OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVIII NUMBER IX
OCTOBER 2021
www.mnbar.org

Bench&Bar OF MINNESOTA

DIVORCE AND THE FAMILY FARM

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Upcoming Events

OCTOBER 29, 2021
First Judicial District: Remote participation only for this event.
(Carver, Dakota, Goodhue, Le Sueur, McLeod, Scott and Sibley counties.)

DECEMBER 10, 2021
Eighth Judicial District: Seminar location, to be determined.
(Big Stone, Chippewa, Grant, Kandiyohi, Lac qui Parle, Meeker, Pope, Renville, Stevens, Swift, Traverse, Wilkin, Yellow Medicine counties.)

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

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

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

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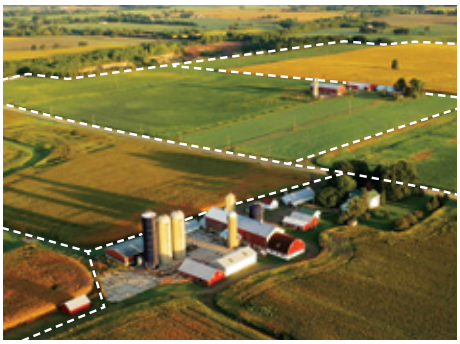

ON THE COVER

Bench&Bar OF MINNESOTA

Official publication of the
Minnesota State Bar Association
www.mnbar.org | (800) 882-6722

MSBA

Bench & Bar of Minnesota (ISSN 02761505) is published Monthly, except Bi-Monthly May/June by the Minnesota State Bar Association, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Periodicals postage paid at St Paul, MN and additional mailing offices. **Postmaster:** Send address changes to Bench & Bar of Minnesota, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Subscription price: $25.00 for members which is included in dues. Nonmembers $35.00 per year. Some back issues available at $5.00 each. Editorial Policy: The opinions expressed in *Bench & Bar* are those of the authors and do not necessarily reflect association policy or editorial concurrence. Publication of advertisements does not constitute an endorsement. The editors reserve the right to accept or reject prospective advertisements in accordance with their editorial judgment.

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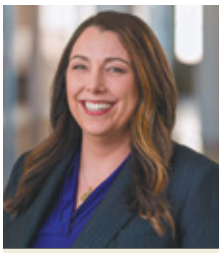
For the public good—and ours

Have you ever cried in court? I have. And, no, it wasn't because I was ill-prepared, scolded by a judge, or schooled by opposing counsel. It was in a moment of sitting with my client, deep inside the pain and struggle of their legal battle. It was while watching my client ache for change that they hoped the legal system could bring to fulfill needs so basic as access to safe housing, contact with family members, and mental health support.

Have you ever had your heart truly, deeply broken with a client? Can you think of that moment right now, as you are reading this? Are your eyes welling up? That's the kind of ache I am talking about. Some of us might have those experiences daily in our practices. Some, like me, do not. I love practicing construction law, but my construction law work has never been a source of deep emotion. Instead, my profoundest experiences with our legal system have been in the volunteer legal work I do for Children's Law Center (CLC) in CHIPS proceedings. I have seen through the eyes of my clients what it is like to be scared, separated, lost, overwhelmed, and so incredibly vulnerable as to desperately *need* a lawyer.



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

I have also learned lawyering skills from my pro bono service that nothing and no one else ever taught me. For instance, a CLC attorney encouraged me early on to think of at least one positive thing going on in my client's life that I could share with the court at each hearing. I use this advice as a reflection to prepare for my CLC hearings, and it is equally applicable to my construction law practice. It's amazing how thinking about the positive thing about your client that you want to impart to the court shapes your entire court appearance. I am a better lawyer for all of my clients because I follow advice I first learned in my pro bono work.

> There is no way around it: We need more lawyers doing pro bono work.

So why am I sharing so much about my pro bono experiences? MSBA presidents usually address the topic of pro bono each year in October because it is the month when we commemorate pro bono service week—and pro bono service is, as Past-President Dyan Ebert so poignantly put it a year ago, part of the social contract between lawyers and the public. I know that a lot of MSBA members do pro bono work. But many of us do not, and the numbers are trending in the wrong direction.

In 2014, there were only 2,922 pro bono attorneys for Legal Services Advisory Committee (LSAC) grantee providers. By 2020, that number had dropped to 2,378 attorneys. This represents a decrease in pro bono attorneys of almost 20 percent. Even more staggering, there has been a 42 percent decrease in pro bono cases closed for LSAC grantees since a peak in 2014. Yes, it's true that not all pro bono work is done through LSAC grantee providers, and some (maybe many) Minnesota attorneys provide pro bono service through other avenues. (CLC, for example, is one group that does not receive LSAC funds.) Nonetheless, LSAC grantees are the legal service providers that most Minnesota attorneys think of when it comes to pro bono service—organizations such as Southern Minnesota Regional Legal Services, Volunteer Lawyers Network, Central Minnesota Legal Services, Legal Services of Northwest Minnesota, Legal Aid Service of Northeastern Minnesota, and Tubman. These providers are not experiencing a decrease in clients needing pro bono service. To the contrary, the need far surpasses the capacity of the available attorneys. With the significant decrease in attorneys providing pro bono service to LSAC grantees, as well as the decrease in the number of cases being closed, many needs are going unmet.

There is no way around it: We need more lawyers doing pro bono work. In a survey of MSBA members conducted last year, the top two reasons attorneys provided for not performing pro bono work were lack of time and lack of subject matter knowledge. As to the former, let's put a pin in that for now. No, I don't have the magic solution to create more time for busy people, but I do have some thoughts on how busy people can help with access to justice. We will have more to say about that soon.

As for subject matter knowledge, let me assure you that there is support and training for practicing in an area of law that might not be your first field. If a construction litigator can navigate CHIPS proceedings, I'm confident that you can find a pro bono practice that fits for you. In addition to fulfilling a professional duty, you may find yourself touched and moved in ways that fundamentally shape you both as a lawyer and as a person. And if I happen to see you teary-eyed in court someday, I will thank you for your service, for honoring your part of the social contract, and welcome you to the club. ▲

Join us for Ramsey County Bar Foundation's 46th annual

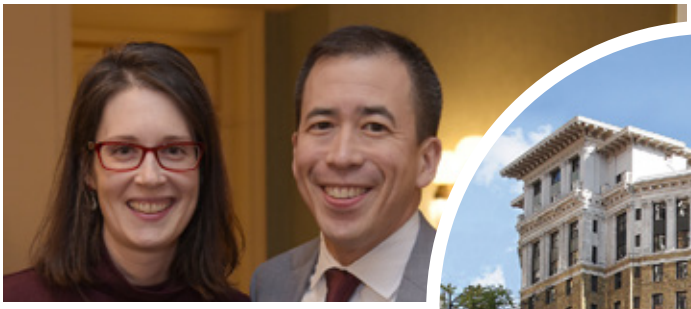
BENCH & BAR BENEFIT

Saturday, November 6
5:30 to 9:00 p.m.

The Saint Paul Hotel
350 Market Street
St. Paul, MN

An evening to honor Pro Bono service and support the legal services community.

Proceeds benefit the
RCBF
RAMSEY COUNTY BAR FOUNDATION






Photos from past benefit

Tickets: $85 per person or two tickets for $150. After Oct. 22, $90 per person or $155 for two.

Table of 10: $750

Join us for a reception and dinner, the presentation of the Second District Pro Bono Award, and silent and live auctions.

Register online at ramseybar.org

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Making a difference through Lawyers Step Up

MSBA member Shruti Vaid learned about the Lawyers Step Up initiative through MSBA and HCBA newsletters. A joint effort of the MSBA and the Minnesota Judicial Branch, the initiative encourages lawyers to start or renew their pro bono practice to answer the many legal needs of the pandemic. She was inspired to start volunteering. After completing the short survey on the website, Vaid was matched with Volunteer Lawyers Network (VLN) for a pro bono opportunity. As a transactional attorney, she didn't have experience in family law, but was interested in working with women and children. She truly wanted make a difference in someone's life.

The staff at VLN—particularly her mentor attorney, Kara Rieke—worked with Vaid to find a case that would be a good match, and have been with her every step of the way. From providing resources for her to learn about family law to scheduling calls with an interpreter and her client, Vaid has felt supported from the beginning.

Asked what she would tell her peers about signing up through Lawyers Step Up, she calls the program a "great opportunity." "VLN has several pro bono matters that are waiting to be allocated to attorneys," she added. "Each of us can dedicate a few hours from time to time to help someone feel empowered." VLN is not alone and organizations around the state are urgently seeking pro bono attorneys. Visit *www.LawyersStepUpMN.org* to find your pro bono match.

New in 2022:

Minnesota lawyers will report their pro bono hours when renewing their attorney registration.

LAWYERS STEP UP
FOR MINNESOTA

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Pro bono. It's part of our profession.

For more information on the new pro bono reporting requirement, visit: **mnbar.org/pro-bono-reporting**

Donate to civil legal aid before year's end

Earlier this year, the Minnesota Supreme Court approved Rule 25 regarding Uniform Reporting of Pro Bono Service and Financial Contributions. While we've given a lot of attention to the pro bono reporting requirement, we also want to highlight that the form will ask you to check a box if you have donated in the previous calendar year to "organizations that provide legal services to persons of limited means." That means you have a little over three months left to decide how to support legal services in Minnesota in 2021.

MSBA member Jeff Sheridan, a 1987 graduate of Hamline University School of Law, practices criminal law at his firm, Sheridan & Dulas, in Eagan, MN. He chooses to financially support his local civil legal aid program, Legal Assistance of Dakota County.

Early in his career, Sheridan practiced family law and volunteered his time to help people with family law problems who could not afford an attorney. As his practice transitioned into criminal law, he realized that his clients' cases were slowing down because of *pro se* civil cases eating up judicial time and resources. A poorly handled divorce can easily end up back in the courthouse eating up much more judicial resources than a well-handled divorce.

Sheridan knows that if Legal Assistance of Dakota County was handling more divorce cases in the county, his clients' cases could move through the courthouse faster. He donates because he sees the value that civil legal aid gives to the entire judicial system, and he always encourages others to do the same.

For a full list of organizations that qualify under this rule, please visit our access to justice page (*www.mnbar.org/ATJ*) and click on the Learn More tab under Pro Bono Reporting Requirement to see a program FAQ. Donations can also be given to the Minnesota State Bar Foundation (*www.mnbar.org/foundation*), which funds those same legal services organizations.

Tubman, Civ Lit section team up

The MSBA Civil Litigation Section is pleased to announce that it's sponsoring a new pro bono program in collaboration with Tubman, a multi-service organization that provides pro bono legal representation to low-income victims seeking orders for protection and harassment restraining orders in Hennepin, Ramsey, and Washington counties. The section is seeking to recruit volunteer lawyers, experienced and inexperienced, to team up to provide legal representation to Tubman clients.

This program has been designed to achieve three goals:

- **Pro bono:** Recruitment, training, assignment, and retention of volunteer attorneys to represent Tubman clients in OFP/HRO hearings.
- **Mentorship:** Pairing and connecting volunteer lawyers to mentor each other through their representation of Tubman clients.
- **Civil litigation skill development:** Volunteer lawyers will develop client counseling, trial preparation, negotiation, and trial skills through their representation of Tubman clients.

The MSBA Civil Litigation Section will recruit volunteers, connect them with Tubman, and provide mentorship and skill development support. Tubman will provide training, assignment, and support for volunteer lawyers in their representation of Tubman clients. Our goal is to attain a cohort of volunteer lawyers, who will be paired together in mentorship teams, complete training, and begin representation of Tubman clients in late 2021.

Trained volunteers will receive representation opportunities periodically from Tubman. Typically, the representation is of short duration—often two weeks from assignment to the evidentiary hearing. Please join us for an online Safety Project Training session on **Friday, October 29 from 8:00 am – 12:00 p.m.** 3.75 Standard CLE credits will be offered; registration available through our CLE & Events calendar at *www.mnbar.org/cle-events*.

NEXT MONTH

MSBA practicelaw virtual conference

MSBA's practicelaw conference is back for 2021. This year we invite you to team up with some colleagues and join us for a friendly Shark Tank-like competition to build an Alternative Legal Services provider concept. Even if you aren't sure what that is, we'll tell you all you need to know during a series of four CLEs (including an Elimination of Bias session) each morning. And each afternoon, you'll have an opportunity to meet with your team and one of our coaches to brainstorm a business concept for delivering legal services to those who can't afford them. You'll end the week pitching your idea to our panel of judges. Prizes will be awarded.

The practicelaw conference is happening the week of November 8-12 and costs just $45 for MSBA members ($100 for non-members). Law students may attend for free. If you'd like to participate but don't have a team, we'll pair you up. Learn more by visiting *my.mnbar.org/build*.

7 new MSBA Advantage partners added

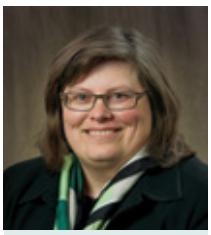
During the past bar year, the MSBA has welcomed seven new partners to its MSBA Advantage Partner portfolio. All of these companies offer MSBA members discounts on a variety of products and services. **MyCase** and **SimpleLaw** are our newest practice management partners. **Indexed I/O** and **Tracers** provide valuable legal research support. **Documate** is an easy-to-use document automation platform. **TrustBooks** accounting software is designed specifically for attorneys. And **LawClerk** helps you hire freelance lawyers. Learn more about these and all of our MSBA Advantage Partners by visiting *www.mnbar.org/Advantage*.

Trust account overdrafts: what you need to know

For more than 30 years, the Office of Lawyers Professional Responsibility has administered a trust account overdraft program. In fact, Minnesota was one of the first states to implement such a program (in 1990, following the American Bar Association's adoption of a model rule on the topic in 1988). This important early warning tool is now in place in all but a couple of states, but I'm not sure how familiar the practicing bar is with the rules, the program, and what to do if you receive a trust account overdraft notice.

The rule and the program

Rule 1.15(m), Minnesota Rules of Professional Conduct, provides that every lawyer practicing or admitted in Minnesota has consented to overdraft reporting by any financial institution holding client trust accounts. Lawyers can only hold client funds in trust accounts.[1] Those accounts, in turn, can only be with banks approved by the OLPR.[2] The bank, as part of its agreement with the OLPR, must report to our Office any time a check or debit is presented against a trust account containing insufficient funds.[3] This is true whether the withdrawal is honored or dishonored. Because the bank is reporting to us, the rules do not require you to report such notices to our office.



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

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When our Office receives an overdraft notification, we send an inquiry letter to the attorney or firm on the account, requesting an explanation and three months of the required books and records. We request and expect a timely response to the request, generally within 14 days. If you receive an overdraft notice, you should immediately turn your attention to discovering the cause of the overdraft and providing the books and records requested. Too often we see lawyers brush off the request by offering a cursory explanation of what happened. Don't do that. Nothing raises the antennae of regulators more than partial responses accompanied by no records or incomplete ones. If there is an issue with your trust account, don't panic! Do seek counsel if you need help with the request, and please do so sooner rather than later. If you need additional time, let us know. Be candid about why additional time is needed but also remember we consider this a critical ethics obligation—so you should prioritize addressing any potential issue accordingly.

Importantly, and please remember this, most overdraft inquiries result in no discipline. Forty-one trust account overdraft notices were reported to the Director in 2020. The Director converted only seven of the resulting inquiries into disciplinary files. One of the most beneficial things about this program is that it allows us to continue to educate lawyers on proper record keeping; it's a concrete example of our recognition that mistakes happen. People write checks on their trust account when they mean to write them from their business account. Banks also make mistakes. Unexpected service charges may be assessed to the account. Deposits may not clear when you expect them to. You might forget to record a disbursement or make a duplicate disbursement. Third party checks may bounce. Strict compliance with the trust account rules, including the provisions set forth in Appendix 1 to the Rules, would eliminate most of these scenarios as potential problems, but again, falling a little short of perfection is not what may trigger further investigation.

When inquiry becomes investigation

There are several reasons we may open a discipline investigation after the initial trust account inquiry. A non-exhaustive list of those reasons includes:

- you do not respond despite our efforts to follow up, or your responses are so incomplete that it is apparent you are not keeping the required books and records on a regular basis;
- the records show you have shortages in the account that persisted over time (less money on hand than you should have, if everyone whose money you are holding asked for their money at the same time); or
- you regularly have more than $200 of your own funds in your trust account.

This last issue is called *commingling* and it means you have client funds and your own funds in the account—often because you want to keep a cushion in place to avoid an overdraft in the first place! Please do not do this as the rules require you to, within a "reasonable time," withdraw earned fees and account to the client for that withdrawal.[4] Commingling can also put client funds at risk by giving creditors a basis to attach funds in the trust account. Thus, commingling gets our attention. As the closing numbers demonstrate, however, the inquiry is focused on the overall adequacy (or inadequacy) of record keeping and rule compliance and should not be a cause for panic. Please know that we also expunge our overdraft records after three years if no investigation is commenced.

Public protection

In addition to the educational benefits of the program, there is no question that it is one of our most effective tools in preventing and detecting trust account misuse and misappropriation of client funds. In the first 15 years of the program, 14 lawyers were disbarred in cases that started

with a trust account overdraft notice, and others received discipline—some private, some public.[5] I have not totaled the overall numbers for the program—something we will do for the board's next annual report—but the program routinely uncovers serious misconduct that otherwise might not come to light from client complaints. Just this month, we discovered intentional misappropriation of client funds in a matter that started with an overdraft notice. I've come to learn that it happens more than you would think, but it still surprises me. And I remain proud that Minnesota was an early adopter of this effective and now widespread program.

Conclusion

The duty to safekeep client property—particularly money—is a fundamental fiduciary obligation. Although Rule 1.15 is the most detailed rule with the most subparts, do not be intimidated. But it does take time to understand the requirements and to comply with them on a day-to-day basis, time I know you would rather spend on billable client work or at leisure. It can't be helped—the consequences of failing to give this ethics obligation the time it requires are serious. Because we want to help you with this important requirement, we have a lot of resources on our website devoted to the topic. Each year an OLPR lawyer and a forensic auditor devote significant time to administering the overdraft notification program. Time well-spent, in my view, due to its strong educational component, as well as the significant public protection benefits. Please call our ethics hotline (651-296-3952) if you have a question about how to satisfy your trust account obligations. ▲

Notes

[1] Rule 1.15(e), MRPC; Rule 1.15(f), MRPC.
[2] Rule 1.15(d), MRPC; Rule 1.15(k), MRPC.
[3] Rule 1.15(k), MRPC.
[4] Rule 1.15(b), MRPC.
[5] Betty M. Shaw, Overdraft Notification, Bench & Bar (April 2006).

Mailbag: Cybersecurity Q&A

In recent months, I've been asked a lot of great questions regarding data privacy and best digital practices in a number of areas. So let's devote this month's column to answering some of those basic questions.

"I have a closet full of old devices, everything from laptops to hard drives to ancient cell phones. How do you properly dispose of old devices?"

I think many of us find ourselves in a similar situation, and it is certainly risky to throw away devices without ensuring that the data contained therein cannot be retrieved. To start, make certain that the device or item you wish to dispose of is ready for disposal. You don't want to realize that the hard drive you just drilled a hole through actually belonged to someone who still needed it. And that brings me to my next point. Physical destruction may be needed before bringing a device to a recycling center. (If I can whistle through it, odds are you can't get data from it!) For an iPhone, factory reset may be enough before recycling, as any entity other than a three-letter agency will most likely be unable to access any data. But for other devices and hard drives (and for more peace of mind in disposing of any device), physical destruction is typically best.

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

"What are some ways to stay secure while using mobile devices?"

Definitely an important question. The National Security Agency has a mobile device best practices fact sheet that lays out critical ways to protect yourself and your data when using your smartphone.[1] Among the many helpful strategies it outlines, some key takeaways include using strong pins/passwords, disabling Bluetooth when not in use, disabling location services when not in use, being wary of malicious apps, updating your phone regularly, and avoiding connection to public Wi-Fi networks. And although it's not specific to mobile devices, it is also advisable to practice caution when browsing the internet and to avoid clicking on links contained in emails, especially those from unknown sources. Be aware of proximity breaches as well, such as "shoulder surfers" who may look at your screen while you work in a public place. Which brings me to my next topic…

Physical destruction may be needed before bringing a device to a recycling center.

"What are some strategies for maintaining security while working remotely? How should a home office be equipped to fend off cyber threats?"

In our day and age, working from home has certainly become a common practice. With this ability comes an expanded number of cyber threats, since multiple remote environments make for a greater potential attack surface. From a "soft skill" vantage point, it is important to be aware of your surroundings when you're working remotely. Again, it is wise to take the possibility of "shoulder surfers" or compromised public Wi-Fi networks into account the next time you bring your laptop to your favorite coffee shop to get some work done. Furthermore, the same security strategies that apply to using mobile devices also apply to remote work more generally—employ strong passwords and multi-factor authentication, secure endpoints, always update your software as soon as new security updates are released, use VPNs, and be sure to only use approved devices. When working remotely, practice the same caution that you would use in your physical office and be sure to report any suspicious activity or possible breaches. Maintaining communication while working from home is critical in mitigating risk. Make sure that organizational training and cybersecurity practices take into account the risks associated with remote work.

"What can I do to prevent myself from becoming a victim of doxxing? What are some tips for data privacy?"

First, as I've written before ("Doxxing redux: The trouble with opting out," Bench & Bar Dec. 2019), scrubbing the internet clean of any trace of your personal information is probably unrealistic. While public-information reseller websites have "opt-out" pages, there are several issues when it comes to manually submitting these requests. If you haven't already noticed, there

are a huge number of sites of this type; keeping up with all of them would be challenging. Furthermore, even if you were to visit each site, opt out (a process which isn't always as straightforward as we'd like it to be), and remove your information, it is very possible that the same information would repopulate within a matter of months. These sites tend to make it difficult to opt out to begin with by changing the page address or by requiring even more personal information to do so, such as a copy of your driver's license. Clearly, it's not a simple task that need only be done once.

But we may be beginning to see hints of improved data privacy options for users. Recently, Apple released an update allowing users to opt out of cross-site data tracking.[2] Some states, such as Vermont and California, have already enacted laws to regulate data brokers, and more such legislation may eventually be enacted around the country. In addition to disallowing cross-site tracking to prevent targeted advertising, it is important for those concerned about data privacy to consider the information they willingly share. Keep in mind that social media is a great source of information for cyber attackers to customize phishing emails or other social engineering-based attacks simply by using information that is easy to find. Make sure that social media settings optimize your privacy and be mindful that the things you post publicly don't necessarily reach only the audience you intend. Practicing strong personal cybersecurity measures, such as those recommended for remote work, is also beneficial.

I hope that these answers are helpful in contributing to a strong security posture, both at work and at home. Often, staying secure requires going the extra mile to prevent the kinds of threats that many of us consider to be unlikely. If recent cyber-trends have shown us anything, it's that individuals, firms, organizations, and companies are all vulnerable to the risks that come with utilizing a variety of technologies. Taking precautions now is always better than dealing with a bigger problem down the road. ▲

Notes

[1] *https://media.defense.gov/2020/Jul/28/2002465830/-1/-1/0/MOBILE_DEVICE_BEST_PRACTICES_FINAL_V3%20-%20COPY.PDF*

[2] *https://www.nytimes.com/2021/04/26/technology/personaltech/apple-app-tracking-transparency.html*

Q: What do you get out of doing pro bono work?

'Pro bono work reminds me that practicing law is a privilege.'

ALYSON CAUCHY has served as U.S. Bank Law Division's pro bono program coordinator since 2017, and in 2020 became co-chair. While working at U.S. Bank, she obtained her JD from Mitchell Hamline School of Law and was admitted to the Minnesota bar in 2019.
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TRIPATHI@FR.COM

Chelsea E. Nelson, U.S. Bank

Like many others, I became an attorney to help people. There is an indescribable specialness about offering help to someone as their last resort and their last hope. Pro bono clients come to you completely vulnerable in that they sometimes must reveal the most personal parts of their life to you and ask for help that they're unable to afford. That is a vulnerability that most people are not willing to subject themselves to.

But those clients are also the ones to say 'Thank You' with the most sincerity. They provide this feeling of being genuinely appreciated that is unmatched by any other sort of representation I can offer. While I can 'help' my paying clients, the help I can offer pro bono clients is unequivocally the most fulfilling. To put it simply, pro bono work just feels good.

Daniel G. Prokott, Faegre Drinker

I believe strongly that every attorney should provide pro bono legal services. I started doing pro bono work during law school and have continued to provide pro bono services for 20-plus years. In my mind providing some amount of pro bono services—which, for a given person, may be a lot or a little, and may vary year to year—is simply part of being an attorney.

The professional, community, and personal benefits are numerous. Pro bono work has allowed me to develop and extend my knowledge about the law, including areas outside of my primary area of specialization, and has resulted in my being able to help many clients navigate and move forward from very stressful and significant life events. It has provided me with numerous opportunities to develop, improve, and use many skills, including effective client interaction, negotiation, and oral and written advocacy skills. Pro bono work has created opportunities to collaborate with many colleagues and interact with numerous other professionals, enabling me to learn from others, to become a mentor and advisor to other attorneys, and to help our judicial and administrative systems be more efficient and effective. Finally, using my time and talent to provide pro bono legal services simply makes me feel good—about myself, my profession, and our legal community.

Alyson Cauchy Anderson Law Offices, PA

I'm not sure if I can calculate the personal value of giving and receiving pro bono services. It is an enormous thing for both sides when one steps in to guide another through challenging moments—and for no reason other than that one could do what another could not do for themselves. Can that personal impact be quantified? Participating in pro bono can be personally uncomfortable and emotionally hard, but the relationships built—and rewards gained—far outshine the difficulties. As the co-chair of the pro bono program at U.S. Bank, I utilize my passion to enable great attorneys to connect and collaborate with nonprofits serving contemporary pro bono needs across the U.S. Personally, my hope is that any small positive value I add to pro bono services perpetuates and compounds.

Professionally, pro bono service is an invaluable opportunity to fill in the cracks of a system that is here to serve all people, but where some people experience significant challenges when trying to gain access to legal representation and services. I believe pro bono work is part of the privilege of being an attorney. It serves as a platform for some of the best work of our profession and demonstrates that the profession does not operate apart from the community we live and practice within.

Veena Tripathi,
Fish & Richardson, P.C.

Pro bono work reminds me that practicing law is a privilege. It's easy to lose steam as a junior attorney—long hours, intensive learning curves, and endless pages of document review can make even the most energetic, motivated associate feel sluggish at times.

But when I feel my gears slowing, pro bono work reminds me of what an honor it is to be a member of this profession. I'm grateful for the opportunity to help a local entrepreneur bring her ideas to a public space, conduct complex factual and legal research for asylum briefs, and protect the First Amendment rights of protestors fighting for the future of our country. I feel lucky that I can learn from dedicated, accomplished, and knowledgeable attorneys from many different practice areas about how to be the best advocate I can. Pro bono work reminds me that this practice is, in no uncertain terms, a privilege.

So what do I get out of pro bono work? Perspective, motivation, and gratitude. ▲

North Star LAWYER

Announcing the 2021 MSBA Pro Bono All-Stars

In 2012, the MSBA created the North Star Lawyers program to recognize members who provided 50 or more hours of pro bono service (the standard in Rule 6.1(a), (b)(1) & (2)) in a given calendar year.

This year, in honor of Pro Bono Week, we would again like to acknowledge our long-term North Star Lawyers– Pro Bono All-Stars - for our members who have participated in 8 or more years of the program. Thank you for your consistent service to our community and for helping to make justice more available to low income Minnesotans.

Congratulations to the 109 MSBA Pro Bono All-Stars!

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Michael Cockson
Amy Conway
William Cottrell
Andrew Davis
Christopher Davis, Jr.
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Joseph Dreesen
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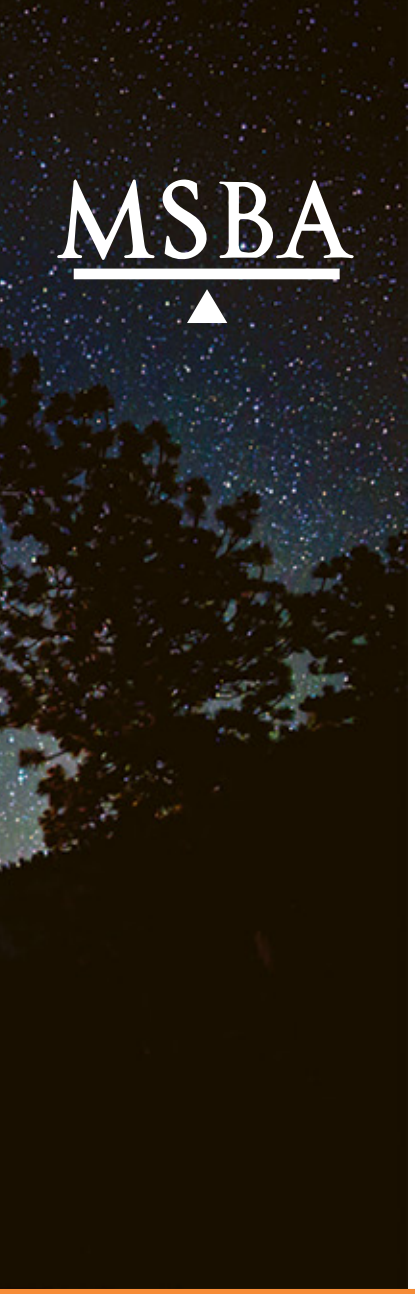

MSBA

Join us for
Pro Bono Week 2021
October 25-29

Pro bono week is a time for us to celebrate Minnesota's dynamic pro bono community and an opportunity to grow or start your pro bono practice. Join us for an outstanding series of three free CLE programs to learn about racial and historical trauma and how it impacts pro bono clients, the diversity found in rural Minnesota and how to serve the community effectively, and immigration law through history including where we are today after several changing administrations.

Program details and registration information can be found at:
www.projusticemn.org/calendar

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VLN is stepping up in response to the end of the eviction moratorium. We need your help.

By Muria Kruger

The abrupt creation of the Minnesota eviction moratorium in response to the covid-19 pandemic in March 2020 and the subsequent phase-out of the moratorium from June 30 – October 12, 2021 has made landlord/tenant housing law a dynamic area of practice in the last 18 months. These rapid changes are also expected to create a steep influx in demand for eviction defense services throughout the fall and winter of 2021. And because the eviction moratorium was developed in part to protect our state's most vulnerable renters, most of those needing help at the end of the moratorium will be low-income and in need of free legal services.

For over 50 years, Volunteer Lawyers Network (VLN) has been mobilizing the pro bono resources of the private bar to help meet the legal needs of low-income Minnesotans who otherwise would not be able to afford an attorney. Private bar volunteerism plays a particularly important role in supplementing/expanding the legal services that can be provided by the never-quite-adequately-funded local Legal Aid organizations and in responding to sudden needs of increased legal assistance. (Remember the lawyers in airports when sudden travel bans were announced?)

Currently VLN volunteers, working in collaboration with local Legal Aid organizations, provide free legal assistance to every tenant, and some landlords, going through an eviction who qualify for (and desire) assistance in Hennepin, Ramsey and Anoka counties. This is a point of pride—knowing that, in particular during the eviction moratorium, no eviction case has gone through court without at least the offer of free legal assistance to those who qualified.

These free legal services are provided through courthouse clinics (all via Zoom right now) that take place during the initial appearance calendars in eviction actions. The courthouse clinics are a partnership between VLN, Legal Aid, and other mediation and financial assistance organizations. The parties checking in for court are told of the services available. The parties who wish to use the services are then siphoned off to separate break-out rooms to meet with a lawyer, financial aid worker, and/or to begin plans to work with a mediator to settle their case.

Some courts even provide the possibility of a seven-day continuance if a party wants to use a service and is unable to do so that day due to high demand or unworkable wait times.

Meeting the demand associated with the end of the moratorium will require greater engagement from pro bono lawyers. VLN, in particular, is looking for lawyers who are willing to staff initial appearance clinics in Hennepin, Ramsey, and Anoka counties. VLN understands that many lawyer volunteers may not have had experience in landlord/tenant law or litigation, and therefore will need training and oversight. So we have built out our website (*www.vlnmn.org/volunteer/housing*) to support volunteers with on-demand trainings, sample documents, and other practice resources. VLN's housing program also has three staff attorneys who are on call to assist volunteers and available to shadow (or be shadowed by) new volunteers not quite ready to provide services on their own. VLN's housing program further publishes a monthly newsletter with court and legal updates and has a monthly, live (via Zoom) "chat and chew" program in which a VLN staff attorney is available to answer questions and discuss legal updates in a group setting.

Finally, because VLN is currently focusing so many of its resources on responding to the dramatic surge in eviction cases, VLN's housing program also needs help with its more regular work, which tend to be in areas particularly well-suited for new volunteers. Two such areas are staffing phone advice shifts (daily from 2-4 pm) and taking eviction expungement cases. For phone advice shifts, all materials are provided approximately 24 hours in advance of the shift so that the volunteer may review the legal issues and have a conversation with a VLN staff attorney prior to calling the client. Eviction expungement work is a full representation opportunity that is perfect for new volunteers.

VLN is proud to work with individual corporations, law firms, or other organizations to discuss what type of volunteer experience is the best match for their lawyers' skill sets and inclinations. And it's not too late if you want to get involved with the end of the moratorium—phase out is ending October 12. It's likely we'll start to see the greatest volume of cases come through courts then. ▲

MURIA KRUGER is housing program manager and a resource attorney at Volunteer Lawyers Network.
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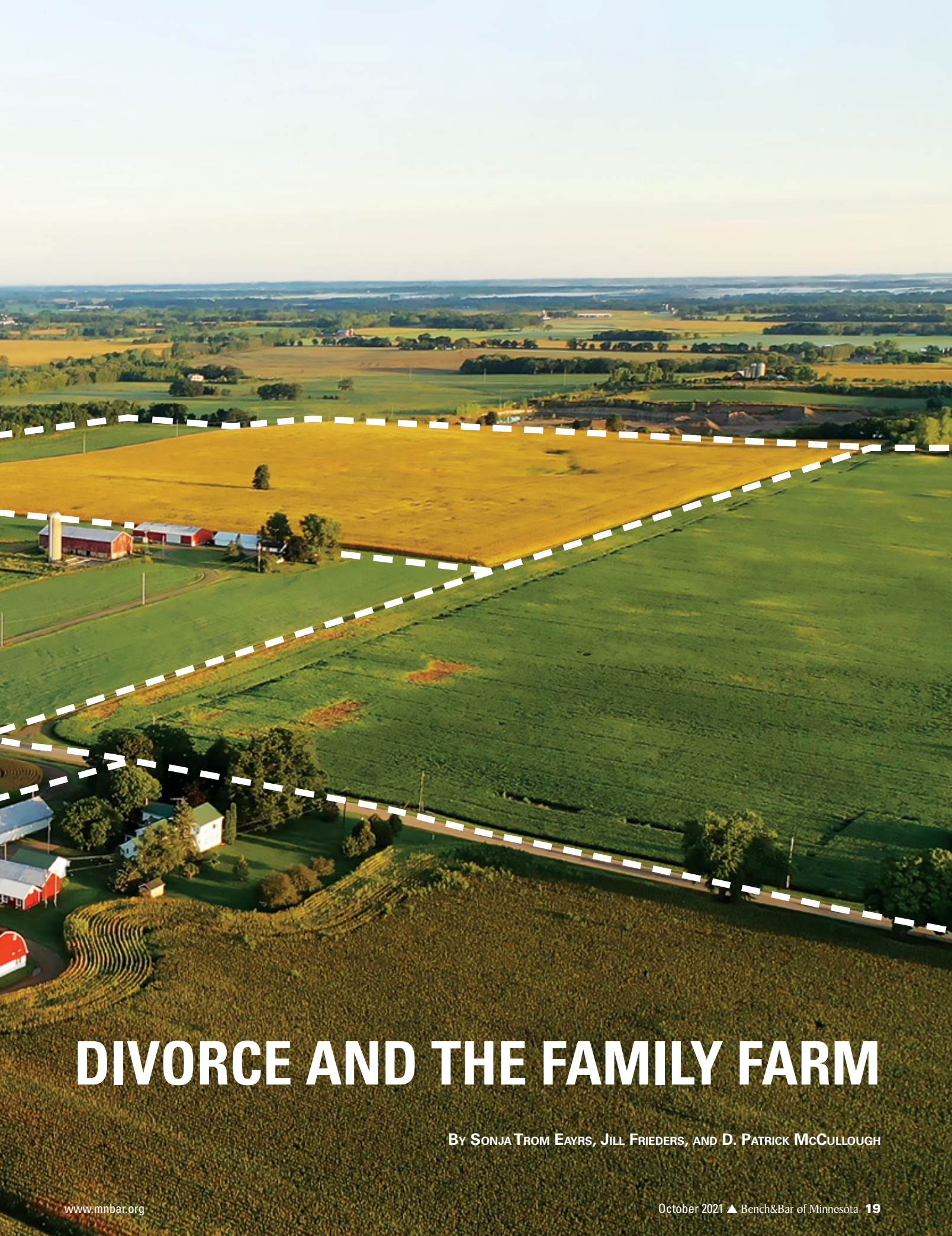

DIVORCE AND THE FAMILY FARM

By Sonja Trom Eayrs, Jill Frieders, and D. Patrick McCullough

FARM DIVORCES ARE COMPLICATED BY AMBIGUOUS BUSINESS ARRANGEMENTS UNIQUE TO THE FAMILY, INCLUDING "UNDERSTANDINGS" OR HANDSHAKE AGREEMENTS.

Today's farming operations present unique challenges—the complexities of weather, fluctuating commodity prices, international trade agreements, tax implications, depreciation, farm subsidies, and other distinctive challenges. But these challenges become particularly thorny when a divorce occurs and threatens continued operation of the farm. Unlike other closely held business interests, farming operations not only serve as commercial ventures but also as the family home, complicating division of the estate. Considering the longstanding ties to the land that come into play, efforts to preserve the family farm take on renewed importance in a divorce.

Certainly, not all farming operations are alike, which adds to the complexity in marital dissolution proceedings. The myriad kinds of farming operations include cash crops such as corn and soybeans; livestock and dairy operations; contract growers who do not own their own hogs, chickens, or turkeys, but sign contracts with an integrator and are contractually bound to raise animals in industrial-sized operations; farmland that is set aside as part of the Conservation Reserve Program (CRP); community-supported agriculture (CSAs); as well as farm families who opt to rent their land to a third party.

In addition to partnering with a lending institution, many farmers essentially partner with the federal government. Local USDA Farm Service Agencies provide access to federally sponsored farm subsidies, crop insurance, and lending programs through the Commodity Credit Corporation. Terms of these programs frequently change in order to accommodate changing circumstances, such as recent farm subsidy programs specifically designed to provide covid-19 relief to farmers.

Family dynamics & ambiguous business arrangements

Family dynamics add to the complexity of most farming operations, as many farm families wish to preserve the family farm and pass it on to future generations. Many farms in Minnesota pass from generation to generation. There may be an unwritten plan to transfer the farm to one or more of the children—frequently creating backlash for the spouse seeking to end the marriage. If a wife, for example, seeks a divorce and requests her marital share, her actions may threaten the continued operation of the family farm and will likely damage her relationship with the parties' children and grandchildren.

Farm divorces are further complicated by ambiguous business arrangements unique to the family, including "understandings" or handshake agreements. Ambiguous arrangements involving parents, siblings, or a child are common, frequently lacking the formalities found in other closely held businesses such as partnerships or LLCs (such as partnership or membership agreements, operating agreements, and buy-sell agreements). For example, while parents may continue to own and operate the land, a son may be engaged in the farming operation and commingle equipment, grain storage, and expenses with his parents, contributing to the difficulty surrounding the divorce of any party or child involved in the farming operation.

These informal arrangements can cause havoc if a divorce occurs. In some cases it may be necessary for third parties affected by a divorce to proceed with a declaratory judgment to establish that equipment or crop belongs to the third party, not the divorcing party. It is not uncommon for parents to engage a child to work the land for next to nothing, with the promise of eventual ownership of the farm. In those instances, if the parties eventually divorce, they may face claims of unjust enrichment by the child promised the land. Farmers often rent land to others or from others—arrangements that are not always detailed in a rental

agreement. In addition, farmers sometimes pay their workers in kind or in cash.

Non-marital claims in farm divorces

Farm families share a special connection with the land, as it ties family members not only to the land but to prior generations who worked the land. There is a sense of pride for families who boast several generations on the same land, with many farm families in Minnesota achieving Century Farm status. In order to transfer the family farm to the next generation, farm families often transfer the land via gift or inheritance to the next generation. They may sell the land below market price and/or retain a life estate.

Given the goal to maintain the family farm, non-marital claims commonly arise in divorce proceedings, as one party asserts ownership of the land prior to the marriage or perhaps acquisition of farmland below fair market value. Classifying and conducting the necessary non-marital tracing to establish a non-marital claim is essential, as courts generally award non-marital property to the party who acquired the property as a gift, bequest, or devise, or acquired the property prior to the marriage in accordance with Minn. Stat. §518.003, subd. 3b.

A common mechanism to transfer the family farm to the next generation involves part sale/part gift transactions. Part sale/part gift transactions frequently enable a child to purchase the family farm on reasonable terms, thus allowing the child to eventually assume responsibility for the entire operation. Upon divorce, part sale/part gift transactions create non-marital as well as marital claims to the family farm, complicating any property division that involves a child benefiting from this special arrangement. However, in a 2012 unpublished decision, *Riopel v. Riopel*,[1] the Minnesota Court of Appeals affirmed award of the family farm, which had been in the Riopel family since 1906, to husband as his separate non-marital property, following a part sale/part gift transaction between husband and his mother.

In order to maintain the farming operation and keep the farm in the family, the court may award a disproportionate property division to the farmer-operator in order to sustain the operation. In Minnesota, courts are required to make a "just and equitable division of the marital property."[2] In making this determination, the court shall base its findings on all relevant factors, including the length of the marriage, any prior marriage of a party, age, health, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, and opportunity for future acquisition of capital assets.

Determining and tracing non-marital claims are often key inquiries in farm divorces. Were gift tax returns filed at the time of the original gift that validate and quantify the original gift? Were improvements made to the land after the gift, thereby adding to the complexity? Was the land encumbered at the time of or after the marriage? Of course, for families contemplating transfer of the family farm to the next generation, parents are encouraged to transfer land through a trust or other legal instrument. If a farmer's son or daughter is contemplating marriage, a valid antenuptial agreement should address the family farm.

While it is easy to track ownership of the land prior to and during the marriage, the value of the land at the time of marriage and the time of dissolution may be more difficult to determine. Improvements to the land such as tiling (an underground drainage system that drains excess water away from the land) enhances productivity and adds to its value. Even if the land was tiled at the time of the marriage, it is possible that additional tiling or other improvements occurred after the marriage, thus increasing the fair market value of the land.

Building the farm balance sheet

Farmland is generally the most valuable asset on a farm balance sheet. Farmers need tillable land, and as they frequently observe, "God isn't making any more." It is essential to obtain an appraisal of farmland, not only at the date of valuation but also at the time of marriage. Not all farmland is created equal, as tillable acres are generally much more valuable than non-tillable acres. Another consideration: Depending on the proximity of agricultural land to commercial or residential development, determination of the fair market value based upon highest and best use may be appropriate. Depending on the farming operation, it may be necessary to appraise tillable land separately from the building spot.

A critical first step regarding valuation is to ensure that accurate legal descriptions of all parcels exist and to list all encumbrances. This is usually best achieved by obtaining an Owners and Encumbrances Report (O&E). While an O&E report will disclose owners and encumbrances against the property, it will not disclose easements against the property—such as wind towers, cell phone towers, or manure easements. It's important to determine whether there are any recorded easements against the property, which may impair transferability.

Farmers often have a name for each parcel of land, such as "the home place," "the northwest 80," "the Brown farm," or some other identifier. Encouraging the real estate appraiser, accountant, or other experts to use the name commonly associated with a specific parcel will simplify identification, valuation, and other considerations as the divorce proceeds, as there will be a common understanding among the parties, counsel, expert witnesses, and the court. A color-coded map may be beneficial to identify select parcels, including identification of parcels subject to non-marital claims.

The value of Minnesota farmland varies, depending upon tillage, soil type, yield (bushels per acre), location, topography, drainage, and other considerations. Given these unique considerations, selection of a qualified real estate appraiser may be one of the most important decisions during the dissolution proceeding. Some counties maintain detailed information regarding all sales in the county, which may be obtained for a small fee from the county recorder or land records director.

Due to significant increase in the value of farmland, substantial capital gains taxes may be triggered in the event of sale, particularly if low-basis farmland is sold to satisfy the terms of a property settlement upon dissolution of a marriage. Capital gains taxes—an outcome that most divorcing couples do not wish to deal with—may be avoided by awarding land to a wife subject to an agreement to rent the land back to husband at fair market value.

Depending on the type of farming operation, additional appraisals may be necessary. For example, production agricultural operations typically include a grain drying and storage facility, grain bins, and other improvements (such as tiling of the land). Livestock operations may include specialty buildings, registered livestock, stored semen, stored eggs, or other assets requiring appraisal.

Equipment is generally the second most valuable line item on a farm balance sheet. Farming operations are capital-intensive, involving extraordinary costs to acquire equipment such as tractors, planters, diggers, disks, plows, combines, rippers, wagons, trucks, and semis. Appraisal of equipment is crucial:

APPRAISAL OF EQUIPMENT IS CRUCIAL: THE FAIR MARKET VALUE OF A COMBINE PURCHASED FOR $500,000 THAT NOW CARRIES A ZERO VALUE ON THE DEPRECIATION SCHEDULE IS CLEARLY NOT ZERO.

The fair market value of a combine purchased for $500,000 that now carries a zero value on the depreciation schedule is clearly not zero. It is not uncommon for farmers to pay over $300,000 for a single tractor or over $500,000 for a new combine—equipment that includes sophisticated technology, such as auto-steer and GPS to track coordinates and yields, and a range of sensors to measure moisture and other data points. Many depreciation schedules are not accurate, as farmers love to trade equipment and do not always update their depreciation schedules to reflect sold or traded equipment. Unlike over-the-road vehicles, farm equipment is not registered with the state but carries a serial number unique to each piece of equipment.

Given the capital-intensive make-up of farming operations, it is essential to review depreciation schedules. Several farm assets have recovery periods that are different from those of their nonfarm counterparts. The Tax Cuts and Jobs Act of 2017 (TCJA)[3] changes some of those recovery periods and increases the rate of depreciation. The TCJA provides that new farm equipment and machinery placed in service after December 31, 2017 are classified as five-year MACRS property, while used equipment is still classified as seven-year MACRS property.

The maximum amount a farmer can elect to deduct for most section 179 property placed in service in 2020 is $1,040,000. This limit is reduced by the amounts by which the cost of the property placed in service during the tax year exceeds $2,590,000.[4] Many state cooperative extension services conduct farm tax workshops in conjunction with the IRS. The rural tax education website at *www.ruraltax.org* is a source of information concerning agriculture-related income and deductions and self-employment tax.

Grain is another key line item on the farm balance sheet and may include corn, soybeans, or other grains. In western Minnesota and the Dakotas, wheat and sugar beets are more common. Sugar beet shares are a unique asset that requires expertise to value. Determining the number of bushels of grain may be a difficult task, as grain may be stored on the farm, on a neighbor's farm, or at the local elevator. Measuring grain bins to determine the estimated number of bushels may be appropriate, as sales may occur throughout pendency of the divorce, making it difficult to establish this moving target and agree upon the value included on the balance sheet. Of course, grain prices fluctuate daily, further complicating the value of grain reflected on the balance sheet. If grain sales continue throughout the pendency of the dissolution proceeding, it may be necessary to file a temporary motion with the court to provide verification of all grain sales, including the number of bushels sold and price received as well as possible escrow of sale proceeds. This is especially important in those counties where the valuation date is delayed until the date of the initial pretrial, typically several months after commencement of the dissolution proceeding.

For farmers who own livestock, those operations can vary significantly. While cows are cows to most people, there's a real difference between a dairy cow and a beef cow. (If you fail to understand the difference, try milking a beef cow.) If a farmer says, "I have 100 cows and calves," how many bovine does the farmer have? Also, silage and hay are assets unique to many livestock operations.

Other assets unique to farming operations may include prepaid expenses for the next growing season, shares in the local co-op or ethanol plant, sugar beet shares, and even manure: Some contract growers sell animal waste from their turkey, chicken, or hog operations to neighboring farmers to apply to their land in lieu of commercial fertilizer.

***SONJA TROM EAYRS** is a partner with Barnes & Thornburg LLP. A recognized family law attorney with over 30 years of experience, Sonja has been granted fellowship in the American Academy of Matrimonial Lawyers and has been named to The Best Lawyers in America. In addition to her legal practice, Sonja serves as business manager of the Trom family farm in southern Minnesota.*

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***D. PATRICK McCULLOUGH** was born and raised on a farm in northwestern Minnesota. Even before tractors, he and his family farmed for many years with horses. Pat presently lives on his farm in Washington County, which is primarily a cow/calf beef operation. He is celebrating his 50th year in the practice of law with primary concentration in family law and personal injury.*

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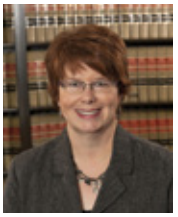

***JILL FRIEDERS** was born and raised in rural Indiana. She grew up on a small farm raising sheep and horses. Jill and her family are avid equestrians, competing in dressage, endurance, and reining. Jill's family law practice in southeastern Minnesota deals with several farm divorces each year. She is celebrating 37 years of practice.*

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Farm income

Income associated with farming operations varies according to the type of operation. Determining the cash flow available for payment of spousal maintenance, child support, or funding a property settlement is not an easy task, as depreciation may reduce the farmer's available income. After adjusting available net income by reducing or eliminating depreciation altogether, dollars may be available to fund these obligations.

Available sources of income may include:

- income from the sale of grain or livestock;
- income from the sale of milk;
- contract payments, typically associated with hog, chicken, and turkey industrial operations;
- federal subsidies, as farmers are essentially silent partners with the federal government and may be eligible to receive federal subsidies that vary from year to year. During the pandemic, a number of covid-19 relief packages were directed to farmers and enhanced their bottom line;
- non-cash income from the USDA for price loss coverage and agricultural risk coverage—federally subsidized programs to protect farmers in the event of price loss or natural disasters such as drought or floods;
- long-term agreements with the USDA, agreeing to less intensive use of highly erodible or other specified cropland through the Conservation Reserve Program (CRP);
- custom work, such as combining beans or picking corn for other farmers;
- trucking or hauling grain or livestock for other farmers;
- miscellaneous income in connection with easements granted for construction of windmills or cell phone towers;
- miscellaneous income (likely unreported) in connection with easements granted to neighboring farmers to allow spreading manure from industrial operations on the land;
- dividends from the local co-op or ethanol plant; and
- other miscellaneous sources of income.

Sources of farm debt

Farm debt typically includes a mortgage that may encumber all or a portion of the land. Each year, most farmers are required to provide their lender with a balance sheet and cash flow projections to obtain an operating loan. Typical financing sources include agricultural lenders, local banks, and local co-ops—financing arrangements that are secured with UCC filings.

In some unfortunate situations, divorcing couples face not only the end of their marriage but also considerable farm debt. In those situations, the lender will need to be involved in any work-out and must approve the terms of a settlement. Depending upon your relationship with opposing counsel, it may be wise to meet jointly with the loan officer.

Discovery tips for the farm divorce

Farm divorces can be quite complex and require review and analysis of documents that need to be tailored to the specific operation. Work with your expert witness to identify appropriate documents.

A number of documents may provide key information regarding the farming operation. They include: (a) income tax returns, including Schedule F (Farm Income), which details farm-related income and expenses for at least a five-year period; (b), estate and gift tax returns (for those parties asserting a non-marital asset claim); (c) depreciation schedules to provide to the equipment appraiser as well as an expert to ascertain cash flow available for payment of spousal maintenance and/or child support as well as sums available to satisfy the terms of property settlement; (d) copies of contracts for the purchase or trade of equipment; (e) copies of balance sheets, cash flow projections, officer notes, and other documents provided by a farmer to a lender (this inquiry may produce a treasure trove of information); (f) documentation of the amount and value of grain, including the location of all grain (many combines include an on-board computer that tracks yields per acre and may serve as a resource to estimate yields); (g) records of prepaid expenses such as fertilizer, seed, and other input costs for the new crop year; (h) copies of all grain checks or other sums received during the pendency of the action (was grain sold through a trucking company or other third party?); (i) copies of contracts involving contract growers, which are common in the hog, chicken, and turkey industries; (j) documentation of all debt, including outstanding mortgages, operating loans, loans through equipment dealers or the local co-op, federally subsidized loans through Commodity Credit Corporation, and other sources of credit; (k) documentation relating to any crop insurance claims or other losses. In matters involving livestock operations, it may also be necessary to retain a specialty appraiser who can assist with discovery. ▲

Notes

[1] Minn. Ct. App. A11-445 (Jan. 2012).
[2] Minn. Stat. §518.58, subd. 1.
[3] Pub. L. No. 115-97 (TCJA).
[4] Publication 225 (2020), Farmer's Tax Guide.

In re: Krogstad and the changing meanings of words

By Kenneth Bayliss

After England's Queen Anne (1665-1714) first saw Christopher Wren's then-new St. Paul's Cathedral, she described it as "amusing, awful, and artificial."[1] Why so negative? At the time it was actually a great compliment to Wren's work, given that "amusing" then meant "pleasing," "awful" meant "awe-inspiring," and "artificial" meant "skillfully achieved."

Similarly, the meaning of the word "snob" has changed dramatically through time. First, it simply meant a shoemaker. Somehow this changed, and the word's second meaning came to denote those who sought association with persons thought to be superior. (It is speculated that this meaning might come from shoemakers in Oxford trying to ingratiate themselves with students and educators in order to sell their services.) But the word changed yet again and we now usually look to its third historical meaning: "one who tends to rebuff, avoid, or ignore those regarded as inferior" or "one who has an offensive air of superiority in matters of knowledge or taste."[2]

The tendency of the meaning of words to change over time is known as "semantic drift." Semantic drift is the reason that when we first read a Shakespearean play, we needed a glossary. It was not just that we came upon words we never knew—"blisson," "petard," or "fardels"—but that we came upon words which we thought we knew the meaning of, but did not: "nice," meaning "precise"; "proper," meaning "handsome"; or "silly," meaning "innocent."[3] Most dangerous to our understanding of Shakespeare were not the words we did not know and needed to look up, but the words that we thought we already knew and therefore did not look up.

Semantic changes have affected many of our words, even the most common ones. And this presents a problem for anyone trying to interpret a statute. Minnesota has now been a state for more than 160 years, about one-third the distance in time back to Shakespeare. And because our earliest statutes were often copied from the statutes of other, older states, some of our statutes contain language that pre-dates Minnesota's statehood. Thus, statutes have been passed down to us containing words with meanings that are very old and not always clear to us—or more problematically, words whose intended meaning we only think we know.

In Re: Krogstad and the meaning of "several"

Earlier this year, the Minnesota Supreme Court, in *In Re: Krogstad*,[4] devoted an entire decision to the interpretation of "several" as it appears in a Minnesota venue statute, Minnesota Statute section 542.10. The case was a grand adventure in etymology and semantic drift: a dream come true for word nerds. Ultimately, the case hinged on two different meanings of the word "several," one of which is more common—the sense meaning "more than two, but fewer than many,"—the other rarer, meaning "separate" or "multiple." This was a close-fought dispute, as evidenced by the fact that the Minnesota Court of Appeals and Supreme Court came to different results. It took careful analysis and research into the history of the meaning of "several" to uncover the right answer.

The venue change statute: Minnesota Statute Section 542.10

In cases with multiple defendants, Minnesota has a statute that allows defendants to transfer venue when the case is not initiated in the county where the cause of action arose and a majority of "several" defendants unite in demanding a change of venue to a different county:

> If the county designated in the complaint is not the county in which the cause of action or some part thereof arose and if there are several defendants residing in different counties, the trial shall be had in the county upon which a majority of them unite in demanding or, if the numbers be equal, in that whose county seat is nearest.[5]

The statute seems clear enough: If a lawsuit is filed in a county in which the cause of action arose, a majority of defendants may change venue to a county that the majority of them prefer. But dicta from a 1990 case, *Riddle v. Ringlewski*, perhaps ignoring semantic drift, questioned whether the statute could apply in an instance involving just two defendants:

> We note that "several" is generally defined as a number more than two, Black's Law Dictionary 1232 (5th ed.1979), and the case was properly filed in the county of residence of one of two defendants. Minn.Stat. §542.09. It appears that respondents may have improperly relied upon section 542.10 in demanding a change of venue.[6]

The *Riddle* court nevertheless acknowledged that this observation was not relevant to the outcome of the case, because the plaintiff had failed to file a timely motion to quash the defendants' demand for change of venue.[7] In *In re: Krogstad*, the trial court and the court of appeals[8] both relied on this dicta from *Riddle* to support their rulings that the statute might not apply when only two defendants united in demanding a venue change.

Competing definitions and semantic drift

Crucial to the determination of the case in *In re: Krogstad* were the competing dictionary definitions of "several." An understanding of the history of the word "several" was the key to obtaining a favorable ruling in the case.

"Several," as it first entered the English language, derived from the Latin word "separalis," which meant "separate" or "multiple." This sense of the word goes back centuries. For instance, when the U.S. Constitution was drafted in the late 1700s, it included nine references to "several," in this sense: eight in the phrase "the several States" and the other in the phrase "the several State Legislatures." "Several" is also found in Minnesota's constitution in a provision dating to the mid-1800s: "If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill." The use of "several" in this sense is found throughout Minnesota's statutes, its court rules, and its administrative rules. In this sense the word means simply "separate" or "multiple."

Statutes have been passed down to us containing words with meanings that are very old and not always clear to us—or more problematically, words whose intended meaning we only think we know.

But apart from the first historical definition, another meaning has crept into our language, and this meaning is now much more commonly invoked. In everyday speech we most often use the word "several" to mean a small number of things—in the words of one prominent dictionary: "more than two, but fewer than many." Both the trial court and the court of appeals in *In Re: Krogstad* found this to be the applicable meaning.

On its face, the rulings of the trial court and court of appeals adopting the second meaning of "several" were attractive, because when they applied the "more than two, but fewer than many" definition, they accepted the meaning that everyone knows best and uses most. But there were major problems with this position.

Perhaps the main reason that the "more than two, but fewer than many" definition could not apply was that the word "several" does not mean just "more than two." Even accepting that in this sense "several" is more than two, one would never use "several" to describe a large number of things, such as the number of stars in the sky or the number of fish in the ocean. Because the definition is "more than two, *but fewer than many*," the plaintiffs had to take the good with the bad: they logically had to accept that the venue rule did not apply when the number of defendants became "many." This would mean one defendant could use the statute to change venue under a portion of the statute that applied to one defendant; two defendants could not use the statute to change venue (has to be *more* than two, say plaintiffs); three or more up to "many" could use the statute to change venue (more than two); but as soon as the number of defendants became "many," the statute no longer allowed a venue transfer (but fewer than many). It made little sense that the Legislature would want such an imprecise and vacillating definition to determine venue.

The court of appeals decision in *In re: Krogstad* noted that all of the dictionary definitions of the meaning it relied on included the requirement "more than two." But the decision did not address the problem created by the second half of the definition, which would require that the venue change statute not apply if "many" defendants (whatever number that is) were involved. The plaintiff's strategy for dealing with the second part of the statute was twofold: 1) ignore it; and 2) when forced to talk about it, argue that the court needed to only consider the first half of the definition, the part before the comma, thus applying "more than two," but lopping off "but fewer than many." Of course, there is no basis in the law for this kind of definitional surgery.

A careful review of the entirety of the text of the definitions gave appellants a strong case. Nevertheless, the pervasive use of "several" to mean a small number of things was difficult to overcome. But further research revealed the backwardness of the opponent's position.

Contemporary statutes from the late 1800s

Judging by the frequency of its use in the late 1800s, the word "several" had many devotees in the Legislature. The word permeates Minnesota's statutes from that time. By way of example, in 1894, civil actions were governed by Chapter 66 of the Minnesota Statutes. Chapter 66 was the very chapter that the 1894 venue statute was incorporated into. A review of the use of the phrase "several defendants" in this chapter, which was essentially Minnesota's rules of civil procedure at that time, shows that it always meant "separate" or "multiple" and never meant "more than two" or "more than two, but fewer than many." The phrase "several defendants" is used seven times in the 1894 version of Chapter 66. The first use of "several" in the chapter is to explain when a court may issue an order giving defendants an opportunity to be heard on an injunction:

> In all other cases, if the court or judge deems it proper that the defendant, or any of *several defendants*, shall be heard before granting the injunction, an order may be made, requiring cause to be shown, at a specified time and place, why the injunction should not be granted (emphasis added).[9]

It is not logical to suppose that the Legislature would want to limit the court's power in a way that would give rights to be heard to a single defendant or "more than two" defendants, but not two. Or for that matter, that they meant to cut off the right to be heard when "many" defendants were involved. All the other examples from Chapter 66 made it similarly clear that the Legislature was using the word "several" simply to mean "separate" or "multiple."

Seeing the word "several" in statutes adopted at about the same time as the venue statute showed us appellants were on the right track.

The Constitution and current statutes

Minnesota's constitution contains an important use of "several" and this example may have led the court to understand the potential consequence of not recognizing that "several" generally meant "separate" or "multiple" in statutes and other legal contexts. In 1876, the Minnesota Constitution was amended to provide for a line item veto of legislative appropriations: "If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill."[10]

If the court of appeals decision had stood, and "several" in the context of the statute in *In re: Krogstad* meant either "more than two" or "more than two, but fewer than many" then there might be some surprising new limitations on the governor's line-item veto power. If one were to adopt the "more than two" definition of "several," then if a bill had only two items of appropriation—perhaps one offensive to the executive and one not—no line-item veto would be available. And of course, if the full and proper definition of "several" in its numeric sense were

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used—which requires using the "but fewer than many" limitation—then as soon as a bill contained "many" items of appropriation, the line-item veto would again be out of the governor's reach.

Of course, that would defeat the very purpose of the line item veto: allowing the governor to trim back "Christmas tree bills," bills with many, perhaps hundreds or thousands, of different appropriations. Limiting the line-item veto to either "more than two" or "more than two, but fewer than many" in the context of the line item veto would be absurd. But it would be wholly consistent with the reported court of appeals decision in this case. All these problems were avoided by the Supreme Court's reversal, recognizing that when laws use "several" in this sense, they generally mean "separate" or "multiple."

The pervasive use of "several" in Minnesota statutes

The single reference to "several" in Minnesota's Constitution is eclipsed by the hundreds of uses of the word in Minnesota's statutes. A search of Minnesota Statutes on the Revisor's website returned 257 uses of the word "several" in Minnesota's statutes. From chapter 2 to chapter 645, there is not a single instance where the word could logically mean "more than two, but fewer than many." By way of limited example, current statutes include "several" in the following contexts:

- Requiring that breaking a project into "several phases" does not affect the cost thresholds which must be computed on software and hardware purchases. Minn. Stat. §16E.03, subd. 1(g) (2019).
- Defining "brand" as including a term, design, or trademark used in connection with one or "several" grades of fertilizers or soil and plant amendment materials. Minn. Stat. §18C.005, subd. 3 (2019).
- Providing that when there are "several" defendants in an equitable action, the court has discretion in awarding costs. Minn. Stat. §549.07.
- When classifying an offense, allowing the aggregation of certain criminal offenses under a scheme or course of conduct involving "the same credit card number or several credit card numbers." Minn. Stat. §609.893, subd. 3(b) (2019).

Interpreting any of these statutes to mean "more than two, but fewer than many" would lead to an inexplicable and absurd result.

It is worth noting that "several" even lodges in chapter 645, the chapter governing the interpretation of statutes and rules: "When, in the same law, several clauses are irreconcilable, the clause last in order of date or position shall prevail."[11] It is not reasonable to argue that this rule of statutory interpretation does not apply in instances involving two clauses.

Lessons in cases involving fights over definitions

In re: Krogstad yields "several" lessons for the attorney diving into a statutory interpretation case that centers on the meanings of particular words:

1. Look to dictionaries contemporary with the enactment of the statutory provision being considered.
2. Come to an understanding of how words important to the statute's meaning entered the English language and how the meanings of those words have changed with time.
3. Look for clues to words' meaning by considering other contemporaneous statutes or legal sources containing the words.
4. Identify other uses of the words in Minnesota's statutes to find analogous uses helpful to your argument.
5. Explain what consequences flow from accepting one interpretation over another by referencing other instances of words' uses in statutes or the constitution.

It was once famously observed that there are three categories of knowing: "[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say, we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. "[12] To these three categories of knowing we might add a fourth, "the unknown knowns," those things we don't know, but think we know. Just as when we were first reading Shakespeare and thinking that we understood when we did not, semantic drift places us in this last category—fighting against what we believe we know in order to find truth. ▲

Notes

[1] *See Ex parte Tutt Real Est., LLC*, No. 1190963, 2021 WL 1152878, at *4 (Ala. 3/26/2021).
[2] *https://www.merriam-webster.com/dictionary/snob*. For a thorough discussion of this interesting word, see *https://www.merriam-webster.com/words-at-play/snob-word-history-origin*.
[3] *https://www.bard.org/study-guides/shakespeare-words-words-words-1*
[4] 958 N.W.2d 331 (Minn. 2021).
[5] Minn. Stat. §542.10 (2019).
[6] *Riddle v. Ringwelski*, 451 N.W.2d 372, 373 (Minn. Ct. App. 1990).
[7] Id.
[8] *In re: Krogstad*, 941 N.W.2d 750 (Minn. Ct. App. 2020).
[9] Law of Minnesota, 1894, ch. 66, §5348 emphasis added.
[10] Minn. Const. art. IV, §23.
[11] Minn. Stat. §645.26 (2019).
[12] *https://en.wikipedia.org/wiki/There_are_known_knowns*

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2nd Amendment: Permit to carry statute does not violate 2nd Amendment. Appellant challenges his conviction for carrying a pistol in a public place without a permit, arguing that the statutory permit requirement violates the 2nd Amendment. Applying strict scrutiny, the Supreme Court finds that the carry permit statute serves the government's compelling interest in protecting the general public from gun violence. The statute is also narrowly tailored to serve that interest, because it is not difficult under the statute to obtain a permit to carry. A sheriff must issue a permit upon receiving an application, unless a narrow exception applies, and the statute provides for circumstances under which a permit is not required to carry or possess a pistol. Appellant's conviction is affirmed. ***State v. Hatch***, A20-0176, 962 N.W.2d 661 (Minn. 8/24/2021).

Property damage: "Cost of repair or replacement" includes reasonable estimates. Appellant attempted to break into the front door of a home from which she had previously been evicted, causing damage to the door, frame, and lock. The homeowner received a repair estimate of nearly $1,600. Appellant was convicted by a jury of first-degree criminal damage to property, and the court of appeals affirmed.

Appellant challenges the sufficiency of the evidence supporting her conviction, specifically whether the estimated costs of repairs the homeowner received were adequate. Minn. Stat. §609.595, subd. 1(4), criminalizes intentionally damaging another's physical property without consent if "the damage reduces the value of the property by more than $1,000 measured by the cost of repair and replacement." "Value" and "cost" are not defined in the statute. Looking to the dictionary definitions, the Supreme Court notes that both incorporate the "price" of goods and services, which the Court finds "consistent with an objective measurement based on the fair market value of an item or service, which need not be solely limited to the price actually paid for an item or… services…" Therefore, the Court holds that "evidence of estimates may be used to establish the 'cost of repair and replacement'."

The state here presented sufficient evidence to support appellant's conviction and her conviction is affirmed. ***State v. Powers***, A19-1856, 962 N.W.2d 853 (Minn. 8/4/2021).

Accomplice after the fact: An accomplice after the fact to a crime with a maximum sentence of life imprisonment may be sentenced to a maximum of 20 years. Appellant pleaded guilty to aiding a person whom she knew committed murder, specifically first-degree murder, as an accomplice after the fact. The district court imposed a sentence of 48 months, but appellant argues the sentence is unlawful. An accomplice after the fact to certain crimes, including first-degree murder, may be sentenced to no more than one-half of the maximum sentence for the crime they aided. Minn. Stat. §609.495, subd. 3. However, for first-degree murder, which carries a maximum sentence of life imprisonment, there is no ascertainable "half."

The court of appeals finds that the Legislature addressed this issue in the context of sentences for attempting crimes punishable by life imprisonment. Minn. Stat. §609.17, subd. 4(1), states that when a person attempts to commit a crime for which the maximum sentence is life imprisonment, that person may be sentenced to not more than 20 years. The court finds that this section supports an inference that a maximum sentence of 20 years also applies in the context of an accomplice after the fact. Appellant's sentence is affirmed. ***State v. Miller***, A21-0221, 2021 WL 3611467 (Minn. Ct. App. 8/16/2021).

Postconviction: Two-year time limit runs from date new retroactive rule of law is announced. Between February 2014 and December 2015, four drivers were convicted of felony DWI test refusal after they refused warrantless blood or urine tests. In 2016, the U.S. Supreme Court decided *Birchfield v. North Dakota*, and the Minnesota Supreme Court decided *State v. Thompson* and *State v. Trahan*, creating the new "*Birchfield* rule": Warrantless blood and urine test refusal convictions under Minnesota's test refusal statute are unconstitutional. In 2018, the Minnesota Supreme Court determined that the *Birchfield* rule was a new rule that applied retroactively. All four drivers filed postconviction petitions in 2019, arguing the *Birchfield* rule rendered their convictions unconstitutional and that, because the *Birchfield* rule was announced as a new rule that applies retroactively in 2018, their petitions were timely because they were filed within two years of that 2018 decision. The district courts in all four cases dismissed the petitions as untimely, but the court of appeals reversed.

The Supreme Court holds that a postconviction petition asserting a claim for relief based on a new, retroactive interpretation of law, under Minn. Stat. §590.01, subd. 4(c), must be filed within two years from the date the appellate court announces an interpretation of law that forms the basis for a claim that the interpretation is a new rule of law that applies retroactively to the petitioner's conviction. Section 590.01, subd. 4(c), provides that a postconviction petition filed under the retroactive new interpretation of law provision must be filed within two years from "the date the *claim* arises." Prior case law has determined that this time limit begins to run when a petitioner "knew or should have known" that the claim arose—that is, when the petitioner knew or should have known of the information that would allow him to assert such a claim.

Here, the drivers all claim the *Birchfield*, *Thompson*, and *Trahan* decisions announced a new retroactive rule of law. Those decisions were made in 2016, and all the drivers' postconviction petitions were file more than two years later. The Court did not announce that the *Birchfield* rule applied retroactively until 2018, but the decisions themselves that gave rise to the drivers' claims under section 590.01, subd. 4(c), were issued in 2016. The court of appeals is reversed. ***Aili v. State***, A20-0205, 2021 WL 3641771 (Minn. 10/18/2021).

14th Amendment: Juror glaring at prosecutor was a race-neutral reason for a peremptory strike and not a pretext for discrimination. Appellant was charged with criminal sexual conduct. During jury selection, the state peremptorily struck the only non-white prospective juror in the jury pool, R.L. Appellant raised a *Batson* challenge, but the state claimed R.L. was struck because R.L. had been "flagged" by law enforcement, R.L. was 20 years old, and R.L. "glared" at the prosecutor. The district court overruled appellant's *Batson* challenge. After the jury ultimately found appellant guilty, he appealed his convictions and sentences, arguing the district court erred in overruling his *Batson* challenge. The Minnesota Court of Appeals agreed.

Under the equal protection clause and *Batson*, a peremptory strike cannot be used to remove a prospective juror because of race. A three-step process is followed to determine if the use of a peremptory strike violates this rule, which is codified in Minn. R. Crim. P. 26.02, subd. 7(3)(a)-(c): (1) The objecting party must make a *prima facie* showing of racial discrimination; (2) the striking party must articulate a race-neutral explanation for the strike; and (3) the court must determine whether the objecting party has shown a racially discriminatory motivation by the striking party and if the striking party's proffered explanation was merely a pretext for discrimination.

Step one was satisfied here. As for step two, age and demeanor can be valid, race-neutral explanations. However, the Supreme Court agrees with appellant that the state's reliance on the law enforcement "flag" is not sufficient, because the state did not offer any explanation as to why R.L. was flagged.

But the Court finds that the juror's demeanor toward the prosecutor was a sufficient race-neutral reason for striking the juror and that it was not merely a pretext for discrimination. Appellant did not argue before the district court that R.L. was not glaring at the prosecutor, so the record is void of any evidence that the strike was racially motivated. Thus, the district court did not err in its ultimate denial of appellant's *Batson* challenge. ***State v. Lufkins***, A19-1809, 2021 WL 3641446 (Minn. 10/18/2021).

5th Amendment: Incriminating statements made during court-ordered sex offender treatment are admissible if the privilege against self-incrimination is not invoked. Appellant was on probation and required to participate in sex offender treatment. Part of that treatment included a mandatory polygraph examination, during which appellant confessed to a polygraph examiner that he had abused his former girlfriend's young daughter. He made similar statements during the treatment process to a probation officer. He was charged with criminal sexual conduct and sought to suppress the statements made to the probation officer and polygraph examiner. The district court suppressed the statements, finding them coerced. The court of appeals reversed, because appellant never asserted his 5th Amendment privilege.

The protection of the 5th Amendment generally must be asserted by a witness being asked incriminating questions. However, the "penalty exception" prohibits the government from depriving a person of his free choice to admit or deny incriminating information, or to refuse to answer potentially incriminating questions. As this exception applies to appellant, the question is whether his probation requirements "merely required him to appear and give testimony about matters relevant to his probationary status or… went further and required him to choose between

making incriminating statements and jeopardizing his conditional liberty by remaining silent."

The Supreme Court first concludes that appellant's probation conditions did not allow him to refuse to provide the incriminating statements to the probation officer and polygraph examiner. The conditions required full participation in the treatment program, which itself required full and complete disclosure of sexual behavior. However, the "penalty exception" does not apply, because revocation of appellant's probation would not have been automatic had he refused or failed to complete the polygraph and treatment. Under Minn. Stat. §609.14, and prior case law, revocation was only a possibility, following a discretionary process.

The Court also finds that Minn. Stat. §634.03 does not require suppression of the statements. This section states: "[A] confession [cannot] be given in evidence against the defendant…when made under the influence of fear produced by threats." The Court clarifies that section 634.03 was meant to codify the common law rule that courts "should exclude confessions made under circumstances where the inducement to speak was such that it is doubtful that the confession was true." Section 634.03 does not apply to the circumstances of this case. The court of appeals is affirmed. ***State v. McCoy***, A20-0485, 2021 WL 3745551 (Minn. 8/25/2021).

Procedure: Judge's affirmative acts in investigating, sharing, and relying on extrinsic facts disqualified the judge. Appellant was charged with domestic assault. At sentencing following his plea to an amended charge of disorderly conduct, the district court ordered that appellant comply with a DANCO during probation. The probationary DANCO was signed by the judge after the hearing and not served personally on appellant in court. During his probation, appellant was charged with violating the DANCO. Appellant moved to dismiss the DANCO violation charge, claiming he never received a written copy of the order. The district court stated that the court's clerks always e-file DANCOs and mail copies to defendants, insisted that court administration did in fact mail a copy of the DANCO to appellant, and suggested that a clerk could testify to these facts. After the court denied appellant's motion to dismiss, the state noted that it may amend its witness list to include a court clerk. Appellant moved to remove the judge for bias, based on the judge's claimed knowledge of a disputed fact and that the judge had contacted a potential witness from court administration. Exhibits filed by appellant thereafter showed internal messages between the judge and a court clerk discussing service procedures for the DANCO, as well as messages between a court clerk and court operations associate concerning the same, and messages between court clerks about procedures and the possibility of testifying about them. The assistant chief judge of court denied appellant's motion to disqualify after a hearing. After a jury trial, appellant was found guilty of violating the DANCO and he appealed. The Minnesota Court of Appeals affirmed, finding insufficient grounds to disqualify the district court judge.

The Supreme Court finds that the district court judge was disqualified in this case, pointing to several of the judge's actions that would lead "a reasonable examiner [to] question the judge's impartiality": investigating the service procedures used by court administration, communicating the conclusions drawn from that investigation, relying on these conclusions in denying appellant's motion to dismiss, and suggesting the state call a clerk to testify. While a judge is presumed to be able to set aside outside knowledge and decide issues solely on the merits, here the judge actively investigated, announced to the parties, and relied on facts related to an essential element of the charge against appellant.

The Court rejects an implication from the court of appeals decision that a jury trial cures the error of a judge presiding over a case from which the judge is disqualified, because the criminal procedural rules and rules of judicial conduct are clear that a disqualified judge must not preside over any proceeding in which their impartiality can reasonably be questioned.

When judicial impartiality is questioned, in deciding whether reversal is necessary, the Court considers "the risk of injustice to the parties…, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial system…" The Court notes, however, that in certain cases, reversal may be necessary on the sole basis of impartiality arising from an affirmative act by the judge that risks undermining the public's confidence in the judicial process in a significant way. In this case, the district court judge's affirmative actions created such a significant risk. The case is remanded to the district court for reconsideration of appellant's motion to dismiss before a new judge and, if the motion is denied, for a new trial. ***State v. Malone***, A19-1559, 2021 WL 3745547 (Minn. 8/25/2021).

Sentencing: A "statement by the Legislature" showing intent to abrogate the amelioration doctrine must be an express declaration in an enacted statute. Appellant was sentenced for criminal sexual conduct offenses in February 2019. He was assigned a custody status point in his criminal history score for committing the acts while on probation for a 2015 felony conviction. In January 2019, the Guideline Commission submitted proposed modifications to the sentencing guidelines, including the elimination of guideline 2.B.2.a(4), under which appellant was assigned the custody status point. The proposal also declared that the modifications would only apply to crimes committed on or after 8/1/2019 and recommended that the Legislature amend Minn. Stat. §244.09, subd. 11, "to clarify that August 1 Guidelines changes will apply to crimes committed on or after that date." The modifications became automatically effective on 8/1/2019, per statute, due to

the Legislature's failure to act in response to the proposal. Appellant argued on appeal that the amelioration doctrine should be applied to reduce his criminal history score, based on the 2019 elimination of 2.B.2.a(4). The court of appeals agreed and remanded for resentencing under the modified guidelines.

"The amelioration doctrine applies an amendment mitigating punishment to acts committed prior to that amendment's effective date, if there has not been a final judgment reached in that case." An amended criminal statute applies to crimes before its effective date if: (1) There is no statement from the Legislature clearly establishing an intent to abrogate the amelioration doctrine, (2) the amendment mitigates punishment, and (3) final judgment has not been entered when the amendment takes effect. At issue here is only the first part of this test.

The Supreme Court agrees with appellant that there was no clear statement from the Legislature here. Only an express declaration or indication from the Legislature in an enacted statute is sufficient to establish legislative intent to abrogate the amelioration doctrine. The statement in guideline 3.G.1 indicating that modifications to the guidelines "apply to offenders whose date of offense is on or after the specified modification effective date" is not an express statement from the Legislature, as it was adopted in 1986 without legislative action and is not part of an enacted statute. Similarly, the Legislature did not take any action on the statement in the proposed 2019 modifications that the modifications should apply to only crimes committed on or after 8/1/2019. Such inaction is insufficient. The court of appeals is affirmed. ***State v. Robinette***, A19-0679, 2021 WL 3745545 (Minn. 8/25/2021).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **FELA; third appeal dismissed.** An employee who brought a claim under the Federal Employers' Liability Act (FELA) after he was injured in a car accident while working for the railroad had his third appeal of a trio of summary judgment dismissals rejected after the Minnesota Court of Appeals held that it was within the trial judge's discretion to exclude certain expert witness reports that were necessary in order to form a foundation for his claim and, without those experts, summary judgment was appropriately granted, based upon his failure to establish a breach of duty by the employer in failing to maintain a driver's seat recliner mechanism. ***Mead v. BMSF Ry. Co.***, 2021 WL 1846592 (Minn. Ct. App. 5/22/2021) (unpublished).

■ **Nursing license suspension; board rescission of stipulation upheld.** The rescission by the Minnesota Board of Nursing of a stipulation and consent order and the indefinite suspension of a nurse's license were upheld after a toxicology screening report showed that the nurse's sample tested positive for drugs. The appellate court upheld the ruling on grounds that there was substantial evidence supporting the rescission of the stipulation that occurred prior to the drug testing. ***Williams v. Minnesota Board of Nursing***, 2021 WL 1847172 (Minn. Ct. App. 5/10/2021) (unpublished).

■ **Unemployment compensation; three denials upheld.** The Minnesota Court of Appeals denied a trio of unemployment compensation claims based upon disqualifying "misconduct." A pharmacy technician who was fired after she refused to comply with her employer's request that she undergo a background check by a licensing agency was denied benefits. The appellate court affirmed a decision by the unemployment law judge (ULJ) with the Department of Employment & Economic Development (DEED) that the employee was disqualified because she failed to comply with a "reasonable" requirement. ***Lentz v. Fairview Health Services***, 2021 WL 2412919 (Minn. Ct. App. 6/14/2021) (unpublished).

An employee who read and copied a private journal, shouted at her co-worker, and discussed an ongoing investigation was deemed to be disqualified from unemployment benefits from the City of St. Paul. ***DeVora v. City of St. Paul***, 2021 WL 1605140 (Minn. Ct. App. 4/26/2021) (unpublished).

An employee who was fired for repeatedly harassing a co-worker was denied benefits based upon substantial evidence showing that he made inappropriate comments, some of which were sexual in nature. The appellate court affirmed the decision by the ULJ that the employee's behavior made him ineligible for unemployment compensation. ***Thomas v. Thermo Tech***, 2021 WL 1846568 (Minn. Ct. App. 5/10/2021) (unpublished).

■ **Noncompete contract; jurisdiction, venue dispute moot.** The dismissal of a lawsuit over settlement of a noncompete dispute brought in Missouri was vacated. The 8th Circuit Court of Appeals deemed the case moot because the former employer that brought the lawsuit against an ex-employee and their new employer agreed to submit to jurisdiction and venue in Delaware in a parallel lawsuit. ***Panera, LLC v. Dobson***, 999 F.3d 1154 (8th Cir. 6/8/2021).

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **U.S. district court vacates Navigable Waters Protection Rule; WOTUS reverts to pre-2015 definition.** On 8/30/2021, the U.S. District Court for the District of Arizona remanded and vacated the Navigable Waters Protection Rule (NWPR) in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. The court granted the U.S. Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers' (USACE) motion for voluntary remand while the agencies work to revise or replace the NWPR and redefine "waters of the United States" (WOTUS).

The NWPR was promulgated in April 2020 in response to Executive Order 13778, issued on 2/28/2017. The executive order directed the agencies to review and rescind the 2015 Clean Water Rule, and to issue a new rule "interpreting the term 'navigable waters'… in a manner consistent with" Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006); Justice Scalia concluded that WOTUS included only relatively permanent, standing, or continuously flowing bodies of water forming geographic features described in ordinary parlance as streams, oceans, rivers, and lakes, and did not include intermittent or ephemeral channels, or channels that periodically provided drainage for rainfall. Prior to the NWPR, the 2015 Clean Water Rule aligned with Justice Kennedy's concurring opinion in *Rapanos*, which held that Clean Water

Act (CWA) jurisdiction would extend to waterways with a "significant nexus" between the wetland and the other traditional navigable water, a broader interpretation than that espoused by Justice Scalia. *Id*. at 780. On 6/9/2021, in response to Executive Order 13990, issued on 1/20/2021—which specifically revoked Executive Order 13778—the agencies announced their intent to revise the definition of WOTUS and review and replace the NWPR.

In vacating the NWPR, the district court held that the NWPR has "fundamental, substantive flaws that cannot be cured without revising or replacing…" and that "remanding without vacatur would risk serious environmental harm." The court based this decision on the fact that the NWPR would significantly reduce the numbers of waters under CWA jurisdiction and projects that would have required Section 404 permitting compared to previous rules and practices. Specifically regarding Arizona and New Mexico, the court noted that "nearly every one of over 1500 streams assessed under the NWPR were found to be nonjurisdictional—a significant shift from the status of streams under both the Clean Water Rule and the pre-2015 regulatory regime."

The EPA has since issued a statement that the agencies have received the district court's order and have halted implementation of the NWPR. Furthermore, the agencies are now interpreting WOTUS under the pre-2015 regulatory regime. Until further notice, the agencies indicated they will define and interpret WOTUS to mean: 1) all waters used in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide; 2) all interstate waters, including interstate wetlands; 3) all interstate lakes, rivers, and streams that could affect interstate or foreign commerce; 4) all impoundments of waters defined as waters of the United States; 5) all tributaries of waters identified above; 6) the territorial seas; and, 7) all wetlands adjacent to waters identified above.

In addition to this, the agencies will rely on clarifying guidance developed in 2008 following *Rapanos v. United States*, 547 U.S. 715 (2006) and guidance developed in 2003 regarding *Solid Waste Agency of Northern Cook County v. USACE*, 531 U.S. 159 (2001).

On 6/9/2021 the agencies announced their intent to propose a rule to restore the regulations defining WOTUS under the pre-2015 regulatory regime, and to pursue a second rulemaking process that would further refine and build upon that regulatory foundation. ***Pascua Yaqui Tribe v. U.S. Environmental Protection Agency***, 2021 WL 3855977.

Minnesota Court of Appeals affirms MPCA's Enbridge Line 3 section 401 certification. In late August the court of appeals issued an unpublished opinion affirming the MN Pollution Control Agency's (MPCA) issuance of a section 401 certification under the federal Clean Water Act, 33 U.S.C.S §1341, for Enbridge's Line 3 replacement project.

This issue was brought before the court of appeals by Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Sierra Club, Honor the Earth, and Friends of the Headwaters. These relators challenged the decision by MPCA to issue a section 401 certification under the federal Clean Water Act to Enbridge Energy Limited Partnership for the Line 3 replacement project. The relators argued that the section 401 certification was based on legal error "because (1) the MPCA failed to consider alternative routes for the pipeline, (2) the MPCA improperly determined that the project would comply with state water-quality and wetlands standards, (3) the MPCA improperly limited the scope of its authority under section 401 to discharges and construction impacts, and (4) the MPCA improperly shifted the burden of proof to Relators."

After first opining that the issue before it was not moot, the court determined that the MPCA's decision was not affected by legal error and did not lack substantial support in the record. In addressing the issues brought forth by the relators, the court first found that the MPCA did not err by only taking into consideration the route approved by the MN Public Utilities Commission (PUC) in determining whether to issue a section 401 certification. The court determined that in applying the plain meaning of the language of the applicable rules, feasible alternative routes to the proposed pipeline do not include routes that are not authorized by the PUC. The court found that as the sole authority to authorize a pipeline route, the PUC's routing permit issued for Line 3 on 5/1/2020 provided for the only authorized route and no other route would be "legal." Thus, there was no failure by the MPCA in not considering alternative routes for the pipeline.

The court next addressed the issue of the MPCA's determination that the Line 3 project would comply with state water-quality and wetlands standards, ultimately finding that the MPCA's determination was not legally erroneous or without substantial support in the record. The court first found that based on the reading of the applicable rules for section 401 certification, the MPCA was not required to use a specific method in analyzing the environmental impact of a project for section 401 certification. The court opined that, given the fact that no such specific form of review is dictated, how the MPCA performs such review is subject to judicial deference, and as such, the court shall defer to MPCA's reasonable judgment with respect to the manner of its review.

The court further reasoned that with regard to compliance with state wetlands standards, the MPCA's determination was supported by the record due to the fact that (i) the MPCA was not required to consider unapproved routes as a way for Enbridge to avoid wetlands; (ii) the MPCA included several conditions in the final section 401 certification that address required regulatory factors to mitigate the project's impact on affected wetlands; and (iii) the compensatory mitigation plan provided by Enbridge to MPCA was adequate under the applicable rules.

In addressing the MPCA's limitation

of the scope of its authority under section 401, the court opined that because relators did not adequately explain how the MPCA restricted its jurisdiction, and because the MPCA's final section 401 certification addressed both construction and post-construction requirements, the MPCA had not improperly limited its scope of authority.

Finally, in addressing the improper shift of the burden of proof to the relators, the court stated that the only instance when the burden of proof was shifted to the relators occurred when the relators sought a contested-case hearing and thus became the party proposing the action. The court found that as the party proposing the action of having a contested-case hearing, the burden of proof was properly placed on the relators. The relators offered no other instances in which the burden of proof was improperly shifted from Enbridge to relators. ***In re Enbridge Energy***, No. A20-1513, 2021 Minn. App. Unpub. LEXIS 727 *; 2021 WL 3853422 (8/30/2021).

ADMINISTRATIVE ACTION

■ **OAH Invalidates MPCA policy on whole effluent toxicity as unadopted rule.** In July Judge Eric Lipman of the Minnesota Office of Administrative Hearings (OAH) granted the petition of American Crystal Sugar Company (ACSC) seeking an order that the Minnesota Pollution Control Agency (MPCA) is attempting to enforce a policy concerning whole effluent toxicity (WET) as if it were a duly adopted rule. Judge Lipman concluded that MPCA's policies of (a) prohibiting acute WET mixing zones (AWMZs) outside of the Lake Superior Basin (LSB), and (b) requiring dischargers outside the LSB to meet 1.0 TUa at "end of pipe" (without the option of meeting 0.3 TUa at the edge of an approved mixing zone, as is allowed under MPCA's mixing zone and WET rules applicable in the Lake Superior Basin, *see* Minn. R. 7052.0210 & 7052.0240) are inconsistent with the relevant regulatory language and constitute illegal unadopted rules. Accordingly, Judge Lipman ordered the following: "Until such time as the agency is authorized by a statute or rule to prohibit the use of acute mixing zones outside of the drainage basin of Lake Superior, the agency shall not prohibit the use of mixing zones to demonstrate compliance with acute toxic unit standards." The ruling has potential ramifications for the numerous NPDES/SDS permits issued by MPCA that have WET testing requirements or WET effluent limitations; generally, MPCA has based these permit provisions on its now-invalidated WET policy of requiring dischargers to meet 1.0 TUa at end-of-pipe. ***In the Matter of the Petition of American Crystal Sugar Company***, OAH 8-2200-37302 (7/22/2021).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Standing; mootness on appeal; dissent.** Where the plaintiffs challenged a covid-related public health order in April 2020, the district court found that the plaintiffs lacked standing, the plaintiffs appealed and sought an injunction pending appeal (which was denied), the plaintiffs did not seek expedited review on the merits, the defendants moved to dismiss the appeal as moot, an 8th Circuit panel ordered that the motion be heard after full briefing on the merits, and the case was argued in April 2021, the majority of an 8th Circuit panel found that the plaintiffs had failed to allege a redressable injury, and alternatively held that the case was moot because the public health order had been superseded by a subsequent order.

A vigorous dissent by Judge Stras argued that the plaintiffs had alleged sufficient facts to establish standing to pursue their claims, and that the case was not moot because further covid restrictions were possible. ***Hawse v. Page***, 7 F.4th 685 (8th Cir. 2021).

■ **Standing; credible threat of enforcement; dissent.** Reversing a district court's dismissal of an action for lack of standing, the 8th Circuit found that the plaintiffs had adequately alleged "a credible threat of enforcement" of a statute, enforcement of which was alleged to violate their 1st Amendment rights, rejecting the defendants' argument that the plaintiffs were required to allege a "specific threat of enforcement" in order to establish standing.

A dissent by Judge Shepherd argued that the plaintiffs had not established injury in fact, asserting that the plaintiffs' fears of prosecution were "currently nothing more than the product of their own imagination." ***Animal Legal Defense Fund v. Vaught***, ___ F.4th ___ (8th Cir. 2021).

■ **Fed. R. App. P. 3(c); notice of appeal.** In August 2021, this column noted the 8th Circuit dismissal of an appeal where the notice of appeal was deficient in numerous respects.

In a case involving the same counsel and the same defendants, but different plaintiffs, the 8th Circuit determined that the notice of appeal was sufficient to establish appellate jurisdiction despite the fact that it purported to appeal from the "United States District Court for the Southern District of Missouri" to the "United States Court of Appeals for the Southern District of Missouri," and stated that it appealed the "order granting monetary damages entered in this action on the 1st day of April, 2020." *Kohlbeck v. Wyndham Vacation Resorts, Inc.*, 7 F.4th 729 (8th Cir. 2021). ***Newcomb v. Wyndham Vacation Ownership, Inc.***, 999 F.3d 1134 (8th Cir. 2021).

■ **Alleged improper and prejudicial closing argument; denial of motion for new trial affirmed.** Where the defendant objected in advance to some of the plaintiffs' closing argument PowerPoint, did not object to the closing argument itself, but later moved for a new trial, arguing that plaintiffs' counsel's closing argument was improper and prejudicial, the 8th Circuit found that the closing argument contained nothing "plainly unwarranted and clearly injurious" despite the fact that portions "crossed the line for permissible argument." ***Mahaska Bottling Co. v. Bottling Grp., LLC***, 6 F.4th 828 (8th Cir. 2021).

■ **Fed. R. Civ. P. 59(e); grant of motion for prejudgment interest affirmed.** Rejecting the plaintiff's argument that the defendants could not seek a post-judgment award of prejudgment interest pursuant to Fed. R. Civ. P. 59(e), the 8th Circuit "declined to impose [a] bright-line rule" that would prohibit Rule 59(e) requests for prejudgment interest, and instead determined that a district court has "discretion" to grant such a motion. ***Continental Indem. Co. v. IPFS of New York, LLC***, 7 F.4th 713 (8th Cir. 2021).

■ **Specific personal jurisdiction; tortious acts; *Calder*.** The 8th Circuit affirmed a district court's dismissal of an action for lack of personal jurisdiction, finding that the defendants' letters and phone calls directed to the plaintiffs in

Missouri were insufficient to establish personal jurisdiction absent evidence of "additional contacts" with the state. ***Morningside Church, Inc. v. Rutledge***, ___ F.4th ___ (8th Cir. 2021).

■ **Personal jurisdiction; defense not waived.** Where the defendant alleged that certification of a collective action "would constitute a denial of [its] Due Process rights," the 8th Circuit rejected appellant's argument that this assertion was not clearly sufficient to preserve a personal jurisdiction defense, instead finding that the reference to due process "was sufficient to give the plaintiffs reasonable notice of the potential defense." ***Vallone v. CJS Solutions Grp.***, ___ F.4th ___ (8th Cir. 2021).

■ **Fed. R. App. P. 8 and 28(j); request for stay denied.** The 8th Circuit denied the plaintiff's letter request for a stay of its decision pending a decision by the Minnesota Supreme Court, finding that a Fed. R. App. P. 28(j) letter "is not a motion for a stay under Federal Rule of Appellate Procedure 8." ***Godfrey v. State Farm Fire & Cas. Co.***, ___ F.4th ___ (8th Cir. 2021).

■ **Denial of leave to amend affirmed; failure to comply with Local Rule 15.1.** Affirming an order by Judge Ericksen, the 8th Circuit found no abuse of discretion in her denial of a motion to amend a complaint where the plaintiff twice failed to comply with Local Rule 15.1. ***Axline v. 3M Co.***, _ F.4th ___ (8th Cir. 2021).

■ **Fed. R. Civ. P. 54(b); related claims still pending; appeal dismissed.** In an unpublished opinion, the 8th Circuit dismissed an appeal from a judgment on one claim entered pursuant to Fed. R. Civ. P. 54(b) where related claims remained pending in the district court. ***Dinosaur Merchant Bank Ltd. v. Bancservices Int'l LLC***, _ F. App'x ___(8th Cir. 2021).

■ **Punitive damages; Fed. R. Civ. P. 15(a); Minn. Stat. §549.191.** While he declined to decide whether a motion to amend to assert a claim for punitive damages was governed by Fed. R. Civ. P. 15(a)'s plausibility standard or Minn. Stat. §549.191's *prima facie* standard, Chief Judge Tunheim granted a motion to dismiss an "improperly included" claim for punitive damages where that claim was asserted in the initial complaint. ***Bergman v. Johnson & Johnson***, 2021 WL 3604305 (D. Minn. 8/13/2021).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Migrant Protection Protocols (MPP) to remain in place pending ongoing litigation.** In August U.S. District Court Judge Matthew Kacsmaryk, Northern District of Texas, issued a nationwide injunction ordering the Biden administration to reinstate the preceding administration's Migrant Protection Protocols (MPP) (remain in Mexico) program. According to Judge Kacsmaryk, the Biden administration's termination of MPP violated the Administrative Procedure Act (APA) (5 U.S.C. §706(2)(A) because the Department of Homeland Security (DHS) ignored certain key factors while at the same time providing arbitrary reasons for rescinding MPP and failing to consider the effect of its termination on compliance with 8 U.S.C. §1225. The decision was stayed for seven days, allowing the Biden administration to seek emergency relief at the appellate level. ***Texas, et al. v. Biden, et al.***, No. 2:21-cv-00067-Z (N.D. Tex. 8/13/2021). *https://www.govinfo.gov/content/pkg/USCOURTS-txnd-2_21-cv-00067/pdf/USCOURTS-txnd-2_21-cv-00067-0.pdf*

On 8/19/2021, the 5th Circuit Court of Appeals declined to grant the government's request for a stay of Judge Kacsmaryk's order pending appeal. ***Texas, et al. v. Biden, et al.***, No. 21-10806 (5th Circuit, 8/19/2021). *https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV0.pdf*

On 8/24/2021, the U.S. Supreme Court denied the Biden administration's request for a stay of Judge Kacsmaryk's order pending completion of appellate proceedings on the matter. ***Biden, et al. v. Texas, et al.***, 594 U.S. ___ (2021). *https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf*

■ **Petitioner's vagueness challenge to 8 U.S.C. §1231(b)(3)(B)(ii) is unfounded.** The 8th Circuit Court of Appeals held the petitioner's challenge of 8 U.S.C. §1231(b)(3)(B)(ii)'s non-*per se* "particularly serious crime" term (PSC) as unconstitutionally vague (for allegedly giving "the executive and judicial branches free rein to label *any* conviction a PSC") was unfounded. "The statute's text, while ambiguous, does more than apply to a crime's imagined, ordinary case. *Cf. Davis*, 139 S. Ct. at 2326. Because its text imposes standards that must reference underlying facts, the statute stands." ***Mumad v. Garland***, No. 20-2140, *slip op.* (8th Circuit, 8/27/2021). *https://ecf.ca8.uscourts.gov/opndir/21/08/202140P.pdf*

■ **No impermissible fact finding nor misapplication of legal standard in CAT claim.** The 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) neither engaged in impermissible fact-finding nor applied an incorrect legal standard to the petitioner's Convention Against Torture (CAT) claim when it reversed the immigration judge's finding that the petitioner would more likely than not be tortured in Somalia. As such, the BIA correctly found the immigration judge's factual conclusions were "clearly erroneous because they were based on a hypothetical chain of occurrences and not a plausible view of the facts and record in the case." ***Mohamed v. Garland***, No. 20-1829, *slip op.* (8th Circuit, 8/13/2021). *https://ecf.ca8.uscourts.gov/opndir/21/08/201829P.pdf*

■ **BIA erred in failing to apply *Matter of Sanchez Sosa* factors in U visa applications.** The 8th Circuit Court of Appeals granted the petition for review of the Board of Immigration Appeals' (BIA) denial of the petitioners' motion to reopen, finding the BIA abused its discretion when it departed from established policy by failing to apply the *Matter of Sanchez Sosa* factors. Those factors are: "(1) the DHS's response to the motion to continue; (2) whether the underlying [U] visa petition is *prima facie* approvable; and (3) the reasons given for the continuance and other procedural considerations." ***Gonzales Quecheluno v. Garland***, No. 20-2200, *slip op.* (8th Circuit, 8/12/2021). *https://ecf.ca8.uscourts.gov/opndir/21/08/202200P.pdf*

■ **No abuse of discretion in denial of petitioner's motion to reopen on account of changed country conditions.** The 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not abuse its discretion when it denied the petitioner's motion to reopen, where the evidence showed the poor conditions facing homosexuals and Christians in Somalia had remained substantially the same since the time of her hearing. ***Yusuf v. Garland***, No. 20-2316, *slip op.* (8th Circuit, 8/9/2021). *https://ecf.ca8.uscourts.gov/opndir/21/08/202316P.pdf*

■ **No particular social group: "Mexican mothers who refuse to work for the cartel."** The 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not err when it found the petitioner's proposed particular social group (PSG)—"Mexican mothers who refuse to work for the Cartel" [Cartel Jalisco Nueva Generación]—was neither sufficiently particularized nor socially distinct. ***Rosales-Reyes v. Garland***, No. 20-2417, *slip op.* (8th Circuit, 8/4/2021). *https://ecf.ca8.uscourts.gov/opndir/21/08/202417P.pdf*

■ **No error in excluding petitioner's mental health issues from particularly serious crime analysis.** The 8th Circuit Court of Appeals found that the Board of Immigration Appeals (BIA) did not err when it failed to consider the petitioner's mental health as a factor in its particularly serious crime (PSC) analysis (involving unlawful trafficking in controlled substances). The petitioner failed to rebut the presumption set out in *In re Y-L-*, 23 I&N Dec. 270 (A.G.) that unlawful trafficking in controlled substances is a particularly serious crime. ***Gilbertson v. Garland***, No. 20-2355, *slip op.* (8th Circuit, 8/2/2021). *https://ecf.ca8.uscourts.gov/opndir/21/08/202355P.pdf*

■ **No violation in substituting immigration judges during different phases of the removal proceeding.** The 8th Circuit Court of Appeals held that the issuance of a decision denying the petitioner's cancellation of removal application by an immigration judge different from the one conducting his merits hearing did not rise to the level of a violation of due process nor the text of 8 U.S.C. §1229a(c)(1)(A). ***Orpinel-Robledo v. Garland***, No. 20-2624, *slip op.* (8th Circuit, 7/19/2021). *https://ecf.ca8.uscourts.gov/opndir/21/07/202624P.pdf*

■ **Vacated and remanded: BIA's decision finding petitioner's Iowa conviction for enticing a minor is a "crime of child abuse."** The 8th Circuit Court of Appeals vacated and remanded the Board of Immigration Appeals' decision that the petitioner was removable because his conviction for enticing a minor was a violation of Iowa Code §710.10(3) constituting a "crime of child abuse." The crime of enticement under Iowa law is not, however, an exact match with that under federal law. "Looking only at the plain text of the Iowa statute, we cannot exclude the possibility that an offender could be prosecuted for enticing a minor with intent to commit disorderly conduct or harassment upon a minor." ***Pah Peh v. Garland***, No. 20-1508, *slip op.* (8th Circuit, 7/16/2021). *https://ecf.ca8.uscourts.gov/opndir/21/07/201508P.pdf*

■ **Unlawful: U.S. government's practice of turning away asylum seekers at ports of entry along the southern border.** In early September U.S. District Judge Cynthia Bashant, Southern District of California, declared the government's practice of denying asylum seekers access to the asylum process at ports of entry (POEs) along the U.S.-Mexico border was unlawful. The court ruled that Customs and Border Protection (CBP) officers must, by law, inspect asylum seekers upon their arrival at ports of entry and refer them for asylum interviews, not turn them back to Mexico under the rationale that the ports are "at capacity" (otherwise known as "metering" or "queue management," whereby a certain number of individuals are allowed to formally request asylum at a port of entry on a given day and thus begin the asylum process). [This is to be distinguished from the aforementioned Migrant Protection Protocols (MPP) where one, even after having been allowed to formally request asylum at a port of entry on a given day under "metering," is turned back to wait in Mexico for their asylum case to be heard.] Judge Bashant granted the plaintiffs' motion for summary judgment as it related to their claims for violations of the Administrative Procedure Act (APA) (5 U.S.C. §706(1) and the 5th Amendment's due process clause. "[T]he record contains undisputed evidence that in 2016, 2017, and 2018, CBP officers did not carry out their discrete statutory duties to inspect and refer asylum seekers to start the asylum process once they arrived at POEs; instead, defendants stationed CBP personnel at the limit line to "turn away" or "push back" asylum seekers as they reached POEs." She also ordered the submission of supplemental briefs regarding the appropriate remedy in this action by 10/1/2021. ***Al Otro Lado, et al. v. Mayorkas, et al.***, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. 9/2/2021). *https://www.govinfo.gov/content/pkg/USCOURTS-casd-3_17-cv-02366/pdf/USCOURTS-casd-3_17-cv-02366-40.pdf*

ADMINISTRATIVE ACTION

■ **Extension of TPS for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan to 12/31/2022.** In September the Department of Homeland Security issued notice of the automatic extension of temporary protected status (TPS) designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan through 12/31/2022 from the current expiration date of 10/4/2021. TPS beneficiaries from the countries will retain their status, provided they continue to meet all the individual TPS eligibility requirements. Beneficiaries under the TPS designations for El Salvador, Nicaragua, Sudan, Honduras, and Nepal will retain their TPS status while the preliminary injunction in *Ramos* and the *Bhattarai* orders remain in effect. Likewise, beneficiaries under the TPS designation for Haiti will retain their TPS while either of the preliminary injunctions in *Ramos* or *Saget* remain in effect. **86 Fed. Register, 50725-33** (9/10/2021). *https://www.federalregister.gov/documents/2021/09/10/2021-19617/continuation-of-documentation-for-beneficiaries-of-temporary-protected-status-designations-for-el*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Copyright: Home floorplans not artistic "pictures" under §120(a) of the Copyright Act. A panel of the United States Court of Appeals for the 8th Circuit recently reversed a district court's award of summary judgment to defendants, holding that 17 U.S.C.S. §120(a) was not a defense to copyright infringement. Plaintiff Charles James and his company Designworks Homes, Inc. build homes using a certain "triangular atrium design with stairs." Owners of homes with such atria hired real estate agents and companies to help sell their homes. The agents then hired contractors to measure and create computer-generated floorplans of the homes for potential buyers to consider. Plaintiffs sued the real estate companies and agents alleging that the defendants infringed plaintiffs' copyrights when defendants created and published the floorplans without authorization. Defendants moved for summary judgment, contending that 17 U.S.C.S. §120(a) was a defense to the accused infringement. Section 120(a) states, "The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place." The district court agreed finding the floorplans were "pictorial representations" of the homes. On appeal, the panel reversed. The court held that floorplans were more properly described as "technical drawings" or "architectural plans" under 17 U.S.C. §101 of the Copyright Act than as "pictures" or "pictorial representations" of architectural works under 17 U.S.C. §120(a). The court also found that "pictorial representations" must be read to require an artistic expression of the architectural works. The floorplans at issue were agreed to be for "practical purposes," not "artistic purposes." Accordingly, §120(a) was not a defense to defendants' alleged unauthorized publication of the floorplans. ***Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.***, Nos. 19-3608, 20-1099, 20-3104, 20-3107, 2021 U.S. App. LEXIS 24381 (8th Cir. 8/16/2021).

Patent: Alleging false marking requires pleading deceptive intent with specificity under Fed. R. Civ. P. 9(b). Judge Nelson recently dismissed defendant's false marking counterclaim under Federal Rule of Civil Procedure 12(b)(6). Plaintiff Wing Enterprises, Inc., dba Little Giant Ladder Systems, sued defendant Tricam Industries, Inc. Little Giant again asserted patent infringement claims against Tricam. Tricam alleged a counterclaim of false marking under 35 U.S.C. §292 (Count III). Tricam alleged that Little Giant's Rapid Lock multi-position ladders were not covered by any claim of the '416 Patent and that Little Giant falsely marked its Rapid Lock ladders as patented under the '416 Patent, even though it knew otherwise. Little Giant moved to dismiss, arguing Tricam had not adequately pleaded deceptive intent. The court found that the particularity requirement of Rule 9(b) applies to false marking claims under 35 U.S.C. §292. Tricam argued it was entitled to a presumption of deceptive intent because the combination of a false statement and knowledge of its falsity creates a rebuttable presumption of intent to deceive the public. The court rejected this argument because Tricam simply compared the claims of the patent-in-suit to Little Giant's products. This was distinguishable from other cases where a rebuttable presumption was found when patent enforcement actions were abandoned and patent labels from certain products were removed. The court found Tricam's allegations that Little Giant is a sophisticated company, with experience in applying for and litigating its patents, to be conclusory. The court further found that any inconsistencies in Little Giant's advertising (i.e. not advertising the ladders at issue as patented while advertising other products as patented) did not give rise to a strong inference of fraudulent intent. Accordingly, the court found that Tricam's false marking allegations failed to plead fraud with particularity and failed to state a claim. Counterclaim Count III was dismissed. ***Wing Enters., Inc. v. Tricam Indus., Inc.***, No. 20-cv-2497 (SRN/ECW), 2021 U.S. Dist. LEXIS 153735 (D. Minn. 8/16/2021).

JOE DUBIS
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TAX LAW

JUDICIAL LAW

Section 278 exclusive means for challenging assessment when challenge is within statute; retailer's claims dismissed. Walmart alleged that several counties discriminated against Walmart in the counties' tax assessments. Such discrimination, Walmart asserts, violates the equal protection clause and Walmart's right to uniformity in taxation. Walmart raised these claims in district court, and outside of Minnesota's statutory structure permitting assessment challenges. That statute, Chapter 278, provides the "exclusive remedy" for bringing challenges if the challenge falls within the scope of one of five specified statutory grounds. Chapter 278 requires challenges to be brought in the year the tax becomes payable. Walmart did not bring its claims in the year the taxes were due, and therefore the claims were untimely if Chapter 278 applies.

The Court articulated the central question before it as whether "Walmart's claims that the Counties

willfully, intentionally, and unlawfully discriminated against the company in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Uniformity in Taxation Clause of Article X, section 1, of the Minnesota Constitution fall within the scope of chapter 278, such that Walmart is subject to the limitations period set forth in section 278.01?" The Court answered that question in the affirmative and Walmart's claims were dismissed because they were not brought within the statute's limitations period. ***Walmart Inc. v. Winona Cty.***, No. A19-1877 ___ N.W.2d ___ (Minn. 8/18/2021).

■ **Sales tax not duplicative of annual personal property tax on aircraft.** Jeffrey Sheridan and Kirk Lindberg separately purchased aircraft outside of Minnesota. Each paid two separate taxes: a use tax and an annual tax. The use tax is a one-time excise tax imposed on the purchase (had the purchase been in-state, we would refer to the tax as a sales tax). The sales and use tax must be paid before an aircraft can be registered in the state. The annual tax, on the other hand, is "imposed for the privilege of operating aircraft in the airspace of Minnesota." The aircraft purchasers paid both taxes, then each asked for a refund of the use tax payments, arguing that the use tax payment is unconstitutional under article X, section 5 of the Minnesota Constitution.

Article X, section 5 of the Minnesota Constitution allows the Legislature to tax aircraft using the airspace over Minnesota "in lieu of all other taxes." Sheridan and Lindberg argue that the "in lieu of" language in Article X, section 5, restricts the Legislature from imposing any additional tax on aircraft. The constitutional language provides that "[t]he legislature may tax aircraft using the air space overlying the state on a more onerous basis than other personal property. *Any such tax on aircraft shall be in lieu of all other taxes.*" (Emphasis added.) Sheridan and Lindberg argued that the broad language "unambiguously restricts the Legislature's taxing authority to just one tax on aircraft for all purposes, in place of all other potential taxes." The commissioner countered that the in-lieu-of language was intended to limit only other personal property taxes on aircraft, not all other taxes regardless of type of tax. The commissioner pointed to the preamble language of the session law and argued that the context of the tax landscape at the time of the passage supported the commissioner's interpretation.

The Court turned to the rules of statutory construction to interpret the provision in a manner consistent with the Legislature's intent. The Court also noted its obligation to "effectuate the intent of 'the people who ratified' the constitutional provision at issue."

The Court began by concluding that the language of article X, section 5 is ambiguous, which permitted the Court to then consider the "the circumstances under which the Aircraft Amendment was enacted, legislative history, and the occasion, necessity, and object to be attained by its passage" to determine the meaning of the phrase "any other taxes." This consideration led the Court to "conclude that the phrase 'all other taxes'… means 'all other *personal property* taxes.'" The Court went on to hold "that the in-lieu clause of the Aircraft Amendment… prohibits only the imposition of duplicative personal property taxes on aircraft." With this holding, the Court was left to decide whether the use tax is a personal property tax that would be prohibited by article X, section 5.

The Court ultimately "agree[d] with the Commissioner and the Tax Court that section 297A.82 imposes an excise tax on sales and purchases of aircraft. Because it is not a personal property tax on aircraft, we hold that it is does not violate the in-lieu-of clause in article X, section 5 of the Minnesota Constitution." ***Sheridan v. Comm'r***, No. A21-0007, 2021 WL 3745173, ___ NW2d ___ (Minn. 8/25/2021).

■ **Prior bankruptcy proceeding does not bar deficiency determination.** A former bankruptcy attorney failed to file income taxes for 2010 or 2011. He eventually filed the returns in 2013. After the taxes were due, but before he filed his returns, the taxpayer filed for chapter 13 bankruptcy. The taxpayer's chapter 13 plan listed the IRS priority claim, and in December 2017 the taxpayer was granted a discharge of debts. The order of discharge noted that some debts were not discharged, and it listed, as an example of non-discharged debts, debts for taxes specified in 11 U.S.C. sec. 523(a)(1)(B).

The taxpayer argued that the commissioner is precluded from pursuing a deficiency case by *res judicata*, collateral estoppel, and judicial estoppel because his chapter 13 plan—which included the IRS' priority claim for the years in issue—was confirmed by the bankruptcy court. The tax court rejected this argument. Although bankruptcy cases could have preclusive effect, no estoppel was appropriate here because "the facts underlying the deficiency proceeding—petitioner's tax items for each year—were not raised or litigated in the plan confirmation proceeding." The court reasoned that judicial estoppel was similarly inappropriate because the taxpayer "does not identify how the IRS' proof of claim in his chapter 13 bankruptcy is completely contradictory to its determination of deficiencies in this case." The court went on to address the merits of the deficiency claim and held for the commissioner. ***Wathen v. Comm'r***, T.C.M. (RIA) 2021-100 (T.C. 2021).

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* 2020 Clio Legal Trends Report

Mitchell Hamline School of Law professor Colette Routel becomes Hennepin County judge

BY TOM WEBER

Mitchell Hamline Professor Colette Routel is now a Hennepin County judge.

Her appointment to the bench, announced in July by Gov. Tim Walz and Lt. Governor Peggy Flanagan, was one of two made to fill vacancies in the Fourth Judicial District that occurred with the retirements of two judges. Routel assumed her judgeship last month.

"She is a brilliant lawyer who brings a unique perspective with her many years of experience as an attorney, tribal court judge, and law professor," said Gov. Walz, in a statement.

A nationally known expert in federal Indian law, Routel has testified before Congress on legislation relating to tribal recognition and land issues and has been active in court cases across the country on behalf of Indian tribes and tribal interests.

Routel has written or co-written eight amicus briefs to the U.S. Supreme Court in recent years, including a brief discussed this year during oral arguments in the case *United States v. Cooley*. The Indian Law Impact Litigation Clinic she founded has litigated and won several cases in state and federal courts on behalf of Indian tribes.

"I can't tell you how excited I am to have Colette Routel on the bench," said Lt. Governor Flanagan, a member of the White Earth Nation. "She has demonstrated her deep commitment through her work at Mitchell Hamline by teaching and developing the next generation of leaders who can go out and change the world for the better."

Routel first came to Mitchell Hamline as an adjunct professor at Hamline University Law School for two years in the mid-2000s. She later joined the faculty of William Mitchell College of Law in 2009 as an assistant professor. She became a tenured professor in 2014, and most recently served as co-director of Mitchell Hamline's Native American Law and Sovereignty Institute.

"I'm honored that Governor Walz and Lt. Governor Flanagan have given me the opportunity to serve the state in this new role," said Routel. "Over the past 12 years, I have been inspired by the Native and non-Native graduates of Mitchell Hamline who've gone on to represent tribal nations. I look forward to seeing the program continue to grow with the energy and direction of our alumni."

"And I hope one of them considers coming to Mitchell Hamline to fill my position."

Since 2015, Routel has served as an appellate judge for the White Earth Nation. Earlier this year, she was named a pro tem judge for the Shakopee Mdewakanton Sioux (Dakota) Community in Minnesota. She will remain on the Mitchell Hamline faculty, but will be on leave.

"This is bittersweet for Mitchell Hamline," said President and Dean Anthony Niedwiecki. "We're sad to lose such an important part of our faculty, but we're also so proud and confident Judge Routel will be a fair and effective jurist who will continue to be an example for our students."


GREEN

Joe Green has joined Faegre Drinker as counsel in the finance and restructuring practice group in the Minneapolis office. Leveraging more than 20 years' experience in senior legal leadership roles, Green advises banking and financial service clients in his practice.


LUKASAVITZ

Gov. Walz appointed Amy Lukasavitz as district court judge in Minnesota's 6th Judicial District. Lukasavitz will be replacing Hon. Robert E. Macaulay and will be chambered in the City of Carlton in Carlton County. Lukasavitz is currently an assistant St. Louis County attorney.


SHANNON

Jennell K. Shannon has joined Jackson Lewis PC as an associate in Minneapolis. Shannon represents employers in labor and employment disputes and litigation, including class and collective actions and wage and hour, discrimination, retaliation, and whistleblower actions.


BUTLER


KUCINSKI

Beth Butler and Ken J. Kucinski have joined Arthur, Chapman, Kettering, Smetak & Pikala, PA, both focusing their practice on workers' compensation law.

R. Leigh Frost, Michael C. Glover, and Michael Pfau joined the Minneapolis office of DeWitt LLP. Frost joins as a partner in the family law practice group. Glover joins as a partner in the transportation & logistics practice group. Pfau joins the firm as an associate practicing with the litigation, real estate, trust & estates, and employment law practice groups.


MCSWEENEY

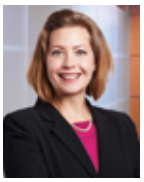

DITTBERNER

Linder, Dittberner & Winter, Ltd., a family law practice in Edina, announced that Kelly M. McSweeney has become a shareholder in the firm. Effective August 1, 2021, the firm will be known as Linder, Dittberner, Winter & McSweeney, Ltd. McSweeney brings with her 25 years of excellence in the practice of family law. The firm also announced that shareholder Michael D. Dittberner has successfully achieved recertification as a Family Trial Law Advocate by the National Board of Trial Advocacy.


PRICE

Mary Frances Price has joined Moss & Barnett, A Professional Association, with the firm's wealth preservation and estate planning team.

Tory R. Sailer joined Gregerson, Rosow, Johnson & Nilan, Ltd. as an associate. Sailer is a 2018 graduate of Mitchell Hamline College of Law. His practice will include prosecution on behalf of the city of Eden Prairie.


DAHL

Rachel Dahl has joined the partnership with Maslon LLP. Dahl brings more than a decade of experience in comprehensive estate planning, probate and trust administration, guardianships and conservatorships, and business and farm succession planning.

Eckberg Lammers was selected to serve as both civil and prosecution attorneys for the City of Mankato, MN.

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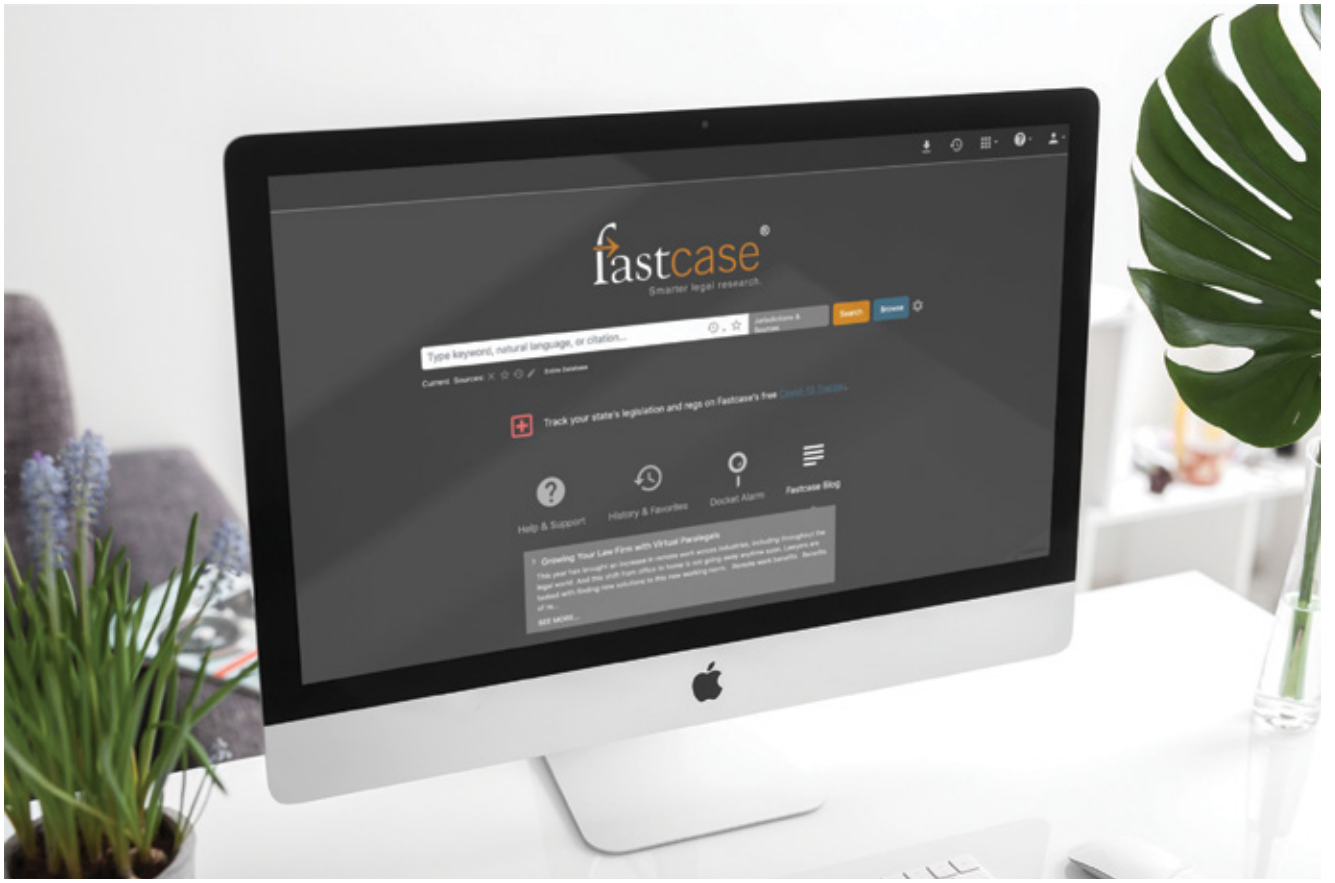

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ATTORNEY WANTED

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BIRKHOLZ AND ASSOCIATES, a litigation law firm in Southern MN since 1972, has an immediate opening for an attorney with preferred two plus years of experience for our Mankato and St James offices. Areas of primary practice include Civil Litigation and Family Law. The applicant must have the ability to handle an active case load, possess strong courtroom skills, be able to travel to courts throughout southwestern Minnesota and be able to work well with others. Benefits: Competitive Base Salary plus performance-based bonuses, Flexible Schedule and 401-K and Profit Sharing. Please email a writing samples and resume to jacob@birkholzlaw.com.

FULL-TIME JOB VACANCY, Mahnomen County Attorney's Office, Mahnomen County Attorney. Location of Job Site: Mahnomen County Attorney's Office, 112 NW 1st St. Mahnomen, MN 56557. Hours Weekly: 40. Duties and responsibilities: To manage the County Attorney's office, staff and direct the preparation and presentation of cases in District Court for civil or criminal prosecution, and to act in a legal advisory capacity to various County officials as assigned Minimum qualifications / experience: Must have a degree from an accredited law school or expect to be licensed as a practicing attorney in the State of Minnesota by October of 2021. Must possess a valid and unrestricted driver's license. Must be able to demonstrate knowledge of legal principles and practice. Must also demonstrate writing skills clearly and informatively. Personnel management skills required. To apply: Please submit a Mahnomen County Employment Application, Cover Letter, and Resume to the Mahnomen County Administrator's office c/o CJ Holl by mail to 311 North Main Street, Mahnomen, MN 56557, or email to: cj.holl@co.mahnomen.mn.us. Application materials can be obtained by visiting: www.co.mahnomen.mn.us and click on the employment tab. Or call the Mahnomen County Auditor's office at 218-935-5669 for assistance.

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candidates should have a JD from an ABA accredited law school and strong legal research and writing skills. Candidates must be licensed to practice law in Minnesota (or be immediately eligible for admission to the Minnesota bar based on the candidate's MBE or UBE score from another jurisdiction) and be in good standing with the bar in each state in which the candidate is licensed to practice law. Experience with banking, bankruptcy, or secured transactions are a plus. This position provides a motivated attorney with the opportunity to take on substantial responsibility and ownership over individual client matters, while also working with a team on complex issues. We seek an attorney who shares the firm's values of honesty, candor, the pursuit of excellence, fairness, communication, teamwork and innovation. Join Gislason & Hunter's collaborative, hard-working and fun team of attorneys. Gislason & Hunter LLP is an equal opportunity employer. We offer a competitive compensation package and comprehensive benefits.For consideration, please send cover letter and resume and law school transcript to: careers@gislason.com, www.gislason.com.

FOR SALE

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

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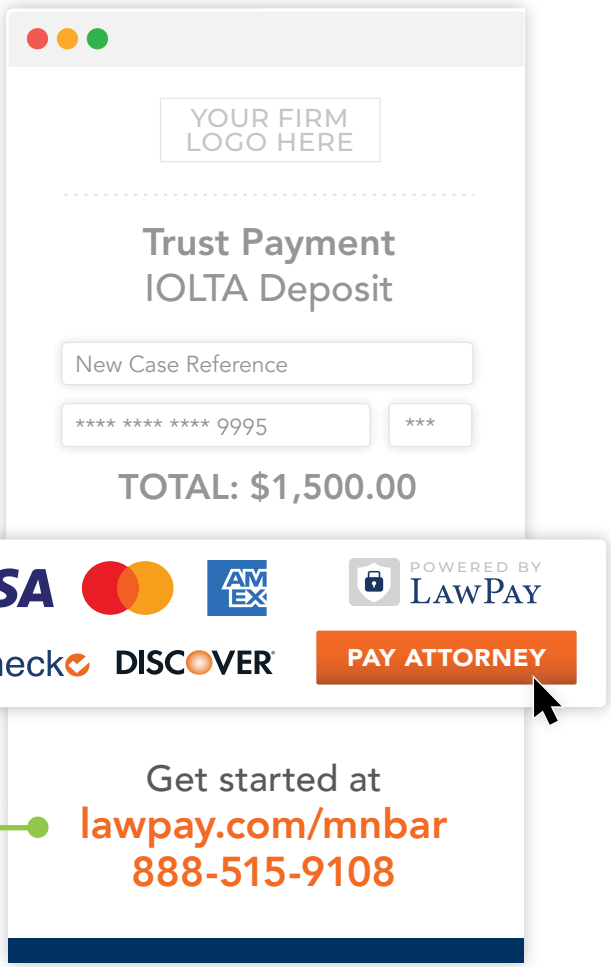

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