we are to encounter difficulty. But the problem with attaching labels to justices, or assigning justices to specific categories, is that we are charged with the duty of deciding cases. And any particular case, with particular facts and arguments, might or might not fit into one of those neatly labelled categories.

**SCHMIDT:** You have served with 16 different justices. When a colleague leaves and a new associate justice is added, how does that affect your approach to the job or to the conference discussions?

**JUSTICE ANDERSON:** Justice Page used to observe that every time a new member joined the Court, it was a new Court. There is much wisdom in that observation. My approach to the work of the Court doesn’t change, but it is important to remember that there is neither a training manual nor a formal orientation program for new members. We all pitch in and help the new member at every available opportunity. The Court has had lots of practice at this over the last five years or so.

**SCHMIDT:** You are the longest-tenured justice on the current Court. What are the biggest changes that you have observed in your 14 years?

**JUSTICE ANDERSON:** E-court. When I joined the Court in 2004, we were still working in a paper environment. If you wanted to take your special term materials home to study, that meant lugging around 500 to 1000 pages of paper (and maybe more). Now all of that material is on your laptop or available via a link to the court network. This doesn’t mean paper has vanished, but that is the trend. I suspect justices who join the Court in years ahead will be working almost entirely in the electronic environment.

**SCHMIDT:** The United States Supreme Court is often very divided in its opinions. The Minnesota Supreme Court does not have nearly the amount of dissents or concurrences as the U.S. Supreme Court. Why do you think that is the case?

**JUSTICE ANDERSON:** I’m not completely sold on the premise underlying the question. In recent years, unanimous Supreme Court of the United States opinions have run in excess of 50 percent of the opinions issued in a given term and 5-4 opinions have fallen generally in the range 15-20 percent. Our unanimity rate is higher, and our closely divided rate is lower, but these differences are not as large as the public might expect. Of course, there are some highly contentious Supreme Court cases that split 5-4 and, not surprisingly, these opinions generate significant media coverage. Our dockets are not the same; all first-degree murder convictions come directly to our Court on appeal, for example, and, for whatever reason, we see fewer civil constitutional disputes. Whether those differences are a factor is anyone’s guess.
SCHMIDT: What are the most pressing issues that you see within the judiciary?

JUSTICE ANDERSON: The overarching concern is access to the justice system, and that includes any number of related issues; in no particular order, those issues include adequate funding for the judiciary, the need for additional judges in specific areas of the state, and support, both public and private, for civil legal assistance and our public defender system. I do want to take this opportunity to stress that the judicial branch has historically had good working relationships with the executive and legislative branches. There are, of course, differences of opinion on specific issues, but leaders of all three branches have a long tradition of open communication and I fully anticipate that will continue. Beyond the access issues, I’m also concerned about the decline of the civil jury trial. One of the ways we are attempting to address this issue is with an expedited litigation pilot program, attempting to get civil cases to trial and resolution more quickly. That pilot shows great promise and I anticipate it will expand.

SCHMIDT: What makes for an effective Petition for Review?

JUSTICE ANDERSON: Pay careful attention to subdivision 2 of rule 117 of the civil appellate rules. A petition that fits within at least some of the criteria outlined in the rule is more effective than an assertion that the court of appeals decision was mistaken. The mere fact that a case garners a great deal of public attention is no guarantee we will accept review, nor does deep obscurity doom a petition for review. Exhibit A of the latter is State v. Vasko, 889 N.W.2d 551 (Minn. 2017), in which we addressed a petty misdemeanor conviction under the Lester Prairie junked or abandoned vehicle ordinance.

SCHMIDT: How much do you find that oral argument actually changes or refines your decision in a particular case? What can an advocate do to make an argument more effective to provide assistance to the Court?

JUSTICE ANDERSON: I find oral argument useful and while I couldn’t begin to quantify how often it has at least some effect on the outcome of a particular dispute, it’s certainly not unusual for that to occur. And, as to advice, two suggestions: First, answer the question (failure to do so is a frequent problem) and second, admit the obvious.

SCHMIDT: Do you come up with your questions for oral argument on the fly? Or do you have your questions written out ahead of time? Do your law clerks assist you in coming up with questions?

JUSTICE ANDERSON: I make note of possible questions for both parties as I’m reading the briefs and the cases cited by the parties. Often, questions occur to me as I’m listening to my colleagues ask questions. I’m not entirely certain why this is, but I’m asking fewer questions at this stage of my career than I did in earlier times. I only occasionally ask law clerks for assistance.

SCHMIDT: What would you do if you won a big lottery jackpot?

JUSTICE ANDERSON: I don’t know; you’d have to buy a ticket first. The odds don’t look particularly attractive to me.

SCHMIDT: You appear to be active on Twitter. Who do you follow?

JUSTICE ANDERSON: I am on Twitter at @justiceanderson and invite anyone on Twitter to follow me there although my tweets are decidedly noncontroversial. I focus on history, sports, and the occasional book recommendation.

SCHMIDT: A Minnesota Supreme Court Justice does more than just hear argument and write opinions. There is also the administrative side of the job that takes a lot of time, which can include serving on councils or as a liaison for one or more judicial districts as well as other committee responsibilities. Can you describe the administrative duties of a justice, what percentage of time those duties take, and what is your favorite administrative duty?

JUSTICE ANDERSON: This is the unseen side of Supreme Court service. Currently, I’m the liaison to two judicial districts, the 10th and the 3rd, liaison to at least two rules committees, and I’m also the Court’s representative to the Board of Law Examiners. At any one moment, there may well be challenging issues percolating up to the court through these administrative responsibilities.

I also serve on the Judicial Council, which is the governing body for administrative decisions for the judicial branch. I’m not sure “favorite” is the correct word, but there is always something interesting occurring at Judicial Council meetings. The council, an innovation of then-Chief Justice Blatz now under the leadership of current Chief Justice Lorie Gildea, pulls together court administrators and judges from the court of appeals and our district courts, and sets administrative policy for the branch. The branch has several thousand employees in all 87 counties in Minnesota, and the range of experience and talent of those employees is astonishing. I learn something new at every council meeting.

SCHMIDT: You appear to be a big fan of Minnesota sports teams. Will the Vikings ever win a Super Bowl? Or are they bound to be pallbearers at my funeral—so they can let me down for the last time?

JUSTICE ANDERSON: I predict a future Vikings Super Bowl victory at some unspecified time in the future. (And yes, Drew Pearson interfered with Nate Wright.) That prediction and five bucks buys you coffee somewhere.

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Long before Minnesota codified the right of same-sex partners to marry, our state began recognizing the right of LGBT persons and same-sex couples to become parents and raise children. By enacting Minn. Stat. §517.01, Minnesota attempted to put an end to all gender-based distinctions in marriage by choosing to provide for the domestic rights of same-sex couples. Looking at parentage through the lens of marriage has served as a way to understand and legally recognize the intent to parent.

Unfortunately, the definition of the “average” Minnesota family upon which decades of case law and statutes are based is often not applicable to current-day family units. While “parents and families have fundamental liberty interests in preserving” intimate family-like bonds, “so, too, do children have these interests” which must also “inform the definition of ‘parent,’ a term so central to the life of a child.” Children have an essential, constitutionally protected interest in preserving the emotional attachments they develop with adult parent figures from shared daily life.

In SooHoo v. Johnson (2007), the Minnesota Supreme Court stated that the state’s interest as parens patriae in the welfare of the child and in promoting relationships among recognized family units is compelling. In LaChapelle v. Mit- ten (2000), a sperm donor commenced paternity proceedings after the child’s mother and her partner refused to allow him to continue to have visitation with the child. The court ruled that the child could maintain a relationship with her (biological) mom and her mother’s former lesbian partner (as her “emotional” parent), and with the sperm donor as her biological father.
Although the Minnesota Legislature may have been aiming for equality, our “marriage equality” statute was enacted in the context of all of our state’s other laws governing families and children, and those laws are based primarily on biology. Interestingly though, 24 years ago, the court noted the possible staleness of biologically based portions of the Parentage Act and encouraged the Legislature to amend the statutes. Unfortunately, to date, they have failed to do so—leaving practitioners to solve the inevitable riddles as they arise.

Beyond biology
While many practitioners may still think that the determination of parenthood is a simple matter, resolved by a DNA test, the determination of paternity in Minnesota is no longer solely an issue of biological fact. That an alleged father is the biological father does not preclude the adjudication of another man as the legal father. “A district court’s paternity adjudication will be affirmed if it is based on the facts of the case and is supported by policy and logic.” In the 2012 case In re Custody of D.T.R., the respondent, Reiter, was the presumed father but ultimately determined not to be the biological father of the child. Holding that biology is not conclusive in adjudicating parentage, the D.T.R. court found the parent/child relationship between the child and Reiter to be in the child’s best interests. The court found that Reiter had spent five and a half years forging a deep and loving father-son relationship and noted that Reiter had provided emotional, physical, and financial support throughout the child’s life. In sum, the appellate court upheld the district court’s application of the statutory standard in determining that, under the circumstances present, “weightier considerations of policy and logic,” favored adjudicating Reiter as D.T.R.’s father even though he was not the biological father.

To promote the public policy of determining parenthood, the Minnesota Legislature enacted statutes in 1980 addressing the establishment of parenthood. Under Minn. Stat. §645.08(2), the application of Minnesota law must be gender-neutral. Additionally, the Legislature declared that the parent-child relationship may exist regardless of the marital status of the parents. In establishing the parent-child relationship, Minnesota law articulates factors that serve to create a “presumption of paternity,” but courts may nonetheless decide that a biological connection is neither necessary nor sufficient for the court to bestow legal rights and legal duties.

The element of intent
Under the laws of the state of Minnesota, gestation initially bestows upon the mother of a child all rights and responsibilities. Since in many same-sex intimate relationships one of the parties will be without a biological connection to the child, the court must then decide how to evaluate and determine the rights and duties of these mothers and fathers since DNA tests will be irrelevant in proving the paternity (or maternity) of the putative parents. Without the means to reproduce their own biological children, in many cases lesbian, gay, and transgender couples must rely on the principle of intent to establish their families.

Through the lens of intent, a person who has participated in the creation of a child by means of assisted or collaborative reproduction should therefore be deemed a legal parent of the child, and should also be estopped from avoiding the obligations of parenthood. (In other legal scenarios, the law recognizes the accountability of a person who has acted in such a way as to induce another party to detrimentally rely on their actions.) On the other hand, if a person did not take an initiating role in the creation of a child, but has held the child out as their own and created an in loco parentis relationship with the child, then that person, under SooHoo, should have standing to petition the court as a presumptive parent for visitation, in the best interests of the child. “Active parenting… is an important factor in deciding who will be deemed a parent, and thus whose relationship with the child will be protected.”

Since the end of the 19th century, the Minnesota Supreme Court has recognized that a young child’s best interests are “paramount to the claims of either parent.” In In re Kayachith (2004), the court of appeals ruled that the right of a parent is presumptively superior to a third person but if extraordinary circumstances exist, that right “must always yield to the best interests of the child,” and “extraordinary circumstances” require at a minimum that the child have a substantial relationship with the potential third-party custodian.

Same-sex parents however, are not third parties. They are second parents to the children at issue. Because the nonbiological parents are not third parties, but second parents, the principle of parental deference developed by the U.S. Supreme Court in Troxel v. Granville does not apply. Yet even though Minnesota allows both same-sex parents to be listed on the birth certificate, it is still the case that...
when same-sex couples have children together through assisted reproduction, only one of the parties is considered a legal parent of the child unless or until they complete a second-parent adoption. The children in question are therefore left vulnerable and at risk of being abruptly cut off from one of the only parents they have ever known.25 Although embracing second-parent adoptions has allowed the court to accept the idea that children can have two legal parents of the same sex, it nevertheless has placed the non-biological parent in a sort of second-class parental status.26 Same-sex co-parents, quite reasonably, have resented having to adopt their own children.

Requiring a same-sex parent to adopt their own child to be legally recognized as a parent disparages their choices and diminishes their parenthood. The rules must be applied equally to all parents regardless of gender or marital status because all children’s relationships with people whom they view as their parents, regardless of marital status, deserve to be protected.27 Indeed, such a result is constitutionally required: Laws that deny protections to children born to same-sex unmarried parents are subject to heightened constitutional scrutiny and are presumptively unconstitutional.28 It is not as though family law issues are so trivial that it would make sense to apply some lower analytical standard. Indeed, family law cases are often ones in which important constitutionally protected interests—intimate relationships between adults, or a parent’s relationship with a child—are at stake.

To put it another way, any failure to apply intent- and conduct-based parentage standards equally across the spectrum discriminates against parents on the basis of their gender and sexual orientation in violation of the equal protection guarantees of the state and federal constitutions, based on an impermissible classification.

Functional equivalency

The Arkansas Supreme Court distinguished a case involving a functional parent from a grandparent visitation case because it “concerns a person who, in all practical respects, was a parent.”29 Thus, the Court continued, “any argument that [the functional parent] cannot seek visitation because to do so would interfere with [the legal parent’s] right to parent is unavailing.” In In re Parentage of L.B.,30 the Washington Supreme Court held that “the state is not interfering on behalf of a third party in an insular family but is enforcing the rights and obligations of parenthood.” The Court held that “the rights and responsibilities which we recognize as attaching to de facto parents do not infringe on the fundamental liberty interest of the other legal parent in the family unit” and therefore do not violate the policy of parental deference.

The U.S. Supreme Court complicated matters in its ruling in Obergefell v. Hodges31 by choosing to elevate marriage as a privileged classification in contrast to unconventional and nonmarital families. Justice Kennedy quoted from Cicero, who wrote, “The first bond of society is marriage; next children; and then the family.”32 The Court chose to focus on functional parenting over procreative sex, gender, and biology. At the same time, unfortunately, the Court chose to ground same-sex couples’ protections and right to parent and form families within the context of marriage.33 In explaining why the fundamental right to marry “appl[ies] with equal force to same-sex couples,” the Court noted that same-sex couples also “provide loving and nurturing homes to their children, whether biological or adopted.”34 Unfortunately, however, while setting aside biology and gender, the Court nevertheless described marriage as “a keystone of our social order.” Marital status therefore provided an artificial and arbitrary line through which the Supreme Court chose to draw parentage.35 In order to comply with this standard, some courts have decided to view parents who are not married but in a marriage-like relationship to be similarly situated with respect to principles of intent and function.36

In Debra H. v Janice R.,37 the Court of Appeals of New York decided “we will no longer engage in the deft legal maneuvering” necessary to read fairness into an unnecessarily restrictive definition of “parent” that sets too high a bar for reaching a child’s best interest and does not take into account equitable principles. Disregarding co-parent/child relationships does not promote the best interests of the child. A legal parent could essentially cut off a co-parent from seeing a child, or a co-parent could re-nounce their responsibilities as a parent and refuse to support (or even acknowledge) their child.38 Deep, meaningful emotional bonds between a child and his or her co-parent can be irreparably sundered. While same-sex co-parents should be allowed to privately order their lives, the courts should take notice of agreements between co-parents, and their resulting conduct, as evidence of their intent to parent.39

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Notes

1 Same-sex marriage has been recognized if performed in other jurisdictions since 7/1/2013. The state of Minnesota began issuing marriage licenses to same-sex couples on 8/1/2013; Minn. Stat. §517.01.

2 The state’s only organization dedicated solely to finding families for Minnesota’s children, Minnesota Adoption Resource Network, allows same-sex partners to adopt in identical fashion to singles and opposite-sex partners.

3 Troxel v. Granville, 530 U.S. 57 (2000). “[A] fit parent’s right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another.” (quoting Troxel, at 100-01) (Kennedy, J., dissenting).

4 Minnesota Department of Health www.health.state.mn.us/divs/ehs/ovr/birthreg/bregmanual.pdf; See, Pasvan v. Smith, 137 St. Ct. 2075 - Supreme Court 2017 (the Supreme Court held that Arkansas’ refusal to list both same-sex spouses on a child’s birth certificate was unconstitutional, because the certificate was “more than a mere marker of biological relationships.”)

5 See, e.g., Melanie B. Jacobs, Mçauch: One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Co-parents, 50 Buff. L. Rev. 341, 345 (2002) (noting that children born into planned lesbian parent families are “routinely separated from a lesbian co-parent who has nurtured and loved them because [the co-parent] is not a legal parent and has little legal recourse to protect her parental relationship.”). See also White v. White, 293 S.W.3d 1 (Mo. 2009) (holding that the birth mother’s same-sex partner, who had co-parented their children from birth for over four years, had no standing to seek custody or visitation).

6 See, In the Matter of HM v. ET, 930 N.E.2d 206, 14 N.Y.3d 521, 904 N.Y.S.2d 285 (NY Court of Appeals 2010), quoting In the Matter of Findlay, 253 NY 1, 7 (1930, Cardozo, Ch. J.); see also Michael H. v. Gerald D., 491 US 110, 125 (1989) (the strength of the presumption derives from “an aversion to declaring children illegitimate... thereby depriving them of rights of inheritance and succession … and likely making them wards of the state”).

7 In Lawrence v. Texas, the Supreme Court established that adult intimate relationships—even nonmarital ones—are entitled to some level of constitutional protection. 539 U.S. 558, 578 (2003); See, Gomez v. Perez, 409 U.S. 557 (1973) (holding that state law denying nonmarital children the right to paternal child support violates Equal Protection).


12 Id. at 2594.


15 United States v. Windsor, 133 S. Ct. 2675, 2690 (2013) (“Congress decided that although state law would determine in general who qualifies as an applicant’s spouse, commonlaw marriages also should be recognized, regardless of any particular State’s view on these relationships.”) (citing 42 U.S.C. §1382c(d)(1)).

16 See, e.g., Jenny Wald, Legitimate Parents: Constraining California’s Uniform Parentage Act to Protect Children Born into Nontraditional Families, 6 J. Center Fam. Child. & Cts. 139, 141 (2005) (“The original intent of the UPA was to guarantee the equal rights of all children by ensuring their financial support from both parents and by protecting their emotional and physical needs derived from existing social relationships with their parents.”) (citing Harry G. Krause, Illegitimacy: Law and Social Policy 25-28 (1971)).

17 14 NY3d 576 (2010).


Credit Where Credit Isn’t Due

What it takes to flunk Minnesota’s CLE standards

By Kasia Kokoszka and Rick Linsk

More than a few Minnesota lawyers have sat in a CLE lecture hall wondering, “What does this have to do with legal education?” Rarely if ever, though, has the state’s board that regulates continuing legal education agreed with that view—and to the point of revoking credit for a previously approved course.

A recent flap not only prompted the board to take that rare step, but also raised questions about how Minnesota officials administer the porous rules that govern CLEs, especially when warring factions disagree over whether controversial content is CLE-worthy.

This article looks at the current rules and whether they are built to handle hot topics such as the recent course in question, which toed the line between conservative religious pushback on LGBTQ issues and what some would consider hate speech.

CLE governance: The basics

CLEs in Minnesota are governed by the Minnesota Board of Continuing Legal Education, which derives its authority from the Minnesota Supreme Court. The board has general supervisory authority over the administration of CLEs, specifically in the areas of course and program approval. To remain in good standing, lawyers must attend and report at least 45 hours of accredited CLE courses every three years, including three hours of ethics and professional responsibility credit and two hours of elimination-of-bias credit.

The board reviewed 14,238 course applications in 2017. “[C]ourses in the special categories of elimination of bias and ethics are reviewed closely to ensure compliance with Rule requirements,” the board stated in its annual report.

But, one might ask, reviewed against what? The CLE rules are arguably ambiguous and leave much open to interpretation:

- According to the rules’ purpose statement, the goals of CLEs include requiring lawyers to continue their legal education as practitioners, establishing minimum requirements for continuing legal education, and improving knowledge of the law and quality of legal services.
- The criteria for course approval under Rule 5 include requirements for “current, significant intellectual or practical content” and course content that “shall deal primarily with matter directly related to the practice of law.”
- Rule 6 addresses the requirements for special categories of credit, which include the elimination of bias. These courses must be at least 60 minutes long; the application must identify the course as an elimination-of-bias course; and the sponsor must explain how the content meets the learning goals of elimination of bias.
Consequently, denials of course credit requests are rare. Only 229 course applications—about 1.6 percent—were denied or administratively closed in 2017. According to the board’s director, Emily Eschweiler, the most common basis for denial is that the course material is not directly related to the practice of law, thereby violating Rule 5. The board sometimes requests additional information from the sponsor about how the course will meet the CLE requirements. The rules do not address how the board should proceed when a sponsor fails to provide requested information. But the annual report states that if additional information is requested and the sponsor fails to provide it, the application is “administratively closed.”

According to Eschweiler, credit determinations are typically made within two to three weeks of application. If a course has not been approved before it is staged, sponsors are instructed to notify attendees that CLE credit approval is pending. The rules don’t directly address revocation. While it’s unclear whether the recent course was the first for which credit was awarded and later pulled, Eschweiler—who has been with the board since 2006—says she cannot recall another case in which the board revoked credit approval.

Elimination-of-bias courses are usually where CLE controversies erupt. In 2001, multiple affinity bars sought credit revocation for a course sponsored by the Federalist Society. In a twist, the course had been approved for elimination-of-bias credit but asserted that bias was not a problem in the legal profession. At the time, the Minnesota Attorney General’s Office produced an informal opinion letter stating the board lacked the authority to revoke CLE credit.4

A CLE controversy ‘moment’

The latest controversy arose last December after Teresa Collett, a professor at the University of St. Thomas School of Law, sought elimination-of-bias credit for “Understanding and Responding to the Transgender Moment,” a lecture sponsored by UST’s ProLife Center. Collett’s application explained that the presenter would be Ryan Anderson, a research fellow at the Heritage Foundation, a conservative think tank, and author of the book When Harry Became Sally: Responding to the Transgender Moment. The Collett-Anderson event was in turn part of a day-long symposium at UST in St. Paul called “Man, Woman, and the Order of Creation.”

The course—which was held on December 11, 2017, while credit was still pending—sought elimination-of-bias credit because, according to the application materials, it would address the public debate about whether, and how, transgender individuals should be accommodated and analyze this question within the context of a broader conversation about religious liberty and the role of government. The proposal included a plan to discuss the Trump administration’s modification of U.S. military policy on service by transgendered individuals and legal actions in other states centered on proper pronoun usage for transgendered individuals.

The CLE board’s decision was all the more remarkable because the CLE rules do not provide a revocation procedure.

Collett says she submitted the application for CLE credit in early December 2017. The board requested additional information on how the course met the requirements for elimination of bias, but did not receive a response. In an interview, Professor Collett stated that she received the requests for follow-up during winter break and spring break, and could not respond due to time constraints.

Even before the event, however, critics who had heard about it began expressing concerns about whether it would constitute a valid CLE. Taking the lead was the Minnesota Lavender Bar Association, which contacted the board to oppose the CLE credit. According to Hillary Taylor, an LBA board member, the group argued that the event was inappropriate for CLE credit principally based on the transphobic message of Ryan Anderson’s publications and its inconsistency with the elimination of bias learning goals. To the Lavender Bar and several affinity bars that added their support to the opposition letter,4 the lecture questioned the very legitimacy of transgender identity—presenting transgender as little more than a mistake in perception—yet its sponsors had the nerve to promote it as a CLE. According to Taylor, the CLE board responded several times, saying each time it was still in the process of reviewing the application, and continued in that mode until the credit was (as Taylor puts it) “quietly approved” on March 12, 2018 for one hour of standard (not elimination-of-bias) CLE credit. The board notified Collett of the approval.

The Lavender Bar didn’t back down. Once a YouTube video of the presentation became available, the LBA argued that the course materials were not directly related to the practice of law and therefore failed to meet the CLE rules. In May 2018, the CLE board received the link to the YouTube video, which it felt illustrated inconsistencies between the application material and the actual presentation, as well as a failure to meet the minimum 60-minute time requirement for one standard CLE credit. The board advised Professor Collett that the CLE credit would be evaluated at the May board meeting and requested additional information to demonstrate compliance with the CLE requirements. At its May 17, 2018 meeting, the Lavender Bar presented its opposition letter, supported by other affinity bars, and discussed its complaint. The board decided to revoke the CLE credit. Minnesota Lawyer reported the revocation on its front page.

In the end, both sides were left grumbling about the process. Collett says she was never notified by the board that Lavender Bar had presented a letter advocating revocation and that it would be considered at the May 17 meeting. Hillary Taylor says the board failed to notify her or the Lavender Bar of Collett’s initial plans to appeal the decision. (After initially considering an appeal, Collett says, she decided against it.)

Authority to revoke?

The CLE board’s decision was all the more remarkable because the CLE rules do not provide a revocation procedure. Eschweiler, the board’s director, was uncertain whether this was the first time a CLE credit was revoked. Still, she distinguished the “Transgender Moment” incident from the Federalist Society CLE in 2001. In the previous incident, she stated, lawyers had detrimentally relied on the board’s approval when they took the course, so revocation was not appropriate. In the recent case, in contrast, there could have been no such reliance because the application was—according to Eschweiler—only submitted on the day of the lecture and had not been approved

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by the time of the lecture. (Collett maintains that the application was submitted around December 4 or 5, 2017. The board’s application form does not contain a space for date of submission.)

For some, the board’s action raised the question of whether the revocation was triggered by the content of Anderson’s lecture—which criticized what the speaker called “transgender ideology,” questioned the “truth” of gender identity, and claimed many transgender individuals later regret their decisions to transition—or by a narrower, more technical violation of the rules. Eschweiler says it’s the latter. Had the application matched the material presented during the lecture, the lecture would have met the criteria for standard CLE credit, she said. But, she added, video footage suggested the lecture did not meet the 60-minute requirement for elimination-of-bias credit, and it was not directly related to the practice of law, instead focusing on philosophical and moral arguments against recognition of transgendered identities.

Collett disagrees. She maintains that the lecture met the 60-minute requirement if the ensuing question-and-answer session—not part of the YouTube video—is counted. She also argues that elimination-of-bias credit is appropriate for discussions that explore whether what contemporary society calls discrimination is in fact a “mistake in perceptions or realities.” (Collett also insists the board never informed her of any opposition to the CLE credit, stating she believed the additional information requested by the board about the lecture was part of a “random audit” and not potentially a response to opposition efforts.)

The board is sensitive about the notion that it reacted based on the hot-button political nature of the program. Kevin Hoffman, chair of the CLE board, stated the role of the board is not to “censor” content, echoing the statement of Eschweiler that it did not do so in response to the Lavender Bar’s complaint.

Conclusion: Are changes needed?

In the aftermath of the revocation, and given the increasingly polarized political and cultural climate, it is worth asking whether changes are needed in the CLE rules or in how the board handles complaints. Even if course content veers toward what some would consider hate speech, the only current basis for revocation is Rule 5, the principal rule the CLE Board applies to approve or deny course applications. But as the Lavender Bar has pointed out, the Minnesota Rules of Professional Conduct prohibit lawyers from “harassing a person on the basis of sex [or] sexual orientation,” and the American Bar Association recently amended its Model Rule of Professional Conduct 8.4(g) to add gender identity to the list of protected classes, although Minnesota has not adopted that change.

But Eschweiler said the board is not considering any changes, nor does she believe any are necessary, because conflicts over credit eligibility are rare. Indeed, asked how the board has managed past reports of offensive content, bad behavior, or low-quality materials, Eschweiler said the board has directed complainants to approach the sponsor about the issues—a form of self-regulation not explicitly reflected in the CLE rules. Collett suggests that at a minimum, either the challenger or the board should have to provide notice of a challenge and its content to the proposed CLE provider before consideration by the board.

Hillary Taylor of the Lavender Bar questioned that approach. What use is the board, she wondered, if its response to complaints is to “punt it back” to the sponsor? “If the rules are so watery that we can’t use these rules to deny credit to hateful events, then the rules need to be changed,” Taylor said. Taylor advocates surveying how other state CLE boards have confronted these situations.

Interviews for this article revealed both sentiment to govern course content that flat-out questions the validity of certain persons’ very identity, and on the other hand a view that—as Collett puts it—the board should remain an impartial arbiter, not “a tool of political viewpoint suppression.” In the end, it seems, the board may be stuck in neutral—fated to a role in reruns of the controversies over the 2001 and 2017 programs. Sponsors with chutzpah are likely to again seek elimination-of-bias credit for programs that question whether there is bias in the legal profession or what should be done about it. Organizations sensitive about programs questioning their members’ identities are likely to keep monitoring and challenging CLE approvals. The rules will again be tested. It seems there should be a better way. But what is it? ▲

Notes
1 See Rules of the Board of Continuing Legal Education, Appendix 1; text at www.revisor.mn.gov/court_rules/rule/prboar-1/
2 Rules of the Board of Continuing Legal Education, Rule 5, at www.cle.mn.gov/rules/
3 Id, Rule 6, at www.cle.mn.gov/rules/
4 The Minnesota Attorney General’s office was not able to produce this opinion letter because it apparently was eliminated through a document-retention policy, and Eschweiler stated the board does not have a copy.
5 The Program was cosponsored by the Minnesota Catholic Conference, the Saint Paul Seminary and School of Divinity, Archbishop Harry J. Flynn Catechetical Institute, and the Siena Symposium for Women, Family and Culture.
6 See Message to Our Members: May 2018, Minnesota Lavender Bar Association, at https://mnlavbar.org/about/mlba/policy-positions (reporting that Minnesota Women Lawyers, Minnesota Asian Pacific American Bar Association, Minnesota Hispanic Bar Association, and Minnesota State Bar Association, plus the MSBA president at the time, all supported the Lavender Bar’s letter of objection).
7 The YouTube video is available on the Minnesota Catholic Conference’s YouTube channel at https://www.youtube.com/watch?v=LbGZnnSIjbA&amp; t=1s.
8 Minn. R. Prof’l Conduct 8.4(g). The comments to the rule add that what constitutes such harassment may be determined by reference to antidiscrimination statutes and case law interpreting them, but that it “ordinarily involves the active burdening of another, rather than mere passive failure to act properly.” Thus one must wonder whether speaking about a protected class in derogatory terms at an event equates precisely to “harassing” people, and if not, whether a different word than “harassing” may be needed to describe an attorney’s discriminatory conduct.

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In order to have a thriving legal practice, a lawyer must have clients who pay for services in a timely manner. Yet despite implementing screening procedures to make sure your new clients are capable of paying, and requesting up-front deposits to cover the estimated work, you may find yourself unpaid after hours and hours of valuable legal advice and representation. In certain scenarios you may be out of luck—but depending upon the assets your client has or may receive, you have an option of asserting a lien for the value of the services you rendered.

Generally, a lien is “a hold or claim upon the property of another as security for a debt.”1 Liens upon property to secure payment of debt have been authorized in Minnesota since the creation of the state.2 Specifically, attorney’s liens prevent clients from benefiting from an attorney’s work without paying for it.3 In Minnesota, attorney’s liens are governed by Minn. Stat. §481.13, which preempts prior common law doctrines4 concerning attorney’s liens.

Procedure

Minn. Stat. §481.13 sets forth the procedure for “establishing the lien, determining its amount and enforcing the lien.” The attorney’s lien statute creates two different types: cause-of-action attorney’s liens and property-interest liens.6 An attorney’s lien attaches to the cause of action or property involved or affected by the attorney’s representation at the commencement of representation.7 While formal notice is not required prior to perfecting a cause-of-action attorney’s lien,8 it is required to perfect a property-interest attorney’s lien. A notice of the lien claim must be filed in order to give notice to third parties of such a lien.9 Such notice, referred to as the “notice of intention to claim a lien”... must be filed in the office of the county recorder... and noted on the certificate... of title affected, in... the county where the real property is located.”10 The attorney must then deliver written notice of the filing to the owner of the real property or the owner’s agent, either in person or via certified mail.12 Failure to deliver the written notice within 30 days prevents the attorney from attempting to enforce the lien.13

If the attorney’s lien is claimed upon personal property, then the notice must be filed “in the same manner as provided by law for the filing of a security interest.”14 The attorney claiming the lien would then have to file the appropriate notice based on the type of personal property over which the lien is claimed.15 The notice of intent to claim a lien may not be filed “more than 120 days after the last item” of work.16 Once perfected, the attorney lien will generally have priority over all subsequently acquired security interests in the property subject to the lien.17

The attorney can establish the lien by a summary proceeding or in “a separate equitable enforcement action.”18 An attorney’s lien proceeding, in the action or proceeding from which the lien accrued, is a summary proceeding conducted by the district court, and “[a]fter the value of the lien has been determined, the district court enters judgment for the amount due.”19 At a summary proceeding to establish an attorney lien, the district court is not required to consider defenses of legal malpractice and breach of fiduciary duty.20
Additional points to bear in mind:

- “Questions as to the validity of an attorney’s lien are issues of fact.”
- “If an express, written agreement for the attorney-client relationship exists, the amount of the attorney lien is determined by interpreting that agreement.”
- “A court may deny a request for an attorney’s lien after determining that the amount the client has already paid is sufficient compensation for legal services rendered.”
- Importantly, the amount of the attorney lien is limited to the attorney’s compensation for the work performed for the client and excludes any collection fees and costs incurred in seeking the attorney lien.

The resulting declaratory judgment establishes the lien. The court action is sometimes referred to as “reducing a lien to a judgment.” Once established, the attorney lien does not create an agreement to pay attorney’s fees, but does impose a lien to protect an attorney who already has such an agreement. The attorney lien secures payment for the attorney’s services awarded by the court in the action under Minn. R. Civ. P. 67. If no such funds are available or scheduled for disbursement, then other means must be undertaken to secure payment.

**Enforcement**

An attorney lien “may be enforced in a variety of ways, including through the ordered sale or mortgage of the property to which the lien attaches.” When a court is enforcing a lien, a separate equitable action is always required. The separate equitable action is similar to a foreclosure by action, or mechanics’ lien action. Also: “An enforcement action is strictly equitable, and there is no right to a jury trial.”

It is important to distinguish an attorney lien foreclosure action from an action for breach of contract, and any related claims seeking repayment against a former client for unpaid attorney fees. The Minnesota attorney lien statute does not authorize “an unqualified personal judgment, independent of the action or proceeding in which the attorney provided representation...” An attorney seeking to have a judgment directly against the former client must proceed with commencing a new civil action for the unpaid fees, which could be combined in a foreclosure action if necessary.

If an attorney is attempting to enforce an attorney’s lien against real property, the attorney must serve and file the initiating pleadings of the equitable action to reduce the lien to a judgment “within one year after the filing of the notice of intention to claim a lien, unless within the one-year time period the owner has agreed to a longer time period to assert the lien.” But the stipulated extension to enforce within one year cannot exceed three years, and must be put in writing that includes a legal description of the affected real property, filed with the county recorder or registrar where the real property is located. Essentially, any attorney lien in real property automatically expires if the attorney fails to commence an action to reduce the lien to a judgment within one year of filing, with the possibility of negotiating a small two-year extension. Additionally, if the real property upon which the attorney is attempting to foreclose is subject to the homestead exemption, which is currently $420,000 (or $1,050,000 for a farmhouse), the attorney must secure a lien waiver to exemption from the debtor. The homestead exemption continues to apply to proceeds of a sale of the property by the homeowner, or conveyance by the homeowner, for one year after the sale or conveyance.

**Ethical concerns**

Depending upon the scope of representation, situations may arise where a client does not have money available to pay for a lawyer’s services until disbursement of funds at the resolution of the client’s case. In circumstances such as these, a client may wish to voluntarily stipulate to entry of an attorney lien. While such arrangements are common, there are ethical concerns that a lawyer must take into consideration when proposing such stipulation. Prior to entering into a transaction with a client where the lawyer would be acquiring a security adverse to the transaction, the lawyer must fully disclose “in writing in a manner that can be reasonable understood by the client” the terms upon which the lawyer is acquiring the interest and a statement indicating that it is desirable for the client to seek the advice of independent legal counsel. The attorney must also obtain the client’s “informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.”

It is also important to note that attempts to foreclose attorney liens upon homesteads without a valid homestead exemption waiver (in which the client’s interests do not exceed the statutory exemption amount) are ethically prohibited—presumably because the foreclosing attorney would not stand to recover any proceeds from the sale if successful, and could be subjected to sanctions for asserting claims with the improper purpose of harassment in order to leverage payment of attorney fees. The $420,000 Minnesota homestead exemption is exceptionally large compared to other states, and must be carefully considered when evaluating the burden and expense of pursuing an attorney lien upon a homestead and the likelihood of succeeding on the merits.

Attorneys are also prohibited from asserting attorney liens over a client’s “papers and property” in order to pressure the client into paying outstanding legal fees, or the cost of copying the files or papers; and an attorney lien may not be asserted over an abstract of title.
This article is intended for informational purposes only and should not be relied upon as legal advice, nor construed as creating an attorney-client relationship with Andrew A. Green or Cottrell Green PA. Readers should not rely upon any information in this article, and are strongly encouraged to seek independent legal counsel.

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Notes

2. See Minn. Const. art. I, §12.
4. Generally, where a statute purports to cover the entire field, as does ours, it must be considered to govern to the exclusion of common-law or equitable liens.” Akers v. Akers, 233 Minn. 133, 139, 46 N.W.2d 87, 91 (1951); cf. St. Cloud Nat. Bank & Tr. Co. v. Brugter, 488 N.W.2d 852, 855 (Minn. Ct. App. 1992) (discussing two common law types of attorney’s liens: the retaining lien and the charging lien, and that Minn. Stat. §481.13 preempts the common law retaining lien).
7. Dorsey & Whitney LLP, 749 N.W.2d at 420 (quoting Minn. Stat. §481.13, subd. 1(a)).
8. See Minn. Stat. §481.13, Subd. 2; see also City of Oronoco, 883 N.W.2d at 956.
11. Minn. Stat. §481.13, subd. 2(a).
12. Id.
13. Id.
14. Id. at subd. 2(b).
18. “[S]eniority is usually determined by the chronological order in which liens... are recorded.” Timeline, LLC v. Williams Holdings No. 3, LLC, 698 N.W.2d 181, 185 n.2 (Minn. Ct. App. 2005) (citing United States v. Dairy Farm Leasing Co., 747 ESupp. 1335, 1338 (D. Minn. 1990)).
21. See Id. at 6–7.
22. Ashford v. Interstate Trucking Corp. of Am., Inc., 524 N.W.2d 500, 502 (Minn. Ct. App. 1994) (citing Lende v. Canby Hereford Farms Co., 177 Minn. 318, 320, 225 N.W. 150, 151 (1929)).
24. First Bank Nat. Ass’n, 458 N.W.2d at 427 (citing Roehrdanz v. Schlink, 368 N.W.2d 409, 412 (Minn. Ct. App. 1985)).
25. Effrem v. Effrem, 818 N.W.2d 546, 551 (Minn. Ct. App. 2012) (citing Minn. Stat. §481.13, subd. 1(a)).
31. Id. at 289; cf. Minn. Stat. §§514.10-11.
32. Boline, 345 N.W.2d at 290 (citing Village of New Brighton, 278 N.W.2d 321 (Minn. 1979)).
33. Typical causes of action in an independent civil lawsuit seeking unpaid attorney fees include account stated, see Meagher v. Kanli, 251 Minn. 477, 88 N.W.2d 871 (1958); breach of an express contract for legal services; breach of implied contract to provide legal services, and unjust enrichment, see Williams, 415 N.W.2d at 24.
34. Dorsey & Whitney LLP, 749 N.W.2d at 422.
36. Minn. Stat. §481.13, subd. 3.
37. Minn. Stat. §510.02.
38. Minn. Stat. §510.05.
40. Minn. R. Prof’l Conduct 1.8(a)(1)-(2).
41. Minn. R. Prof’l Conduct 1.8(a)(3).
42. Jorgensen, supra note 26, at 19; see also Minn. Stat. §549.211 (providing sanctions for presenting a claim for any improper purpose, including harassment).
43. Compare 11 USC §§522(d)(1) & (5) (New Jersey and Pennsylvania lack homestead exemptions and when filing for bankruptcy debtors must rely on the federal exemption amount of $23,675.00); Va. Code §34-4 (Virginia: $5,000.00); Tenn. Code §26-2-301 (Tennessee: $5,000.00); and Wy. Stat. §1-20-101 (Wyoming: $20,000.00); with Fla. Const. Art. X §4 (Florida: unlimited); Iowa Code §561.16 (Iowa: unlimited); Kan. Stat. §60-2301 (Kansas: unlimited); and 31 Okla. Stat. §2 (Oklahoma: unlimited).
44. Minn. Stat. §510.02, Subd. 1.
45. Minn. R. Prof’l Conduct 1.16(g).
46. Minn. Stat. §386.375, subd. 1(c).
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.

**CIVIL PROCEDURE**

**JUDICIAL LAW**

- **Minn. R. Civ. P. 12.02(e); affirming claim dismissal due to insufficient pleading of foreseeability.** Doe 121 v. Diocese of Winona arose out of sexual misconduct by a priest in the early 1960s. A Catholic priest received a written reprimand from the bishop of the Diocese of Winona for “his poor financial habits and the taking of two teenagers with him on vacation.” Because of these indiscretions, the diocese reassigned the priest to St. Mary’s Catholic Church. The plaintiff, a young boy at the time of the priest’s reassignment, claimed to have been sexually abused by the priest on several occasions. Plaintiff eventually filed a complaint against the diocese and St. Mary’s in 2016, claiming general negligence, negligent supervision, and negligent retention against both defendants. The district court dismissed the general negligence claim for failure to state a claim under Minn. R. Civ. P. 12.02(e) because no special relationship existed between the plaintiff and defendants. The district court then dismissed both the negligent supervision and negligent retention claims at summary judgment because the record provided no evidence that the priest’s abuse was foreseeable or that the defendants knew or should have known of the priest’s prior sexually abusive conduct. Plaintiff appealed on all fronts.

The court of appeals affirmed in part and reversed in part. First, for the general negligence claim, the court noted that though a person does not have a duty to prevent harm caused to another by a third party, a duty may still arise where there is a special relationship between a plaintiff and defendant, and the harm is foreseeable (citing Doe 169 v. Brandon, 845 N.W.2d 174, 177–178 (Minn. 2014)). The plaintiff’s claim failed, though, because “faith-based advice or instruction, without more, does not create a special relationship,” and the plaintiff’s pleadings failed to establish anything more (citing Meyer v. Lindala, 675 N.W.2d 635, 640 (Minn. Ct. App. 2004)). Instead, the pleadings revealed no facts that the diocese had any custody or control over the plaintiff, or that St. Mary’s could have foreseen the harm plaintiff allegedly suffered. The negligence claim was thus properly dismissed, and the court affirmed this holding.

The court then analyzed whether the district court properly granted summary judgment on the plaintiff’s remaining claims, focusing on the question of foreseeability and which parties had access to the priest’s letter of reprimand. Because the letter could have been interpreted to have “chastised [the priest] for taking teenagers with him because he had prior inappropriate conduct with teenagers or was suspected of having done so,” a jury could reasonably infer that the letter would provide enough foresight into the priest’s future abusive actions. Because the diocese had access to the letter through the priest’s personnel file, the court reversed the district court’s dismissal of negligent supervision claims as to the Diocese. But because St. Mary’s did not have access to the letter, the court affirmed the district court’s dismissal of the claims as to St. Mary’s. Doe 121 v. Diocese of Winona, No. A18-0480, 2018 WL 4558318 (Minn. Ct. App. 9/24/2018).

- **Minn. R. Civ. P. 12.02(e); affirming claim dismissal due to insufficient pleading of damages.** In a case that involved a dispute about fees payable for a timeshare home, the plaintiff’s mother bought a timeshare in the defendant’s timeshare community, then later signed a joint-ownership authorization form that added plaintiff to the deed as a joint owner. The deed was signed by defendant’s president and notarized. The plaintiff’s mother later passed away and nobody paid the timeshare’s accruing maintenance fees. Sometime later, the defendant contacted plaintiff to tell him he had two options: (1) surrender the
property by a quitclaim deed, or (2) pay outstanding fees and keep the property. Plaintiff retained counsel and refused to pay the maintenance fees and asserted that the timeshare deed was invalid.

After receiving an unsatisfactory response from the defendant, plaintiff sued alleging violations of the Minnesota Consumer Fraud Act. The defendants answered and counterclaimed. Both parties then brought motions to dismiss the other party’s claims for failure to state a claim under Minn. R. Civ. P. 12.02(e), and the plaintiff also moved for attorney fees and expenses. The district court denied the attorney-fee motion and then dismissed each party’s claims under Minn. R. Civ. P. 12.02(e). The plaintiff appealed, arguing he had a valid claim under the MCFA.

The Minnesota Court of Appeals disagreed with plaintiff. “To state a claim alleging a violation of the MCFA,” the court reasoned, “a plaintiff must plead that ‘the defendant engaged in conduct prohibited by the statute[] and that the plaintiff was damaged thereby.’” (Quoting Grp. Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 12, 12 (Minn. 2001)). The problem with plaintiff’s claim, though, was that he did not suffer any damages by Minnesota’s traditional “out-of-pocket rule.” Put simply, because plaintiff had “not paid any value for the property and stipulated that he has no ownership interest in it, it is not possible to measure the difference between the price he paid for the timeshare interest and its actual value.” Furthermore, plaintiff’s subsequent hiring of an attorney to assist with the defendant’s demand letter was insufficient to qualify as damages. Concluding that plaintiff did not sufficiently plead any injury, the court affirmed. Engstrom v. Whitebirch, Inc., No. A18-0366, 2018 WL 4290056 (Minn. Ct. App. 9/17/2018).

Minn. R. Civ. P. 56; affirming summary judgment of high schooler’s claims after suspension. A high school sophomore was suspended after the assistant principal at the Benilde-St. Margaret’s School heard that pictures on social media showed students drinking alcohol at a party at Gabrielle Huson’s home. The assistant principal started an investigation and quickly learned that two students admitted to drinking alcohol at the home. The assistant principal then met with Gabrielle, who admitted that alcohol was at the party and that she tried to stop students from drinking. The school then suspended her for violating the student handbook.

Gabrielle’s mother, Christina, met with school administrators the next day and sent an email saying that Gabrielle denied telling the assistant principal that she knew alcohol was at the party. The Husons then sought a temporary restraining order from the district court and filed a complaint alleging breach of contract, procedural and substantive due process violations of both the United States and Minnesota Constitutions, and defamation. The TRO was immediately dismissed. The school eventually moved for summary judgment and the Husons requested leave to amend their complaint. The district court granted the summary-judgment motion and denied the motion for leave to amend. The Husons then appealed, claiming summary judgment was improperly granted and that the district court lacked jurisdiction to deny the motion for leave to amend.

The district court’s decision was affirmed in full. As to the breach-of-contract claim, the court of appeals explained that “no Minnesota court has held that the handbooks of private schools generally constitute contracts between the school and the student.” The Husons ultimately “chronically failed to identify any handbook language that satisfies the requisite elements of a contract.” That, in turn, meant that no jury could rely on any language in the handbook to “reasonably conclude that the school made an enforceable promise.”

But even if the handbook constituted a contract, the handbook included a provision that a student violates the alcohol policy when they “supply” alcohol at any time—including by “hosting a party in which alcohol... is present.” This meant that Gabrielle’s knowledge of alcohol at the party was irrelevant and no corresponding breach of contract could have happened as a result. The Husons’ procedural fairness and due process claims were, ironically, barred on procedural grounds because those arguments were not raised in their principal appellate brief—only their reply brief.

The court next turned to the defamation claims. The court began by noting that “the Husons point to no specific allegedly defamatory statement at all. They... offer[ed] only generalizations and characteristics.” Doing so directly violated “the well-settled rule requiring specific pleading of defamatory language” and was fatal to the defamation claims. As such, the district court correctly dismissed the defamation claims.

The court also concluded that the district court properly retained jurisdiction to deny the Husons’ motion to amend complaint. In short fashion, the court recognized that district courts retain jurisdiction until judgment is entered and becomes final. But the summary judgment order had not been entered—let alone become final—by the time the district court ruled on the Husons’ motion to amend. The district court thus properly exercised its jurisdiction in denying the motion to amend. Huson v. Benilde-St. Margaret’s Sch., No. A18-0317, 2018 WL 4401726 (Minn. Ct. App. 9/17/2018).
In his appeal, King argued the county’s motion under Rule 12.03 should have been converted to a motion for summary judgment because the county relied on documents beyond the pleadings. As the county saw it, because subject matter jurisdiction can be challenged with documents outside the pleadings, and because it was essentially challenging the district court’s subject matter jurisdiction, the district court appropriately considered such evidence.

The Court of Appeals disagreed, reasoning that “[e]ven if rule 12.03 were to require conversion to a summary-judgment motion when a motion alleging lack of subject-matter jurisdiction relies on matters outside the pleadings, this case can be resolved based solely on the pleadings . . . .” Because conversion to a summary motion was unnecessary, the court of appeals then proceeded to review the substantive, rather than procedural, grounds for the district court’s decision. Following that review, the court of appeals affirmed in part, reversed in part, and remanded. King v. Cty. of St. Louis, No. A18-0041, 2018 WL 4397587 (Minn. Ct. App. 9/17/2018).

**Hostile workplace; remedial measures dictate dismissal.** An employer in St. Louis County who was sued for failure to take remedial measures to address a claim of a hostile-environment workplace secured dismissal of the employee’s lawsuit. The Minnesota Court of Appeals, affirming the St. Louis County District Court, held that the employer took appropriate remedial measures in response to the claim of harassment, negating any liability and warranting summary judgment. Allen v. United Piping, Inc., 2018 WL 4558314 (8th Cir. 9/24/2018) (unpublished).

**University wrestling coach; jury trial, bias claims rejected.** The termination of the University of Minnesota wrestling coach, J. Robinson, was upheld on grounds that he was not entitled to a jury trial when going through the University’s internal dispute resolution process and there was no showing of bias against him. On certiorari review, the court of appeals held that the grappling coach was not entitled to a jury trial to gripe his termination because he sought the equitable remedy of reinstatement, and he failed to show “actual bias” on the part of the University internal hearing panel appointed to conduct an evidentiary hearing on his grievance. Robinson v. University of Minnesota, 2018 WL 4395020 (Minn. Ct. App. 9/17/2018) (unpublished).

**Noncompete agreement; employer not prevailing party.** The employer was not the prevailing party in a longstanding noncompete dispute and, therefore, was not entitled to an award of costs and disbursements. Affirming a ruling of the Hennepin County District Court, the court of appeals held that the determination by jury that the employee’s new employer did not interfere with the noncompete agreement—and that, even though the employee breached the agreement, there were no damages awarded—did not justify an award of costs to the former employer who brought the lawsuit. St. Jude Medical, Inc., v. Carter, 913 N.W.2d 678 (S.Ct. 6/27/2018).

**Whistleblower claim; failure to promote dismissed.** A claim by a Minneapolis police officer that failure to promote him to the rank of lieutenant constituted reprisal for exercise of his rights under the Minnesota Whistleblower Act, Minn. Stat. §181.932, was dismissed. Affirming a ruling of the Hennepin County District Court, the appellate court held that the claimant’s contention that he was involved in protected activities over an eight-year period was insufficient to create an inference of any causal connection to the city’s failure to promote him. Osland v. City of Minneapolis, 2018 WL 4201218 (Minn. Ct. App. 9/4/2018) (unpublished).

**Unemployment compensation; denial of child care accommodation request.** An employee who lost her job after requesting and being denied an accommodation because of her lost child care was entitled to unemployment compensation benefits. The Minnesota Supreme Court held that the employee who quit because of a loss of child care is entitled to unemployment compensation benefits because the employer granted a request for accommodation and then changed its mind and took the accommodation away from her, which satisfies the accommodation-request requirement under Minn. Stat. §268.095, subd. 1(A) and allows unemployment compensation benefits even though the employee quit her job. Gonzalez Diaz v. Three Rivers Community Action, Inc., 2018 WL 4244468 (Minn. Ct. App. 9/27/2018).

**Unemployment compensation; physical limitation does not warrant quitting.** A postal employee who refused to substitute for two additional routes because of an employee shortage was denied unemployment compensation benefits. The Minnesota Court of Appeals held that although the claimant may have had physical limitations that prevented him from doing the routes, the employer did not discriminate against him by merely asking him to perform any of the two other routes, which he refused to do and then quit. Bjerke v. U.S. Postal Services, 2018 WL 4398321 (Minn. Ct. App. 9/17/2018) (unpublished).

**Unemployment compensation; unauthorized products at work.** An assistant to a chiropractor who brought a topical mediation to the office and
offered it to the clinic’s clients without authorization by her employer was not entitled to unemployment compensation benefits. Affirming a ruling by the Department of Employment & Economic Development (DEED), the court of appeals held that the employee’s behavior constituted disqualifying “misconduct.” Olsen v. Lindberg Chiropractic, 2018 WL 4394968 (Minn. Ct. App. 9/17/2018) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

Iowa joins list of states in which newly revived WOTUS Rule does not apply; rule does apply in Minnesota.

In September the federal District Court for the District of North Dakota issued an order clarifying that the court’s 2015 stay of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers rule defining “Waters of the United States” under the Clean Water Act (CWA) (WOTUS Rule) applies in Iowa. The decision in North Dakota v. United States EPA is the latest of many recent developments concerning the embattled WOTUS Rule. Shortly after EPA and the Corps promulgated the WOTUS Rule in June 2015, 13 states—not including Iowa (or Minnesota)—challenged the rule in the North Dakota federal district court. North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015). The court granted the states’ motion for a preliminary injunction, staying the rule in those 13 states. Two months later, in October 2015, the U.S. Court of Appeals for the 6th Circuit issued a nationwide stay of the WOTUS Rule pending the 6th Circuit’s review on the merits. In December 2015, the North Dakota federal district court granted Iowa’s motion to intervene in the challenge to the WOTUS Rule; however, the court did not clarify whether its previously issued stay also now applied in Iowa as well as in the 13 states that commenced the lawsuit.

Approximately two years later, in January 2018, the U.S. Supreme Court held that federal district courts, not appellate courts, have jurisdiction to hear challenges to the rule. Nat’l Ass’n of Mfrs. v. DOD, 138 S. Ct. 617 (2018). As a result, the 6th Circuit dismissed the consolidated challenges before it and dissolved the nationwide stay. At around the same time, however, EPA and the Corps, in February 2018, published a final rule postponing the effective date of the WOTUS Rule to February 6, 2020 (Postponement Rule), ostensibly to allow the agencies to develop a replacement rule. 83 Fed. Reg. 5,200 (2/6/2018). Thus, even though the 6th Circuit dissolved the stay, the WOTUS Rule continued to not be in effect because of the Postponement Rule.

This changed, however, on 8/16/2018, when the federal District Court for the District of South Carolina vacated the Postponement Rule. S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018). The South Carolina court held that EPA and the Corps had not complied with the federal Administrative Procedures Act when they limited public comment on the Postponement Rule to whether the effective date should be extended and, if so, for how long. In so doing, the court held, the agencies had failed to engage in a substantive evaluation of the relative merits of the WOTUS Rule and the prior 1980s WOTUS definition, which would remain the law of the land as a result of the Postponement Rule. Citing prior decisions rejecting such “hastily enacted rules,” the court vacated the Postponement Rule.

As a result of the South Carolina court’s decision, the WOTUS Rule was revived and became effective for the first time since October 2015. However, the rule only became effective in 23 states; the other 27 states—including the 13 states that challenged the WOTUS Rule in North Dakota federal court—were subject to federal district court preliminary injunctions that continued to stay the rule in those states.

Which brings us back to Iowa. Recall that when Iowa, in December 2015, intervened in the North Dakota challenge to the WOTUS rule, the district court did not clarify whether the court’s stay—granted to the original 13 state plaintiffs before Iowa joined the lawsuit—applied to Iowa. The question was not critical at the time because the 6th Circuit had stayed the rule nationwide and, once that stay was lifted, the Postponement Rule kept the WOTUS Rule from taking effect in Iowa. However, once the South Carolina court vacated the Postponement Rule in August 2016, the question became suddenly important. As a result, Iowa Gov. Kim Reynolds asked the North Dakota district court to clarify the stay’s status in Iowa, and, on September 18, 2018, the court issued an order holding that the stay does apply (i.e., the WOTUS Rule does not apply) in Iowa. The decision brings to 28 the number of states in which the revived rule is not effective. Minnesota is among the 22 states in which the 2015 WOTUS Rule is in effect. At least for now—on 10/2/2018, Acting EPA Administrator Andrew Wheeler said during a roundtable discussion that the agency plans to unveil its proposal for a new “clean and straightforward” CWA jurisdiction standard within 30 days. North Dakota v. United States EPA, No. 3:15-cv-59, Order (D.N.D. 9/18/2018).

ADMINISTRATIVE ACTION

EPA proposes amendments to roll back methane reduction rules. On 9/11/2018, the EPA announced a proposed rule of targeted amendments to the 2016 New Source Performance Standards (NSPS) for the oil and natural gas industry. 40 CFR §60 Subp. OOOOa. The 2016 rule, developed under the previous administration, sought to reduce emissions of volatile organic compounds (VOCs) and was the first rule to reduce methane emissions from the oil and natural gas sector. Methane is the main component of natural gas, and is a greenhouse gas that has 25 times more heat-trapping capacity than carbon dioxide.

The proposed rule amends a few aspects of the 2016 rule. For example, the 2016 NSPS fugitive emission provisions required operators to monitor for leaks at oil and natural gas wells within 60 days of startup production and every six months thereafter. The proposed rule amends the requirements for monitoring fugitive emissions to occur on an annual basis. Furthermore, the proposed rule would delineate low-production well sites, producing less than 15 barrels of oil per day, and only require biennial monitoring (once every other year) at those sites.

In addition, the 2016 NSPS required operators to repair leaks within 30 days of detection of a fugitive emission. The proposed rule amends the repair requirement to allow the operator to make a “first attempt at repair” within 30 days of detection, with complete repairs required within 60 days after
fugitive emission detection.

Finally, as a way to reduce regulations and streamline requirements for oil and natural gas well operators, the proposed amendments would allow operators to meet certain state requirements for monitoring, repair, and recordkeeping requirements. The 2016 NSPS required operators to meet federal standards after being unable to conclude that state fugitive emission requirements would be “at least equivalent” to the requirements of the NSPS. Now the proposed rule allows operators to meet state fugitive emissions monitoring and repair standards, in lieu of NSPS requirements, in California, Colorado, Ohio, Pennsylvania, Texas, and Utah. The proposed rule requires operators to notify EPA 90 days in advance if they intend to use the state’s fugitive emission standards as an alternative standard.

The EPA analysis estimates the proposed rule would save the oil and natural gas industry $73 million a year from 2019 through 2025, for a total of $424 million. However, the EPA analysis also estimates that the proposed rule, over the same time period, would allow emissions of 380,000 short tons of methane; 100,000 tons of VOCs; and 3,800 tons of other hazardous air pollutants into the atmosphere, as compared to levels that would have resulted from the 2016 NSPS.

The EPA established a 60-day comment period and scheduled a public hearing in Denver, Colorado. EPA RIN 2060-AT54; Docket ID: EPA-HQ-OAR-2017-0483.

EPA publishes proposed regulations replacing Clean Power Plan with Affordable Clean Energy Rule. On 8/21/2018, the (EPA) proposed the Affordable Clean Energy Rule (ACE) to replace the 2015 Clean Power Plan (CPP), which was stayed by the U.S. Supreme Court and never went into full effect. Pursuant to Section 111(d) of the Clean Air Act, 42 U.S.C. §7411(d), ACE establishes guidelines for states to develop plans to address greenhouse gas (GHG) emissions from existing coal-fired power plants by focusing on efficiency improvements “inside the fence” of the plant, without regulating actions “outside of the fence” of the plant, like transitioning to natural gas and renewable energy sources.

The proposed rule contains several components that distinguish it from the CPP. However, ACE proposes four key aspects worth noting. First, ACE revises the determination of the best system of emission reduction (BSER) for GHG emissions from coal-fired power plants. Rather than requiring power-producing sectors to switch from coal to renewable energy sources, the proposed rule adopts a narrow interpretation of BSER, requiring states to evaluate on-site heat rate improvement options at individual power plants, thereby boosting the plants’ efficiency and lowering GHG emission intensity.

Second, ACE provides a list of “candidate technologies” states can use when establishing standards of performance and developing their GHG plans. These candidate technologies include, inter alia, upgrading the plant’s computer system models, air heater and duct leakage control, and upgrading the steam turbine system.

Third, ACE would revise the New Source Review (NSR) permitting program. The rule proposes a new test to determine whether a physical modification or improvement would constitute a “major modification” and thus trigger an NSR. In order to avoid triggering NSR permitting requirements, the proposed revisions would allow states to adopt an hourly-emissions increase test for heat rate improvement projects, rather than the existing annual-emissions increase test. Only projects that increase a plant’s maximum hourly rate of pollutant emissions would trigger a full NSR analysis; if the plant’s hourly rate of pollution emissions would not increase, no NSR analysis would be triggered. This proposal is meant to allow coal-fired power plants to complete efficiency improvement projects and reduce GHG emissions without undue burden or disruption.

Fourth, the proposed rule revises “emission guidelines” for states when establishing standards of performance and developing their plans to submit to EPA. These revisions allow the states more time and flexibility to develop state plans. Currently, states are provided nine months to develop and submit state plans to EPA. The proposed rule would allow states three years. Existing regulations provide four months for EPA to review state plan submissions. The proposed rule would allow 12 months. Finally, EPA is currently provided six months to issue a federal plan upon disapproval of a state plan. The proposed rules would allow EPA two years.


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FAMILY LAW

JUDICIAL LAW

No exceptions to writing and execution requirements for antenuptial agreements. Earlier this year, the Minnesota Supreme Court decided Kremer v. Kremer, clarifying the separate common law and statutory standards governing antenuptial agreements. 912 N.W.2d 617 (Minn. 2018). In part, Kremer held that even agreements which do not meet the statutory requirements of “full and fair disclosure” and “an opportunity to consult with counsel,” can still be procedurally fair if they satisfy a four-part test under common law. See Minn. Stat. §519.11, subd. 1.

But the common law cannot remedy every error. In a recent published decision, the Minnesota Court of Appeals rejected attempts to invoke the common law to validate an unwitnessed agreement between spouses-to-be. Despite arguments from the husband that statutory writing and execution requirements do not exist under common law, the court of appeals held that all antenuptial agreements must be written, signed, witnessed, and notarized. See Minn. Stat. §519.11, subd. 2. Failure to follow these procedures will render an agreement invalid. In so doing, the appellate court distinguished between notions of procedural fairness (addressed in Kremer) and basic formalization requirements contained in statute. See Siewert v. Siewert, 691 N.W.2d 504 (Minn. Ct. App. 2005). Muschik v. Conner-Muschik, No. A17-1332, __ N.W.2d __ (Minn. Ct. App. 10/1/2018).

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**FEDERAL PRACTICE**

**JUDICIAL LAW**

- Non-mutual claim preclusion bars second action; dissent. Applying federal common law, the 8th Circuit affirmed an order dismissing a second federal action brought by the plaintiff. The 8th Circuit applied an expanded definition of “privacy,” and broadened non-mutual preclusion to bar successive claims against a new group of defendants where there was “no good reason” that the plaintiff did not include those defendants in his first action. Judge Kelly dissented, arguing that the claims against the new defendants did not fall within the “discrete exceptions” permitting the application of non-mutual claim preclusion. *Elbert v. Carter*, ___ F.3d ___ (8th Cir. 2018).

- Lack of standing on removed claim requires remand, not dismissal. For at least the third time in recent months, the 8th Circuit, relying on 28 U.S.C. §1447(c), reversed the dismissal of a removed action for lack of standing and held that where a district court determines that a plaintiff lacks standing on a claim removed from state court, the action must be remanded. *Hillesheim v. Holiday Station Stores, Inc.*, ___ F.3d ___ (8th Cir. 2018) (9/10/2018).

- Mootness; claim not capable of repetition; failure to proceed expeditiously. Affirming a dismissal by Judge Magnuson, the 8th Circuit found that claims brought by a former 2016 Minnesota presidential elecotor were moot because the results of the Minnesota vote already had been submitted to the Senate, and rejected the argument that the claim for declaratory relief was not moot because it was “capable of repetition, yet evading review” where the plaintiff had failed to “proceed expeditiously” with his claim. *Abdurrahman v. Dayton*, ___ F.3d ___ (8th Cir. 2018).

- Rule 11, 28 U.S.C. §1927 and inherent powers sanctions affirmed. The 8th Circuit affirmed sanctions imposed against counsel for a plaintiff who repeatedly sought to relitigate discovery issues previously decided by the district court, “disregarded or re-argued nearly all unfavorable court rulings,” and posed discovery questions “explicitly beyond the scope of discovery as ordered by the court.” The 8th Circuit also found that any procedural issue relating to the Section 1927 sanction was waived when it was raised for the first time in the reply brief. *Valdejo v. Amgen, Inc.*, ___ F.3d ___ (8th Cir. 2018).

- Fed. R. Civ. P. 15(c)(1)(C); suing the wrong defendant; relation back of amended claims. Denying the new defendant’s statute of limitations-based motion to dismiss, Judge Doty found that the plaintiff’s claims against the new defendant related back to the date of the original complaint where the plaintiff had made a “mistake concerning the proper party.” *Osorio v. Minneapolis Hotel Acquis. Group, LLC*, ___ F. Supp. 3d ___ (D. Minn. 2018).

- Statute of limitations remains tolled on individual claims filed while class action is pending. Rejecting a 1983 decision by Judge Magnuson, Judge Frank cited *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and held that that statute of limitations on an individual plaintiff’s claims is tolled during the pendency of a related class action even if the plaintiff files her action while the class action is pending. (See also *Pulley v. Burlington N., Inc.*, 568 F. Supp. 1177 (D. Minn. 1983.).) *Christianson v. Ocwen Loan Serv., LLC*, 2018 WL 4283577 (D. Minn. 9/7/2018).

- Removal; diversity; what is the relevant date for determining citizenship? In the course of denying the plaintiff’s motion to remand an action that had been removed based on diversity of citizenship, Judge Magnuson found that diversity was to be determined based on the parties’ citizenship as of the date of removal, while noting that other courts have focused on the date the action was filed or the date of service. *Chahla v. Jukko, Inc.*, 2018 WL 4492233 (D. Minn. 9/19/2018).

- Motion to stay pending resolution of similar case denied. Judge Frank denied the defendant’s motion to stay an action pending resolution of an action in the Northern District of Texas involving similar issues, finding that a stay was not warranted where resolution of the other action “will not affect the resolution of this matter,” and that the case could be decided “solely on the plain, unambiguous language of the statute” at issue. *Tovar v. Essentia Health*, 2018 WL 4516949 (D. Minn. 9/20/2018).

- Denial of untimely motion to amend scheduling order affirmed. In August 2018, this column noted Magistrate Judge Rau’s denial of plaintiffs’ untimely motion to amend a scheduling order to allow them to file an amended complaint. Chief Judge Tunheim recently affirmed that order, finding that the order was neither clearly erroneous nor contrary to law, and distinguished his prior decision in *Portz v. St. Cloud State Univ.*, 2017 WL 3332220 (D. Minn. 8/4/2017), in which he had reversed the denial of an untimely motion to amend. *MCI Communications Servs., Inc. v. Maverick Cutting and Breaking, LLC*, 2018 WL 300339 (D. Minn. 6/15/2018), aff’d, 2018 WL 4562471 (D. Minn. 9/24/2018).

- Motion to stay pending appeal denied. Judge Magnuson denied a motion to stay pending appeal despite questions raised by the respondent relating to subject matter jurisdiction, finding that the respondent was unable to establish any of factors required to support its request for a stay. *Federated Mut. Ins. Co. v. Federated Nat’l Hold. Co.*, 2018 WL 4328882 (D. Minn. 9/11/2018).

- ADA; reduced attorney’s fees awarded to prevailing plaintiffs. Despite noting “flaws” with the lodestar method, Judge Schiltz utilized that method when awarding fees to prevailing plaintiffs in an ADA action, reduced plaintiffs’ counsel’s requested hourly rate from $425 to $300 per hour in what was described as a “cookie-cutter ADA-compliance action,” and awarded a total of $6,750 in attorney’s fees rather than the $11,220 originally sought. *Midwest Disability Initiative v. NelMatt, LLC*, 2018 WL 4616455 (D. Minn. 9/26/2018).

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**INDIAN LAW**

**JUDICIAL LAW**

- Claim based on Winters doctrine requires allegation of insufficient water to fulfill the reservation’s purposes. An Indian tribe sued the United States for diverting water from a river that bordered the tribe’s reservation. The tribe argued that that the diversion was a 5th Amendment taking because, under the Winters doctrine, creation of an Indian reservation includes an implied right to sufficient water to ac-
Judicial Law

Trademark: No infringement if conduct permitted by agreement. Judge Wright recently granted dismissal of a trademark infringement claim but denied motions to dismiss claims of breach of contract and unfair competition. My Pillow owns the registered trademark “MY PILLOW” while LMP Worldwide (LMP) has a trademark registration for an “i love my pillow” design. The parties settled a previous trademark infringement suit through an agreement prohibiting LMP from using My Pillow’s mark in connection with pillows and from making any “ad word” purchases for the words “my” and “pillow.” My Pillow alleged that LMP subsequently violated the agreement and sued for trademark infringement, cancellation of LMP’s mark, breach of contract, and unfair competition. The court found that My Pillow’s complaint insufficiently pled infringement because the allegations included examples that appeared allowable in accordance with the agreement terms. The accompanying cancellation claim necessarily failed because it was premised upon the infringement claim’s viability. My Pillow alleged false advertising based only on an LMP employee’s statement to a wholesale customer in a private email. The claim failed because the statement was insufficiently alleged to be disseminated or directed to the purchasing public. Thus, it could not qualify as either “advertising” or “promotion,” as required for a false advertising claim. The court, however, determined that the breach of contract claim should remain because My Pillow had alleged facts sufficient to state a claim for LMP’s breach of the agreement through its purchase of ad words. Finally, My Pillow sufficiently pled its unfair competition claim when it alleged LMP used My Pillow’s mark in a manner intended to cause confusion, mistake, and/or to deceive as to the source of origin or affiliation of LMP’s goods and services. My Pillow, Inc. v. LMP Worldwide, Inc., No. 18-CV-0196 (WMW/SER), 2018 WL 4242447 (D. Minn. 9/6/2018).

Copyright: Claims remain from software licensing dispute. Judge Frank recently denied a defendant’s summary judgment motion because several questions of material fact remained regarding the scope of a software licensing agreement. Plaintiff Neil Haddley sued Next Chapter Technology (NCT) and various Minnesota counties alleging copyright infringement and violation of the Digital Millennium Copyright Act (DMCA). Haddley owns the copyright registration of a software program for scanning paper documents into electronic form. Next Chapter Technology (NCT) licensed Haddley’s software for use in an NCT product licensed to the counties. Haddley alleged NCT and the counties exceeded the scope of the software license when they accessed or facilitated access to Haddley’s software for counties that were not parties to the original agreement. NCT brought a summary judgment motion arguing the software license was unrestricted and that Haddley implicitly consented to use by those counties not included in the original license. Judge Frank denied dismissal of the infringement claim, concluding there were still several questions of material fact about whether Haddley granted an implied license to NCT for software installation by other parties. Haddley also asserted that defendants violated the DMCA when they bypassed the software license key system and enabled unauthorized distribution of the software. Defendants again argued that the license permitted software access and that Haddley had enabled access. The court concluded that there were fact questions regarding the scope of a software licensing dispute.


INTELLECTUAL PROPERTY

Notes&Trends | INDIAN LAW | INTELLECTUAL PROPERTY
PROBATE & TRUST LAW

JUDICIAL LAW

Authority to correct “title defects.” Appellant son challenged the inclusion of a farm in his father’s estate, arguing that the farm belonged to his sister at the time of his father’s death. At the time of the father’s death, title to the farm was held in joint tenancy between the father and the sister. The son argued that the farm therefore passed to his sister upon his father’s death and a subsequent quitclaim deed to the estate constituted a gift for tax purposes.

The district court held that inclusion of the farm in the father’s estate was proper because the joint tenancy between the father and sister was a title defect that was corrected by the quitclaim deed. In doing so, the court relied on testimony by the sister that her father had not intended to transfer the farm to joint tenancy and had done so solely “to divert funds from [his] second marriage” while he was going through a divorce. The sister further testified that she had executed the quitclaim deed at the personal representative’s request in order to correct her father’s mistake.

The court of appeals affirmed the district court, reasoning that by finding the quitclaim deed served to correct a title defect, the district court had implicitly found that the father owned the farm at the time of his death and that the personal representative had acted within his authority to correct titled defects. *In re Estate of Harold Farnes*, 2018 WL 4397449 (Minn. Ct. App. 9/17/2018).

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TAX LAW

JUDICIAL LAW

Tax protester convicted for not filing or paying. Minnesota charged appellant Rapatt with four counts of failure to file a tax return and four counts of failure to pay state income tax. After being found guilty of six of the eight charges, Rapatt appealed under Minn. Stat. §590.01, subd. 1(1) to the Minnesota Court of Appeals, claiming his rights were violated. Specifically Rapatt argued that the conviction violated his rights because (1) the state’s witnesses should have been required to testify regarding certain tax-code definitions; (2) his 1099 federal tax forms were not sufficient to establish his guilt; (3) he was exempt from paying state income tax based on his citizenship status; and (4) the district court did not obtain his not-guilty plea before trial.


Subject matter jurisdiction to review tax forfeiture procedure. Following health problems, a Minnesota taxpayer sold his property to a third party on a contract for deed. The purchaser paid property tax. Eventually, the property was transferred via quit claim to the Duluth Economic Development Authority. The taxpayer challenged the transfer of the property, but the trial court dismissed the complaint for lack of subject matter jurisdiction. On appeal, the reviewing court summarized the taxpayers arguments as “(1) that decisions of respondent County of St. Louis (the county) to place King’s tax-forfeited property on the forfeited-lands list and ultimately sell it to respondent Duluth Economic Development Authority (DEDA) — described in claims one through four of appellants’ complaint — were quasi-judicial in nature and therefore subject only to certiorari review; and (2) that it was constitutional to apply the statute of limitations for challenging tax forfeitures to dismiss appellants’ fifth claim.” The Minnesota Court of Appeals agreed with the taxpayer on claims 1 – 4, holding that these decisions were not legislative decisions and were quasi-judicial; thus the district court had subject matter jurisdiction to review the decisions regarding the tax forfeiture procedure. The court reversed the dismissal of claims, and remanded to the district court for further proceedings. In contrast, the appellate court affirmed on the statute of limitations issue, *King v. St. Louis Co.*, No. A18-0041 (Minn. Ct. App. 9/17/2018).

Sales & use tax of machinery and equipment. Kroll Ontrack, LLC claimed that it was exempt from sales and use tax for machinery and equipment purchased for use in a taxpayer’s business. The Minnesota Tax Court rejected Kroll’s claims and granted the commissioner’s motion for summary judgment. First, Kroll claimed that the machinery and equipment purchased was “used primarily to electronically transmit results retrieved by a customer of an online computerized data retrieval system,” and was therefore exempt from Minnesota sales tax under Minn. Stat. §297A.68 (2016). The tax court denied this exemption because Kroll’s system was not equally available and accessible to all customers of the system as required by statute. Second, it claimed that the electricity purchased to power that equipment was “used or consumed in industrial production of personal property” and was therefore exempt under Minn. Stat. §297A.68, subd. 2(a) (3) (2012). The tax court denied this exemption because Kroll does not engage in the sale of personal property. *Kroll Ontrack, LLC v. Comm’n*, No. 8977-R (Minn. T.C. 9/14/2018).

Individual income tax: Security equipment technician not eligible for section 911 foreign earned income exclusion. The taxpayer earned wages over
two tax years while working in Germany under a personal services agreement (PSA) for the U.S. Department of State. The taxpayer argued that he should be eligible for the exclusion because he was not a U.S. government employee during the years at issue and in fact was excluded from certain perquisites that he says are normally afforded to U.S. government employees. As additional support for the exclusion, he argued that to apply for his position he was required to be a resident of Germany, have a German work permit, and have a local bank account to receive his salary, which was paid in local currency. Beginning its discussion with the reminder that “[e]xclusions from gross income are construed narrowly, and a taxpayer must clearly establish his entitlement to any such exclusion,” the court rejected the taxpayer’s arguments. The court granted the commissioner’s motion for summary judgment and held that under the relevant statute, 22 U.S.C. Sec. 2669(c) (2012), the taxpayer is considered an employee of the U.S. government for income tax purposes and therefore he is not entitled to the foreign earned income exclusion with respect to these wages. Sidney O’Kagu v. Comm’r, No. 3835-18, 2018 WL 4501217 (T.C. 9/19/2018).

Individual income tax: Taxpayer not entitled to mortgage interest deduction where husband, and not taxpayer, was equitable owner. The petitioner’s husband purchased a home that was used by petitioner, their children, and him as a second home. Petitioner’s husband was named on the deed, and petitioner’s husband encumbered the property with a mortgage. Shortly after the purchase, petitioner and her husband entered into an agreement they titled “Spousal Marital Residence Agreement,” in which they agreed that the petitioner would be entitled to “claim any deduction on her personal income tax returns for those expenses that she actually paid” and that the petitioner’s husband “shall not claim any mortgage interest deduction on his individual income tax returns.” In the tax year at issue, the petitioner and her husband filed separate tax returns and petitioner claimed the home mortgage interest deduction. Following audit, the service denied the home mortgage interest deduction and petitioner challenged that denial. The court rejected petitioner’s contention that she was entitled to the deduction, and it rejected her argument that she was so entitled because she had assumed the benefits and burdens of ownership through the Spousal Marital Residence Agreement. The court noted that because petitioner’s husband was the sole mortgagee on the mortgage for the home, petitioner must establish that she was the equitable owner of the residence during the relevant tax year.

The court listed several factors that it will consider in the determination of equitable ownership: The party claiming equitable ownership must (1) have the right to possess the property and to enjoy the use, rents, and profits thereof; (2) have the right to improve the property without the seller’s consent; (3) have the right to obtain legal title at any time by paying the balance of the purchase price; (4) bear the risk of loss of the property; (5) have the duty to maintain the property; (6) have responsibility for insuring the property; and (7) have the obligation to pay taxes, assessments, and charges against the property. The court found that the petitioner was unable to establish each of these factors, and that the Spousal Marital Residence Agreement addressed only some of the factors. Furthermore, petitioner’s argument that she held equitable title to the home because of her marriage did not render her the equitable owner for federal income tax purposes because this argument was not supported by New York law. Frankel v. Comm’r, No. 7208-16S, 2018 WL 4520467 (T.C. 9/19/2018).

Looking Ahead

■ SCOTUS cases on intergovernmental questions. On December 3, the United States Supreme Court is set to hear argument in the case of Dawson v. Steager. The issue presented is whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. §111, prohibits the state of West Virginia from exempting the retirement benefits of certain former state law enforcement officers from state taxation without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service. The argument date is still pending in Franchise Tax Board of California v. Hyatt, in which the Court will take up the issue of whether Nevada v. Hall, which permits a sovereign state to be haled into another state’s courts without its consent, should be overruled.

Administrative Action

■ Revenue Notice # 18-01: Individual Income Tax. This notice addresses whether a taxpayer must follow the federal election to itemize on their Minnesota return. According to Minn. Stat. §290.01, subd. 19, Minnesota individual income tax starts at federal taxable income and requires taxpayers to have a consistent election between their federal and state income tax returns. However, according to the 1971 case Wallace v. Commissioner of Taxation, Minnesota’s Constitution prohibits the state Legislature from delegating its power to tax to any outside agency, including the United States Congress. 289 Minn. 220 (Minn. 1971). Thus, the Minnesota Department of Revenue concluded that taxpayers can have separate elections on their federal and Minnesota returns for itemizing because forcing taxpayers to make the same election when the amounts are different would violate the principle set forth in Wallace. The Minnesota Department of Revenue made sure to clarify that not following federal election only applies to whether the taxpayer is itemizing and not to any other federal elections.
Gray Plant Mooty announced the hiring of eight new attorneys in its Minneapolis and St. Cloud offices. Eli Bensignor, Alyssa Brandvold, Eric Brown, Chelsea Buck, Amy Fiecke, Hannah Holloran Fotsch, and Jon Hodge joined as associates; Kirsten Donaldson joined as special counsel.

Dorsey & Whitney LLP announced that its policy committee has appointed William R. Stoeri to serve as the firm’s managing partner. For more than 30 years, Stoer’s practice at Dorsey has focused on general commercial litigation.

Stuart Williams, an attorney with Henson & Efron, PA, was appointed by Gov. Dayton to a four-year term on the Minnesota Board of Medical Practice. Williams also continues his service on the Minnesota Board of Pharmacy.

Gov. Dayton appointed Judge Randall J. Slieter as the 7th Congressional District judge on the Minnesota Court of Appeals. Judge Slieter will be replacing Hon. Michael L. Kirk. Judge Slieter is a district court judge in the 8th Judicial District in Renville County.

Gov. Dayton appointed Judge Jeanne M. Cochran as the 6th Congressional District judge on the Minnesota Court of Appeals. Judge Cochran will be replacing Hon. Randolph W. Peterson. Judge Cochran is an administrative law judge with the Office of Administrative Hearings.

Robert C. Freed and Conrad A. Hansen of the intellectual property law firm Moore & Hansen have joined Dykema’s Minneapolis office, both as senior counsel.

Nicole Dailo joined Nilan Johnson Lewis as an associate attorney in its labor and employment practice group.

The Innocence Project of Minnesota announced the appointment of former Minnesota Women Lawyers President Sara H. Jones as its executive director.

Gov. Dayton appointed Juanita C. Freeman and Karen B. Schommer as district court judges in Minnesota’s 10th Judicial District. Freeman will be replacing Hon. Susan R. Miles and will be chambered at Stillwater in Washington County. Schommer will be replacing Hon. Gary R. Schurrer and will be chambered at Elk River in Sherburne County.

Gov. Dayton appointed Melissa Listug Klick as a district court judge in Minnesota’s 8th Judicial District. Listug Klick will be replacing Hon. Michael J. Thompson, and will be chambered at Glenwood in Pope County.

Gov. Dayton appointed Tracy Perzel and Vicki Vial Taylor as district court judges in Minnesota’s 1st Judicial District. They will be replacing Hon. M. Michael Baxter and Hon. Erica H. MacDonald and will be chambered at Hastings in Dakota County.

Gov. Dayton appointed Sarah L. McBroom as a district court judge in Minnesota’s 9th Judicial District. McBroom will be replacing the Hon. Lois J. Lang and will be chambered at Grand Rapids in Itasca County.

Nicole A. Swisher joined Fredrikson & Byron as an associate in the firm’s mergers & acquisitions and private equity groups.

CHANG WANG was appointed as an attorney member of Minnesota State Board of Continuing Legal Education by Chief Justice Lorie Gildea of the Minnesota Supreme Court.

DON LEWIS was recognized by Twin Cities Business as a “2018 Outstanding Director” honoree for his work on the Board of Directors of HealthPartners. Lewis is a co-founder and shareholder of Nilan Johnson Lewis.

Ben Kappelman was elected to the board of directors of PAI, Inc., a Minnesota-based, non-profit day training and habilitation program that empowers adults with disabilities. Kappelman is an attorney at Dorsey & Whitney LLP with the intellectual property litigation group.

Charles V. Firth was honored as Cancer Legal Care’s 2018 Volunteer Attorney of the Year at the organization’s annual Legal Care Affair on September 27. Firth is an attorney at Engelmeier & Umanah PA.

Mary S. Ward, age 69, died in August from pancreatic cancer. Mary graduated from Hamline University School of Law. She was an avid and devoted member of the MSBA and excelled in her roles as teacher, attorney, and trust officer.

Harding A. “Bud” Orren died on September 28, 2018. Bud was born to immigrant parents, grew up in St. Paul, and served in the Marines in WWII. He went on to become a respected lawyer and a managing partner at Robins Kaplan.

Mary S. Ward
Harding A. “Bud” Orren
Mark Fredrickson, a partner at Lind, Jensen, Sullivan & Peterson, PA, was elected to the Board of Directors of DRI, the Voice of the Defense Bar, as its North Central Regional Director at its 2018 Annual Meeting in San Francisco in October.

Jennifer Boutu Mojica joined Fredrikson & Byron’s immigration group. Mojica advises multinational, regional, and local clients on diverse employment-based immigration matters.

Emily Wood joined Wood & Rue, PLLP as an associate attorney. Wood practices in the areas of estate planning, probate, guardianship, conservatorship, and real estate. She is a graduate of Mitchell Hamline School of Law.

Judge Mel Dickstein (ret’d) announced the commencement of his mediation and arbitration practice, Mel Dickstein ADR LLC. Judge Dickstein served as an assistant U.S. attorney, a partner at the Robins Kaplan law firm, and for 16 years as a Hennepin County district court judge.

Fredrikson & Byron announced the addition of six associates to the firm’s Minneapolis office: Samuel M. Andre, Mary G. Hyland, Chelsea E. Jonason, Jessica R. Sharpe, Jeffrey C. Story, and Ashley W. Wilson. The firm also elected Leigh-Erin Irons and Todd A. Wond to the firm’s board of directors and re-elected John J. Erhart, John M. Koneck, and Steven J. Quam. They join Clinton E. Cutler, Kevin P. Goodno, Ann M. Ladd, and James H. Snelson, who are currently serving board terms.

Fredrikson & Byron announced the certification of five attorneys as MSBA Board Certified Civil Trial Specialists. The Certification achievement has been earned by fewer than 3% of all licensed Minnesota attorneys.

Matthew E. Steinbrink
Sieben Carey, PA

Andrew J. Rorvig
McEllistrem, Fargione, Landy, Rorvig & Eken, PA

Cole James Dixon
Schwebel, Goetz & Sieben, PA

Bradley A. Kletscher
Barna, Guzy & Steffen, Ltd.

Brendan R. Tupa
Law Offices of Thomas P. Stilp

Jennifer Bouta Mojica

Fredrikson & Byron

Mojica joined Fredrikson & Byron’s immigration group. Mojica advises multinational, regional, and local clients on diverse employment-based immigration matters.

Emily Wood

Wood & Rue

Wood joined Wood & Rue, PLLP as an associate attorney. Wood practices in the areas of estate planning, probate, guardianship, conservatorship, and real estate. She is a graduate of Mitchell Hamline School of Law.

Judge Mel Dickstein

Mel Dickstein ADR LLC

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The Minnesota State Bar Association announced the certification of five attorneys as MSBA Board Certified Civil Trial Specialists. The Certification achievement has been earned by fewer than 3% of all licensed Minnesota attorneys.

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Fredrikson & Byron

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EMILY Wood

Wood & Rue

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Fredrikson & Byron

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The Minnesota State Bar Association announced the certification of five attorneys as MSBA Board Certified Civil Trial Specialists. The Certification achievement has been earned by fewer than 3% of all licensed Minnesota attorneys.

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Mojica joined Fredrikson & Byron’s immigration group. Mojica advises multinational, regional, and local clients on diverse employment-based immigration matters.

EMILY Wood

Wood & Rue

Wood joined Wood & Rue, PLLP as an associate attorney. Wood practices in the areas of estate planning, probate, guardianship, conservatorship, and real estate. She is a graduate of Mitchell Hamline School of Law.

Judge Mel Dickstein

Mel Dickstein ADR LLC

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**EXECUTIVE DIRECTOR** position. The Minnesota Life and Health Insurance Guaranty Association (“Association”) is seeking a well-qualified candidate to fill the position of Executive Director. The Association is a non-profit insurance industry supported organization which handles and pays, pursuant to statute, insurance claims of Minnesota residents if their life, health or annuity insurer becomes insolvent. The Executive Director is an independent contractor position reporting directly to the Board of Directors. The Executive Director is responsible for carrying out the duties of the Association and maintaining adequate professional staffing during times of varying work activity levels. Ability to travel and effectively coordinate activities with other state guaranty associations through a national organization, with insurance receivers, and regulators, is essential. The candidate must possess insurance and management experience in an insurance company or a related setting such as regulatory, legal or consulting. Desired is a background in law, accounting, insurance finance, insurance treasury and/or actuarial and prior experience with an insurance guaranty association or in a receivership setting is a plus. On or before Thursday, November 15, 2018, send resumes to: Joel Glover, Joel.Glover@FaegreBD.com.

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Business and Commercial Litigation in Federal Courts
Fourth Edition
ROBERT L. HAIG ed.
(Thomson Reuters, $1,811)

Reviewed by COURTNEY WARD-REICHARD

In 2017, almost 20 years after its initial 1998 publication, the ABA Section of Litigation and Thomson Reuters published the fourth edition of this 16-volume treatise. The set is a must-have for any attorney whose practice includes federal court litigation that involves corporate entities of any kind, including commercial disputes, employment matters, white collar crime, or products liability, just to name a few.

Editor-in-chief Robert Haig, of the New York law firm Kelley Drye & Warren LLP continues at the helm of this comprehensive publication. Haig has over 40 years of experience litigating in federal court, and manages to make the work of dozens of authors flow together seamlessly. And the credentials of the authors are extremely impressive, as Haig has gathered judges and well-known practitioners for every chapter.

The first six volumes cover every stage of litigation, from establishing personal and subject matter jurisdiction (Volume 1, Chapters 1 and 2), to removal to federal court (Volume 1, Chapter 12), to multidistrict litigation (Volume 2, Chapter 14), to discovery pleadings (Volume 3, Chapters 23-28), to every possible stage of trial, from motions in limine to final arguments (Volume 4, Chapters 36-45), to appeals (Volume 6, Chapters 60-61).

One standout chapter is class actions (Volume 2, Chapter 19). This is a complex subject, with many different variations and considerations. But in 369 well-written and organized pages, the authors manage to flesh out the basics of Federal Rule 23 in a readable yet comprehensive way, and then tackle individual subject matter areas like consumer fraud, ERISA, and mass torts.

Almost all chapters in the first six volumes contain extremely useful practice aids, including checklists, forms, pleadings, and jury instructions. Some excellent examples are checklists for interviewing document custodians about electronically stored information (Volume 3, Chapter 26), a sample order appointing a special master to determine damages (Volume 4, Chapter 33), a checklist of steps needed to establish expert qualifications and admissibility (Volume 4, Chapter 43), and a sample class discovery plan and schedule for coordinating litigation in state and federal court (Volume 2, Chapter 15).

Volume 7 begins with practice advice for litigators—chapters on how corporations manage litigation (Chapter 69) and marketing for potential business clients, including ethical considerations (Chapter 70), are particularly useful. The remaining volumes contain a detailed analysis of individual case types, from more common practice areas like products liability (Volume 11, Chapter 109) and contracts (Volume 8, Chapter 89), to much more nuanced and unusual areas like sports (Volume 14, Chapter 147), aviation (Volume 11, Chapter 111), and immigration (Volume 10, Chapter 105).

The authors of these chapters also manage to present subjects in a way that is useful both to lawyers who are new to a practice area, and those with many years of experience. The set is particularly useful when an unanticipated issue arises in a case; suddenly, having a guide to money laundering (Volume 13, Chapter 133) or land use regulation (Volume 12, Chapter 128) may be important. Practice aids are included in these chapters as well, with a strong emphasis on checklists and sample jury instructions.

One final praise for this tremendous work: its organization. This isn’t a treatise anyone is likely to read cover to cover. That’s not the point; this is reference material. In addition to a comprehensive index that appears at the beginning of each volume, there is also a much more detailed table of contents to each chapter that makes navigation easy.

At just over $1,800 for the set, it is an investment. But for attorneys who spend any time in federal court, it will prove to be an invaluable tool.
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