MDLA PRESIDENTS' MANUAL

FOREWORD

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This book is intended to provide defense lawyers with practical tips for their day-to-day practice. The authors are all past presidents of MDLA. We gave the authors carte blanche to write about whatever topic they desired, in whatever format they chose. You will find the substance of the articles to be very useful in your practice. As we reviewed these chapters, we were constantly reminded of things that we once knew, but sometimes forget in the hectic schedule of a defense lawyer. If you follow the advice and tips from these experienced and knowledgeable attorneys, you will be a better defense lawyer. Enjoy!

We would like to thank the authors for their substantial contribution to this publication. We would also like to recognize all past presidents for their commitment and service to MDLA.

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VOIR DIRE – AN ADVANTAGE TO DEFENDANTS

BY PATRICK J. SAUTER (2006-07) AND PETER L. GREGORY

Introduction

Voir dire is arguably the only procedural advantage a defendant receives in a civil trial in Minnesota State Courts. And it is an opportunity that counsel should fully seize. This presentation is intended to take you through the basics of voir dire, and provide suggestions on how to best utilize that advantage.

Fundamentals of Voir Dire

Prior to the start of trial the court administrator should provide you with written biographical information about each juror in the pool, i.e., full name, city/town or residence, profession, marital status, spouse's profession, and number of children. The judge then questions the jurors for more detail relating to their background, especially as it relates to their service as jurors (e.g., work experience, prior jury duty, involvement in litigation, special training, length of the trial) and matters related to the issues to be tried (e.g., does the juror have low back issues like those being alleged by plaintiff). The judge is looking for facts that would clearly disqualify the prospective juror for cause such as relation to the parties or outspoken opposition/support of a significant issue. The judge may decide sua sponte to excuse a prospective juror based on the response given, but more often will call for a sidebar to discuss the issue with the attorneys.[1] In the end, questioning by a judge in a civil trial will generally identify areas of potential concern to be explored in detail by the attorneys.[2]

Questionnaires are often proposed as a tool for voir dire in cases involving extremely sensitive topics such as sexual abuse and exploitation.[3] Use of a questionnaire is subject to the judge's discretion.[4] In theory, questionnaires spare the jurors from having to publicly disclose their own painful life experiences.[5] Vendors of trial services promote questionnaires as a way to save time and provide more candid responses to sensitive issues. The contrary view is that questionnaires prolong voir dire, generate an unworkable amount of material, and provide no assurance the prospective juror would be any more candid in writing than he/she would be in responding verbally to the issues. Admittedly, there are cases where a questionnaire may be helpful, but it should be carefully scrutinized since it can shape the jurors' thinking and impact defendants' advantage to develop a rapport.

Once the judge has completed the preliminary questioning, the floor is turned over to the attorneys. Minnesota is one of a few states where the defendant's attorney is the first to question prospective jurors. Where there are multiple defendants, the attorneys should at-

1 It is unlikely the judge will grant a request to allow you to question the prospective juror under consideration at that moment, but if you have a strong belief that juror could be rehabilitated you could ask the judge to reserve the decision until you have had an opportunity to voir dire the panel. *State v. Yant*, 376 N.W.2d 487, 491 (Minn. Ct. App. 1985).

2 In federal court, the judge does all (or the vast majority of) questioning of the jury panel. Depending on the particular judge, the attorneys may be granted 10-15 minutes to voir dire the panel under close scrutiny of the judge for any hint of repetition or advocacy. Often the judge will solicit written questions on issues of concern, but even those questions are frequently ignored or truncated. Hon. Gregory E. Mize, Paula Hannaford-Agor, J.D., & Nicole L. Waters, Ph.D., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, National Center for State Courts, April 2007, at 27.

3 *Id* at 29.

4 *State v. Bowles*, 530 N.W.2d 521, 530-31 (Minn. 1995).

5 Jurors are frequently given an option to be questioned in camera on sensitive topics.

tempt to agree on the order of questioning. Otherwise, the court will start with the last named defendant in the case caption and move up the list of named parties so that the plaintiff's attorney is the last to question the panel. An effective voir dire by defense counsel frequently leaves plaintiff's counsel with limited areas to cover and no real opportunity to establish a connection to the jury panel. This is the defendant's advantage.

The goal of voir dire is multifaceted. The primary purpose is to remove prospective jurors for cause, i.e., those that display bias, prejudice, or have an interest in the case such that they cannot be fair and impartial to all parties to the lawsuit.[6] Examples can be people who have an injury similar to the plaintiff's claim and admit they cannot separate their situation from the plaintiff; or have their own lawsuit/claim against a defendant company; or a profound opposition to the subject matter of the lawsuit; or a physical or mental disability that impairs their fair participation. The list of reasons "for cause" disqualification is long and often unique to the particular lawsuit. However, once possible "cause" is identified, it presents the difficult and awkward challenge of whether and how to have the juror disqualified. Developing the necessary facts for disqualification of one juror has the potential to sour the entire panel towards your questioning.[7] On the other hand, if your questions of the juror are fair and even-handed the remaining members of the jury panel will likely understand the necessity of your actions.

Once you have made the decision to establish "cause," it is critical to make it nearly impossible for the plaintiff's attorney to rehabilitate that prospective juror. Tie up the loose ends and calmly ask for a sidebar where you request to have the prospective juror removed for cause. Plaintiff's attorney will likely be given an opportunity to question the juror on the "cause" issue, e.g., that you (the juror) can separate your low back problems from the plaintiff's situation and be fair. Ultimately, the decision rests with the judge whether to remove a juror for cause. If the juror is not removed, you still must continue your voir dire of the panel. Focusing attention on that same juror may be unproductive and create the impression you are unfairly picking on him/her. A better course is to use a preemptory strike at the conclusion of jury selection.

A second, and possibly more important purpose of voir dire, is to identify the jurors who present the greatest risk to your defense so they can be stricken with preemptory challenges. In the typical two-party case, the attorneys are each given two preemptory strikes for a panel of eleven prospective jurors.[8] Consequently, the focus should not be on which jurors may be friendly to the defense, but which ones may be harmful. Spending unnecessary time questioning the "friendly" juror simply identifies the people plaintiff should strike. Instead, identify in advance of trial the qualities you don't want on the jury and then spend your time determining which jurors fit that criterion.

Third, voir dire gives the defendant's attorney an opportunity to establish credibility and rapport with the panel. It is not to convince the prospective jurors of the merit of the defense, but rather to establish that you are someone they can trust. The panel will have already gone through orientation and should understand the general purpose of voir dire. If your questions are fair and appear to have a purpose in determining if there is potential bias or prejudice, you will establish credibility that may carry through the remainder of the trial.

Avoid the temptation to advocate facts helpful to your client's case by pandering to the jurors. For example, no one wants a "dangerous product" in their home, and everyone expects cars to stop for red lights, so why ask such questions? Admittedly, it feels good to see the jurors nodding in agreement to such questions, but it impedes a key goal of voir dire, i.e., to identify the juror(s) who will hurt the defense. Sweeping questions like, "Can you be fair ..." will reveal nothing. In contrast, establishing a dialogue that requires the prospective jurors to provide narrative responses can give a glimpse into their thinking and their acceptance or rejection of various issues (e.g., "Tell us about your experience with ABC Company, or its products."). When in doubt about

6 Mize, Hannaford-Agor & Waters, *supra* note 2.

7 There is an old adage that if you are going to shoot then it is better kill than to simply wound.

8 Where there are multiple defendants with no adversity between them, the court may require those non-adverse parties split the number of preemptory strikes. If there is true adversity, each defendant should request/argue for the same number of strikes as given to plaintiff.

how to frame the question, a fallback method is to ask, "Some people have strong feelings about large companies; some positive, some negative. How do you feel?"

Finally, enjoy the process, and **don't be boring**. Take interest in meeting the jurors and listen, listen, listen. It is expected you may have questions written down that you will refer to from time to time, but do not write notes as the juror is responding. It is unnecessary since your memory will not fade in an hour or two.[9] Furthermore, your lack of attention could be interpreted as rude or condescending.

To reduce the potential for boredom among the panel, it is recommended that you use the concept of "looping" in your voir dire. Rather than start in the upper left hand corner and work your way through the panel, one by one, try mixing it up. On key questions, loop through two or three jurors. For example:

Juror #7	Assume Juror #7 provides a favorable response to a key issue. Now consider moving immediately to another juror on this same issue rather than wait until you finish with Juror #7.
Juror #2	You've just heard Juror #7 indicate . . . How do you feel about . . .?
Juror# 10	You've heard Juror #7 and Juror #2 respond . . . how do you feel?
To the Panel:	Now end the repetition and ask the entire panel, "Does anyone have a different view or response?"

Not knowing who you are going to call on next tends to keep the entire panel alert and engaged. Equally important, it keeps you engaged because boredom will set in if you ask each juror the same 5-10 questions about their children, or their hobbies, or their favorite color. When asking relevant questions, listen to the responses and enjoy meeting these new people.

When your questioning is complete, state out loud, "Your Honor, Defendant passes the jury for cause" and return to counsel table. Stay alert as plaintiff tries to ask questions that are not repetitive of your voir dire. More importantly, be prepared to object if the questioning goes too far into advocacy or improper topics. Do not hesitate to object to an improper voir dire, but appreciate the risk of becoming obstructive.[10]

At the conclusion of the plaintiff's voir dire, the clerk will initially hand the defendant's counsel the list of jurors still on the panel. Defendant must make the first strike by placing a line through the name, an indication of your first pre-emptory strike. It then rotates to plaintiff and continues until the allowed strikes are exhausted:

Defendant #1	~~George Johnson~~
	Mary Smith
Plaintiff #1	Ann Leary
	~~Judy Larson~~
	Mike Peterson

Rules of Voir Dire in Minnesota

Aside from the prudential and strategic considerations discussed above, practitioners should be aware of a number of authorities governing voir dire:

A. Minnesota Civil Trialbook

Like many aspects of civil trial practice in Minnesota state district court, voir dire is governed by the Minnesota Civil Trialbook, promulgated at Title II, Part H of the General Rules of Practice for the District Courts. Section 6 of the Civil Trialbook sets forth the rules for voir dire of Jurors.

Subsection (a) states as follows:

> **(a) Swearing Jurors to Answer.** The entire panel shall be sworn by the clerk to truthfully answer the voir dire questions put to them. The clerk shall then draw the names of the necessary persons who shall take their appropriate seats in the jury box.

During this phase of jury selection, the panel is typically seated in the gallery and is called up by name after administration of the oath. Subsection (b) states as follows:

9 I frequently ask my client to keep notes so they stay engaged.

10 Recognize cues from the judge and that even one emphatic "overruled" may be a signal this judge allows great latitude in voir dire.

> **(b) Statement of the Case To and Examination of Prospective Jurors.** The court shall make a brief statement to the prospective jurors introducing the counsel and parties and outlining the case, contentions of the parties, and anticipated issues to be tried and may then permit the parties or their lawyers to conduct voir dire or may itself do so. In the latter event, the court shall permit the parties or their lawyers to supplement the voir dire by such further nonrepetitive inquiry as it deems proper.
>
> **(c) Challenges for Cause.** A challenge for cause may be made at any time during voir dire by any party or at the close of voir dire by all parties.

The Court will typically ask that the parties jointly submit the statement to the jurors outlining the case, contention of the parties, and anticipated issues. As discussed above, judges' practices with respect to conducting voir dire, allowing counsel to conduct voir dire, or allowing some combination of both varies from one judge to the next. It is essential to raise any concerns about a juror during voir dire because issues that are not timely raised will generally be deemed waived. *See Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 393 (Minn. Ct. App. 2001) ("Generally, a party may not point to juror incompetency after that juror is accepted and sworn if the party knew of the juror's incompetency beforehand and was silent.") The best practice is to ask the judge at the pretrial conference how the judge will handle voir dire so that counsel can prepare accordingly. *See* Minnesota Civil Trialbook § 5(d) (10) (requiring discussion of voir dire procedures at pre-trial conference).

Subsection (d) provides as follows:

> **(d) Peremptory Challenges.** Each adverse party shall be entitled to two peremptory challenges, which shall be made alternately beginning with the defendant. The parties to the action shall be deemed two, plaintiffs being one party, defendants the other. If the court finds that two or more defendants have adverse interests, the court shall allow each adverse defendant additional peremptory challenges. When there are multiple adverse parties, the court shall determine the order of exercising peremptory challenges.

In a simple lawsuit between one plaintiff and one defendant, application of this mechanism is relatively self-explanatory and straightforward. But as the rule indicates, the allotment and exercise of peremptory strikes in complex multi-party cases where parties are aligned for some purposes but adverse for others can make this process quite contentions and confusing. This is another issue to be addressed with the court in at the pre-trial conference.

One issue that litigants should keep in mind is that striking a panel member based on that person's race, gender or ethnicity is prohibited by the equal protection clause of the United States Constitution. *See State v. Seaver*, 820 N.W.2d 627, 633 (Minn. Ct. App. 2012) (discussing "Batson" challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986)). This rule applies in civil cases, as well as criminal cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

Subsection (e) provides as follows:

> **(e) Voir Dire of Replacements.** When a prospective juror is excused, the replacement shall be asked by the court:
>
> (1) whether he or she heard and understood the brief statement of the case previously made by the judge;
>
> (2) whether he or she heard and understood the questions;
>
> (3) whether, other than to personal matters such as prior jury service, area of residence, employment, and family, the replacement's answers would be different from the previous answers in any substantial respect.
>
> If the replacement answers in the affirmative to (3) above, the court shall inquire further as to those differing answers and counsel may make such supplemental examination as the court deems proper.

Conducting voir dire can be a complicated exercise and is made even more so when a panel member is excused for cause, requiring a replacement be seated in

the jury box. Subsection (e) is an imperfect solution to the practical problem of how to efficiently determine whether a substitute panel member is qualified to serve on the jury without re-asking that newly-seated panel member all of the questions that have already been asked. Most judges will explain this possibility to panel members seated in the gallery and admonish them to listen carefully to the questions being asked in case they are called upon to replace a panel member who is dismissed. If counsel observes that panel members in the jury are not paying attention, it is appropriate to bring that to the attention of the Court.

B. Gen. R. Prac. 123

In addition to the general rules governing voir dire in the Civil Trialbook, Minnesota General Rule of Practice 123 prescribes specific rules for voir dire in cases where an insurance company is interested in the defense or outcome of the action. Rule 123 provides as follows:

> **Rule 123. Voir Dire of Jurors in Cases in Which Insurance Company Interested in Defense or Outcome of Action**
>
> In all civil jury cases, in which an insurance company or companies are not parties, but are interested in the defense or outcome of the action, the presiding judge shall, upon the request of any party, be advised of the name of such company or companies, out of the hearing of the jury, as well as the name of the local agent of such companies. When so disclosed, no inquiry shall be permitted by counsel as to such names in the hearing of the jury, nor shall disclosure be made to the jury that such insurance company is interested in the action.
>
> During examination of the jurors by the court, the jurors shall, upon request of any party, be asked collectively whether any of them have any interest as policyholders, stockholders, officers, agents or otherwise in the insurance company or companies interested in the defense or outcome of the action, but such question shall not be repeated to each individual juror. If none of the jurors indicate any such interest in the company or companies involved, then no further inquiry shall be permitted with reference thereto.
>
> If any of the jurors manifest an interest in any of the companies involved, then the court shall further inquire of such juror or jurors as to any interest in such company, including any relationship or connection with the local agent of such interested company, to determine whether such interests or relationship disqualifies such juror.

This rule is somewhat internally inconsistent in that it prohibits inquiry or mention by counsel about a particular insurer but allows the court, by request of a party, to inquire into the panel members' interests in an insurance company. The rule is also in tension with Minn. R. Evid. 411, which provides that evidence of insurance is not admissible to prove fault. Upon being questioned about whether they have financial interest in an insurer, most jurors will likely infer that the identified insurance company has an interest in the outcome of the lawsuit. Plaintiff's attorneys have thus used Rule 123 as a way to circumvent the spirit of Rule 411, and it is incumbent upon judges to exercise the discretion they have under this rule to prevent abuse.

Conclusion

Years ago, a now-forgotten author titled his/her article on voir dire as, "Shake Hands with the Jury" which is a phrase that capsulizes a recommended approach to jury selection. Imagine the panel as guests in your home living room and that your voir dire is to simply shake their hands and get to know them. Keep that phrase in mind so you can enjoy the process and make full use of defendant's advantage.

TECHNIQUES FOR CROSS-EXAMINING THE PLAINTIFF'S EXPERT

BY STEVEN R. SCHWEGMAN (2004-05) AND JOHN A. SULLIVAN

Much has been written about the "art" of cross-examination. Like everything in the law, some of it involves natural talent, but most of it involves hard work and practice. Cross-examination is a combination of three factors — personality, presence and persuasion. These traits are often manifested in the ability to think and react quickly during trial. The art of cross-examination involves using each of these traits to paint a picture that the jury will understand, believe and, most importantly, agree with you.

Rarely, will there be a time when you decide to forgo cross-examination entirely, but if the direct testimony was inconsequential, you may decide not to cross-examine at all.

However, an expert should be cross-examined if: 1) you have specific points to make through cross; or 2) the expert's testimony damaged your client or directly impacted your theory of the case. Following are helpful hints, tips, strategies and stories to prepare you for your cross-examination of Plaintiff's expert.

Experts and their Purpose

Experts are qualified by "knowledge, skill, experience, training, or education." Minn. R. Evid. 702. The rule itself excludes almost no one automatically, and its broad parameters are intentional. Expert testimony is necessary to establish what the standard of care is and whether the defendant has conformed to it, unless the issue of care is one commonly understood by lay persons. Experts direct the jury's attention to issues you wish to emphasize and/or elevate the perceived status or importance of your case.

In *Gross v. Victoria Station Farms, Inc.*, 578 N.W. 2d 757 (Minn. 1998), for example, an expert with a Ph.D. in biology/systematics who published many articles on horses and who had founded the Equine Studies Institute was deemed, nonetheless, unqualified to testify as to the cause of a particular horse's lameness. As to that opinion, the Supreme Court implied a preference for experts who had experience diagnosing equine lameness or training in the veterinary sciences.

In medical malpractice cases, the parameters of expertise, over the years, have become considerably more restrictive than is obvious from the face of Minn. R. Evid. 702. Experts proffered to testify to standards of medical care, or departures therefrom, in medical malpractice cases must have *both* education *and* experience as well as firsthand knowledge of the standards themselves.

Minn. R. Evid. 705 "leaves it to cross-examination to develop weakness in expert's opinion." Minn. R. Evid. 705 committee Comment (1989). In *Daubert v. Merrell Dow Pharmaceuticals*, Justice Blackmun emphasized that "[v]igorous cross-examination [is one] traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596 (1993). Cross examination has been described as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149 (1970). Like any engine, it must be refined and tuned to ensure maximize performance.

Make a Goal Sheet

"Goals without a plan are just a wish."

Before you start to prepare for cross-examination, you should write down the top five points you want to make during cross-examination. Humans do not remember a 30-second commercial. The jury will not remember the entire one hour cross-examination, but if you can highlight a few key points and create a road map for the jury, you will have a better chance for the jury to remember your key points. Irving Younger, an advocate of short cross-examination, often stated that the lawyer should "make three points and sit down." As lawyers, that is impossible for us to do. We like to talk, and when we talk we think people listen. The attention span in a jury box is limited. An effective cross-examination cannot be accomplished without a clear understanding of which points are critical to the case, and which ones can be extracted most appropriately from each witness.

Make Plaintiff's Expert See that the Glass is Half Full

If the jury does not like your expert, the jury will not listen to your expert. A person's likeability — fairly or unfairly — will impact their perceived credibility. With that in mind, be sure to sell the personality and their credentials to the jury while selling their opinion. Research shows that jurors accept or reject expert testimony based more upon the *credibility* and *likeability* of the expert and the clarity and consistency of testimony than upon any substantive analysis of the testimony.

During the cross-examination, it is imperative to control the examination and not let the expert repeat unfavorable testimony. If you are able to, get the expert to champion your case. For example, get the expert to: 1) agree with and corroborate your propositions; 2) acknowledge areas of agreement; 3) corroborate the expertise of your expert. Additionally, get the Plaintiff's expert to admit: 1) your expert's qualifications and recognitions, 2) all or some of the propositions your expert relies on are correct; 3) your expert's conclusions reflect legitimate scientific and/or professional knowledge.

To the extent possible, make the Plaintiff's expert your witness. Get the expert to criticize their client's conduct and force the expert to agree that there can be legitimate differences of opinions between experts. The expert is not infallible, so force the expert to agree that he/she is not perfect and sometimes makes mistakes. Just imagine an expert claiming to never make mistakes.

At the same time, when it is appropriate, be sure to criticize the expert's competence, credibility, bias, methodology, and/or conclusions. This does not and should not be a shouting match. Remember to do it tactfully and with grace. Treat the expert with courtesy. The jury is judging you as much as they are judging the expert. Do not lose your temper or argue with the expert. Keep your ego in check — arguing over minor issues can affect your credibility and takes away from the main plot.

The Three Ps: Prepare, Prepare and Prepare

Preparation is essential. Legendary Coach Paul "Bear" Bryant said, "It's not the will to win that matters — everyone has that. It's the will to prepare to win that matters." Most importantly, a lawyer must prepare because the jury will assess his or her depth of knowledge and commitment to the case by the demonstrated ability to handle the details of cross-examination. If the lawyer appears vague on the details, the jurors may conclude that they, too, should be unconcerned about the finer points of the case. Thorough preparation also will ensure that the witness appreciates the lawyer's competence. Under such circumstances, the witness will be less willing to take advantage of the lawyer's lack of first-hand knowledge.

The cross-examination of the plaintiff can be a pivotal point at trial. Jurors tend to pay special attention to this encounter because they recognize that it focuses the essential controversy of the case — a battle between the plaintiff and the defendant. A

prepared and effectively accomplished cross-examination of the plaintiff, perhaps more than any other event at trial, can increase significantly the chances of a defense verdict. For a plaintiff's cross-examination, preparation involves digging into every relevant background fact. This includes employment history, medical history, prior statements, and every other important detail. It seems obvious, but the first thing you should do is Google the expert. Read articles and publications authored by the expert. Read transcripts of any other testimony that the expert has given in previous cases. Prior testimony at depositions and trial can be a goldmine for potential impeachment and inconsistent statements. Be well-versed on the subject matter and understand the underlying data that the expert relies upon to support the opinion. Educate yourself by reading treatises and other articles on the subject. Be better prepared than the expert; the greatest compliment you can receive is when somebody tells you, "You obviously have done your homework."

Your greatest resources are your colleagues. Do not hesitate to contact other lawyers and even your own expert. Bottom line: Investigate their expert because "by failing to prepare you are preparing to fail."

What to Look for when Investigating the Plaintiff's Expert:

- Education
  - Accreditation or quality of school?
  - Education consistent with claims of expertise?
  - Has field of knowledge changed since expert was educated?
- Licenses or Certifications
  - Failed licensure or certification tests?
  - Length of licensure or certification?
  - Any suspensions, revocations or lapses?
- Professional Discipline
  - Any complaints made against him/her?
  - Disciplined by any employer or professional organization?
- Professional Society Memberships
  - Active or inactive member?
  - Ever refused membership?
- Experience
  - Daily work different than problem in case?
  - Any writing, teaching or research experience in the areas of testimony?

Know the Rules of the Game

The starting point is to know the rules of evidence. That does not involve reviewing law school notes from your Evidence class or the notes you took at BarBri. It means, however, that the rules of evidence must be read again. Literally. You should read the rules — all of them — two days before the trial, the day before trial and each day of trial. During the heat of trial, you will not have the time to flip through the rule book. It is imperative to have the rules fresh in your mind so you can use them at your disposal. It also means that cases and articles must be reviewed. Generally, lawyers who are not also law professors do not maintain encyclopedic recollection of the rules of evidence. Yet these rules must be refreshed so that they can be argued usefully.

In addition to this general re-acquaintance, be sure to identify those rules that hold particular importance to the trial. Different rules come into play in different trials. Know well the ones that count. Anticipate problems with the authenticity and admissibility of documents needed for cross-examination. Be sure to contemplate an argument supporting the admissibility of evidence important to every aspect of cross-examination. Prepare trial briefs on hand to inform the judge or motions in limine, and raise problem areas in advance of cross-examination.

If you do not read all the rules, it behooves you to know the following Rules of Evidence, especially when it comes to cross-examination:

- Hearsay
- Relevance
- Exclusion of evidence — prejudice, confusion, or waste of time
- Character evidence
- Subsequent remedial measures
- Evidence of conviction of crime

Be the Star in Your Own Show

People often analogize a trial to a TV show or movie. This is especially true during cross-examination. You must develop a theory and then let that theory shine during the course of your examination. Ask yourself: What is your theory and what are you attacking or trying to establish on cross-examination?

- The expert — bias or prejudice
- Attack expert's facts and assumptions
- Attack expert's foundation — not well prepared
- Establish lack of experience
- Impeach the expert's opinions or conclusions
- Supporting your expert

Develop an outline or script, but never, never, never read your cross-examination. Listen to the witness — if you don't, you'll miss many opportunities. Be prepared to locate, handle and publish the exhibits. People are visual. You have to tell the jury what you want them to hear. You will then have to show them what you want them to know. You then have to re-tell them what you want them to remember.

As the director of the play, you have to be in control at all times. That means you tell your story while the expert agrees with your statements. Keep the leash short and don't let the expert go on tangents or diatribes that disparage your client. Additionally, your presence in the court room is not as prominent if you are sitting behind counsel table. In Federal Court, you are required to stand, but many State district court judges require that you be seated during your examination. When this is the case, find a way to get on your feet. This can be accomplished in a number of ways. I have had success by approaching the witness to enter an exhibit into evidence. I then return to counsel table and forget to sit down. When the judge asks me to sit down again, I find another exhibit to offer into evidence. Eventually the judge stops asking you to sit down.

KISS (Keep It Simple Stupid)

A cross examination is not the time to demonstrate your intelligence using arcane vernacular. The art of cross-examination is using common parlance to describe highly complex matters. A person's ability to use common language to describe and define technical terms is the real art, not reciting past dictionary.com words of the day. This helps to demystify the expert and it also allows the jurors to stay focused during the show. The comic strip "Stu's Views" ran an item that illustrated this point perfectly. A lawyer was conducting his voir dire and asked, "How many of you comprehend the term 'follicular'?" A juror responded by asking, "What does 'comprehend' mean?" A gifted trial attorney is able to reduce the technical to the simple without appearing to patronize the jury. This is not the Scripps National Spelling Bee, so you do not get extra points for using sesquipedalian words. Do not use a $10 word when a 50 cent word will be sufficient. "Drive your car," but do not "operate your vehicle."

This is important in all phases of the trial, but it is most important in cross-examination when counsel is attempting to undermine the case of an opponent through the testimony of the opponent's witnesses. If the jury does not understand that an opponent has been bested, time has been wasted. If counsel is moving laboriously through technical points and boring the jury in the process, both time and substance are lost. The jury will grow angry. There are few truisms in the business of trying cases, but there is one: if the jury is mad at counsel, the case is lost. Effective trial lawyers remember that the important audience is seated in the jury box. The jury must understand the case. In particular, jurors must understand the points being made on crossexamination. Yet again, this starts with preparation.

Rules to Follow

Asking only leading questions is perhaps the oldest rule of cross-examination. It is an old rule because it is a good one. Leading questions are most effective because they essentially allow the cross-examiner to testify and the witness to ratify. The

technique advances one of the important dynamics of the courtroom-control. Asking leading questions allows the cross-examiner to be forceful, fearless, knowledgeable and informative. Good things come from leading questions. So, when permitted, lead, lead, and lead.

Of course, rules are meant to be broken. If an expert is being called by the plaintiff to testify but has not provided the jury during direct examination with any experience specific to the issues in the case, it is most likely because the expert lacks such experience. Although the rule is to ask leading questions, I would suggest taking the risk and asking the expert what experience he or she has on the particular subject. Your gut will tell you whether you should take such a risk, but the pay-off can be tremendous.

David Letterman is now retired, but use this top-10 list when conducting your cross-examination:

1. Have an objective for every line of questioning. Once you have achieved that objective, move on.
2. Do not allow the expert to explain away the testimony and never allow a witness to repeat on cross examination what s/he said on direct examination.
3. *Start* on a strong point.
4. Do not say "is that correct," "right" or the lawyer-like introduction, "isn't it a fact ..." It is redundant and the way your question is phrased infers the same. However, I violate this suggestion all of the time.
5. Make all your questions short and precise.
6. Do not ask the expert to explain anything.
7. Don't ask a question if you are unsure of the answer.
8. You need to control the cross-examination and the best way to accomplish this is to be prepared.
9. Stand away from the jury and make the expert look at you during the questioning.
10. *End* on a strong point. The hardest decision with respect to cross-examination is knowing when to quit; don't ask the one question too many. Stop when you have made your point and leave the argument for the jury.

Always Listen to the Witness

Conducting a cross-examination can be scary. However, it is imperative that you not be glued to your outline. You need to listen to the witness and use their answers as opportunities to attack the expert's credibility, etc. If the witness gives you a good answer, follow up. And make sure you pace yourself. It is important to keep in mind that the jury is trying to follow along and understand where you are going with your cross-examination. Take a breath. Let the jury absorb a point before moving onto the next one. If they are taking notes, as most of them do, you don't want the jury missing your cross-examination because they were jotting down point one while you also covered points three through six.

Don't Be Like Mike

In the late summer of 1991 after the Chicago Bulls won their first of six titles, Gatorade ran an ad featuring Michael Jordan with a catchy *Lion King*-like song and the tag line, "Be like Mike." If only we can play basketball like Mike. Unfortunately, we cannot be Mike — so do not try to be like Mike. It is far more effective to just be the best version of yourself. It is imperative to develop your own style.

That doesn't mean that you shouldn't watch and learn from others, but don't try to change who you are. Authenticity is far more persuasive than impersonation. Good trial lawyers develop their own comfortable styles. In this regard, it is important to observe other trial lawyers; good trial lawyers are impressive. It is a mistake, however, to mimic them. Excellent trial lawyers come in many different packages.

Some are funny; some are very serious. Some have booming voices; some speak softly. Some move around the courtroom; some never become detached from the podium. Each trial lawyer must do what is comfortable for him or her, following the old adage: Be true to yourself and, most importantly, **be like you.**

TECHNIQUES FOR CROSS-EXAMINING THE PLAINTIFF'S EXPERT

BY STEVEN SCHWEGMAN (2004-05) & CALLY KJELLBERG

Why Do We Need Experts?

- **Proof:** Expert testimony is necessary to establish what the standard of care is and whether the defendant has conformed to it, unless the issue of care is one commonly understood by lay persons.
- **Persuasion:** Direct the jury's attention to issues you wish to emphasize and/or elevate the perceived status or importance of your case.
- **Preservation:** An expert affidavit can often make your record show material issues of fact in dispute.

Goals for Experts at Trial:

- Sell personality and their credentials to the jury; AND
- Sell their opinion.
- Research shows that jurors accept or reject expert testimony based more upon the *credibility* and *likeability* of the expert and the clarity and consistency of testimony than upon any substantive analysis of the testimony.

Goals of Cross-Examination

- Focused — don't let expert repeat unfavorable testimony
- Get the expert to:
  - · Agree with and corroborate your propositions
  - · Acknowledge areas of agreement
  - · Corroborate the expertise of your expert
- When appropriate, criticize the expert's competence, credibility, bias, methodology, and/or conclusions.

Deciding Whether to Cross-Examine

- If the direct testimony was inconsequential, you may decide not to cross-examine at all.
- An expert should be cross-examined if:
  (1) you have specific points to make through cross; or
  (2) the expert's testimony damaged your client.

How to Prepare for Cross-Examination

The Basics:

Review Discovery, Pretrial Disclosures, and Expert Reports

- Under Federal Rules, an expert report must be disclosed. The expert report contains the expert's qualifications, the data and information considered in forming the opinions, summary or supporting exhibits, all publications in preceding 10 years, compensation paid, and all cases in preceding 4 years where expert gave deposition or trial testimony. Fed. R. Civ. P. 26(a)(2)(B).
- Under Minnesota Rules, discovery is limited only to the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which the expert is expected to testify and a summary of the grounds for each opinion. Minn. R. Civ. P. 26.02(e)(l)(A).

How to Prepare for Cross-Examination

- Read articles and publications authored by the expert.
- Read transcripts of any other testimony that the expert has given.
  - Potential impeachment using depositions and inconsistent statements.
- Google the expert.
- Contact other lawyers.
- Contact your own expert.
- Bottom Line: Investigate their expert!

What to Look for when Investigating the Plaintiff's Expert

- Education
  - Accreditation or quality of school?
  - Education consistent with claims of expertise?
  - Has field of knowledge changed since expert was educated?
- Licenses or Certifications
  - Failed licensure or certification tests?
  - Length of licensure or certification?
  - Any suspensions, revocations or lapses?
- Professional Discipline
  - Any complaints made against him/her?
  - Disciplined by any employer or professional organization?
- Professional Society Memberships
  - Active or inactive member?
  - Ever refused membership?
- Experience
  - Daily work different than problem in case?
  - Any writing, teaching or research experience in the areas of testimony?

How to Prepare for Cross-Examination

Know the Expert and Know the Case!

- Understand the underlying data that the expert relies upon to support the opinion.
- Educate yourself by reading treatises and other articles on the subject.
- Be better prepared than the expert

"You obviously have done your homework"

- Know the following Rules of Evidence, especially when it comes to cross-examination:
  - Hearsay
  - Relevance
  - Exclusion of evidence — prejudice, confusion, or waste of time
  - Character evidence
  - Subsequent remedial measures
  - Evidence of conviction of crime

Develop a Theory

- What is your theory and what are you attacking or trying to establish on cross-examination?
  - The expert-bias or prejudice
  - Attack expert's facts and assumptions
  - Attack expert's foundation — not well prepared
  - Establish lack of experience
  - Impeach the expert's opinions or conclusions
  - Supporting your expert

Helpful Tips for Cross-Examination

- Develop an outline — but never, never, never read your cross-examination
- Prepare a road map for your cross-examination
- Listen to the witness — if you don't, you'll miss many opportunities
- Be prepared to locate, handle and publish the exhibits
- Develop your own style! Watch and learn from others, but don't try to change who you are.

How to Conduct the Cross-Examination

KISS (Keep It Simple, Stupid)

- Short cross-examinations are better than long ones
  - Why are my examinations always long?
- Ask leading questions — but general rules are intended to be broken
- Should you demand "yes" or "no" answers?
- Have an objective for every line of questioning. Once you have achieved that objective, move on.
- Do not allow the expert to explain away the testimony.
- Start on a strong point.

- Make all your questions short and precise.
- Do not ask the expert to explain anything.
- Use common language in defining technical terms. This helps to demystify the expert.
- Don't ask a question if you are unsure of the answer.
- You need to control the cross-examination and the best way to accomplish this is to be prepared.
- Stand away from the jury and make the expert look at you during the questioning.
- End on a strong point.
  - The hardest decision with respect to cross-examination is knowing when to quit.

Objections — Should You Make Them?

- Whether and when to make an objection
- How do you object?
  - Timeliness

Use the Plaintiff's Expert to Bolster Your Expert

- Get the Plaintiff's expert to admit:
  - Your expert's qualifications and recognitions.
  - All or some of the propositions your expert relies on are correct.
  - Your expert's conclusions reflect legitimate scientific and/or professional knowledge.

Make the Plaintiff's Expert Your Witness

- Get the expert to criticize their client's conduct.
- Force the expert to agree that there can be legitimate differences of opinions between experts.
- Force the expert to agree that he/she is not perfect and sometimes makes mistakes.
  - Keep in mind, an expert claiming to never make mistakes will appear arrogant to the jury.

Things to Remember about Cross-Examination of the Plaintiff's Expert

- Treat the expert with courtesy. The jury is judging you as much as they are judging the expert.
- Do not lose your temper or argue with the expert.
- Keep your ego in check — arguing over minor issues can affect your credibility.
- Be cautious of attacking the expert if it seems that he/she is a likeable witness.
- Do not react to negative testimony.
- Remember who your audience is — watch the jury during cross-examination (or have your client watch).

ASSERTING THE PRIVILEGE

BY MARK SOLHEIM (2011-12) AND JENNIFER YOUNG

> *Privilege law is arguably the most important doctrinal area in the law of evidence. Most evidentiary doctrines relate primarily to the courts' institutional concerns about the reliability of the evidence that the trier of fact relies on. In contrast, privileges impact 'extrinsic social policy.'*[1]

Privilege can be one of the most important tools in a defense attorney's litigation toolbox. Clients must feel free to candidly disclose potentially damaging information to their attorney for counsel to prepare an effective defense. Similarly, the attorney must feel free to develop litigation materials and strategies without fear of disclosure.

Any claim of privilege requires the balancing of two competing interests: full disclosure in the interest of justice and confidentiality sufficient to encourage self-critical evaluation. Privilege rules do not enhance the reliability of fact finding; in fact, they may be used to exclude otherwise probative evidence. 2 *Federal Evidence* § 5:2 (4th ed.). To withhold information based on a claim of privilege, either the court or the legislature must deem the public interest in protecting the information to outweigh the need for probative evidence. *Harris v. One Hope United Inc.*, — N.E.3d —, 2015 IL 117200 (Ill. 2015).

Attorney Client Privilege

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal quotations omitted).

Most states, including Minnesota, have formalized the common-law attorney-client privilege in statute. Minnesota's statute provides: "An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent." Minn. Stat. § 595.02(1)(b) (2014). In federal court, by contrast, the privilege is defined by common law. But under either statute or common law, the privilege applies to (1) a communication (2) between an attorney and client (3) in confidence (4) for the purpose of obtaining legal advice. *Restatement (Third) of the Law Governing Lawyers* § 68 (2000); *see also Prior Lake Am. v. Mader*, 642 N.W.2d 729, 737 (Minn. 2002) [quoting 8 Wigmore, *Evidence* § 2292 at 554 (1961)]. The advent of email and other electronic forms of communication have dramatically complicated this seemingly simple formulation.

A. Communication

A communication is any expression through which a privileged person conveys information to another privileged person and any document or other record revealing such an expression. Restatement (Third) of the Law Governing Lawyers § 69 (2000). Even non-verbal communicative acts, such as shaking the head no, can count. *Id.*, cmt. E. Only the communication itself is protected, however, not the facts that make up the communication:

> [T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that

1 Edward J. Imwinkelried, *Protecting the Attorney-Client Privilege in Business Negotiations: Would the Application of the Subject-Matter Waiver Doctrine Really Drive Attorneys from the Bargaining Table?* 51 Duq. L. Rev. 167, 168 (2013).

> fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Upjohn, 449 U.S. at 396-97 (internal quotation omitted).

Similarly, merely transferring documents to an attorney does not make them privileged. *Bouschor v. United States*, 316 F.2d 451, 457 (8th Cir. 1963). Documents that pre-exist the attorney-client relationship do not become privileged when transferred to an attorney to obtain legal advice; conversely, if the documents in possession of the client are not obtainable by subpoena or summons, they remain privileged when given to the attorney. *Fisher v. U.S.*, 425 U.S. 391, 403-04 (1976). Similarly, email attachments that are not privileged by their content do not become privileged by merely attaching them to a privileged email communication with the attorney. *Muro v. Target Corp.*, No. 04 C 6267, 2006 WL 3422181, at *5 (N.D. Ill. Nov. 28, 2006); *see also AM General Holdings, LLC v. The Renco Group, LLC*, 2013 WL 1668627 (Del. Ch. Ct. Apr. 18, 2013) (stating that email attachments must "independently earn" privileged status).

For example, in *Brown v. St. Paul City Ry. Co.*, the Minnesota Supreme Court considered whether a post-accident report written by a street-car conductor and given to his supervisor was protected by the attorney-client privilege. 241 Minn. 15, 27, 62 N.W.2d 688, 697 (1954). Defendant street-car company argued that the documents were given to the company's attorney to familiarize him with the facts of the case and help him give legal advice. But the supreme court reiterated that if the document was privileged when created, it would remain privileged when sent to the attorney, but that "mere delivery of the document to an attorney does not create a privilege." *Id.* at 33. Because the accident report was prepared pursuant to an established company routine and was likely used for many purposes, it was not privileged. *Id.* at 36.

B. Between Privileged Parties

Privileged parties include the client, the attorney, or agents of either who facilitate the communication. *Restatement (Third) of the Law Governing Lawyers* § 70 (2000).

1. AN ATTORNEY

Generally, courts have defined a "lawyer" for purposes of the attorney-client privilege as a member of the bar of a court. *See Kobluk v. Univ. of Minnesota*, 574 N.W.2d 436, 440 (Minn. 1998) ("By its express terms, the statutory attorney-client privilege pertains only to disclosures by lawyers."). Conversely, a law student has been held not to be a "lawyer" for privilege purposes. *State v. Lender*, 266 Minn. 561, 124 N.W.2d 355, 359 (1963) (holding communication with law student legal aid volunteer not privileged). Most courts hold that the attorney need not be a member of the local bar in order to claim the privilege, so long as the attorney is admitted to practice in some state or county. *See Paper Converting Mach. Co. v. FMC Corp.*, 215 F. Supp. 249, 251 (E.D. Wis. 1963); *Ga.-Pac. Plywood Co. v. U.S. Plywood Corp.*, 18 F.R.D. 463, 465 (S.D.N.Y. 1956). Some courts apply the privilege more narrowly to in-house attorneys, noting that the dual business-legal function of in-house counsel makes application of the privilege more difficult. *Compare Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1326 (8th Cir. 1986) (stating that in-house counsel is treated no differently than outside counsel), *with TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143, 144 (S.D.N.Y. 2003) (noting that privilege issues related to in-house counsel may be more difficult to determine given counsel's involvement in business, rather than legal, matters).

2. THE CLIENT

In this case, courts apply various tests to determine whether communications between an attorney and agents of a corporation are protected.

Control-Group Test: Under this test, only communications between an attorney and persons in a position to control or make a substantial decision about actions to be taken upon the advice of the lawyer, or at least a member of a group having such authority, are privileged. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977). This test is restrictive, often

limiting the privilege to communications between an attorney and a corporation's upper management. It was once a widely used test, *see id.*, but it fell out of favor after the Supreme Court observed in *Upjohn*, "[t]he control group test ... frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Upjohn*, 449 U.S. at 391.

Subject-Matter Test: In contrast to the control-group test, the subject-matter test casts a broad net, sometime engendering criticism that it protects too many employee communications. *See, e.g.*, *Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W.2d 305, 308 n.7 (Minn. 1981). Nevertheless, federal common law and the majority of states follow the subject-matter test. Todd Presnell, "The In-House Attorney-Client Privilege," *In-House Defense Quarterly* 6, 7 (Winter 2014). Under this test, a communication between an attorney and a corporation is privileged where the employee (1) made the communication at the direction of his superiors, (2) the subject matter of the communication concerns the performance by the employee of the duties of his employment, and (3) the corporation is seeking legal advice about the subject matter of the communication. *Diversified Indus.*, 572 F.2d at 602. Some courts follow a modified-subject matter test, which, in addition to the three factors just listed, requires that (4) the superior made the request so that the corporation could secure legal advice; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *Id.* at 609.

Upjohn Test: In *Upjohn*, the Supreme Court considered attorney-client privilege in the context of an internal investigation by inside counsel. Counsel sent questionnaires to lower-level employees seeking factual information that would form the basis for legal advice to the company. The Supreme Court rejected both the control-group and subject matter tests. It held that information sought and gathered by counsel as part of an internal investigation is privileged when (1) the information is necessary to supply the basis for legal advice to the corporation; (2) the information was not available from "control group" management; (3) the communications concerned matters within the scope of the employees' duties; (4) the employees were aware that they were being questioned in order for the corporation to secure legal advice; and (5) the communications were considered confidential when made and kept confidential. *Upjohn*, 449 U.S. at 394-95. This test applies primarily in federal courts applying federal law; most states have not adopted *Upjohn*, and federal courts sitting in diversity apply state law. *See* "The client—Who speaks for the client?" 1 *Corporate Counsel Guidelines* § 1:3 (2014); Fed. R. Evid. 501.

Former Employees of Corporate Clients: The *Upjohn* court noted that a few of the questionnaires were sent to former employees, but declined to decide the issue of whether the privilege applied to statements of former employees. *Upjohn*, 449 U.S. at 394 n.3. Justice Burger's concurrence suggested that the Court should have articulated a standard for former employees. *See id.* at 402-02 (Burger, J., concurring). The Ninth and Fourth Circuits have adopted the test articulated by Justice Burger in his concurrence: for attorney-client privilege to apply to communications with former employees, the former employee must speak at the direction of management with the attorney authorized to investigate the matter, and the information gathered must assist counsel in "(a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct." *Id.* at 403; *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997). Federal district courts considering claims of privileged communications with former employees, however, have reached mixed results. *See* ALI-ABA, "Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine" SM090 ALI-ABA 481, 508-510 (2007) (collecting cases).

As a practical matter, corporations that operate in multiple states and frequently communicate across state lines rarely know before they are haled into court which test the court will apply. Minnesota, for

example, has not adopted any of the above tests. The Minnesota Supreme Court considered the subject-matter test and the control-group test in *Leer*, but it declined to adopt either, deciding instead that under any of the possible tests, communications about an employee's knowledge gained simply because he witnessed an accident are not privileged. *Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W.2d 305, 309 (Minn. 1981); *see also Ewald v. Royal Norwegian Embassy*, No. 11-CV-2116 SRN/SER, 2014 WL 1309095, at *7 (D. Minn. Apr. 1, 2014) (noting that "Minnesota has not established a separate test for corporations").

3. WHAT COMMUNICATIONS WITH AGENTS ARE PRIVILEGED?

Generally speaking, an attorney may disclose privileged communications to other attorneys within the firm and with appropriate non-lawyer staff. *Restatement (Third) of the Law Governing Lawyers* § 70 cmt. g (2000). Similarly, clients may confide information to people reasonably necessary to facilitate communication with the attorney, whom they reasonably believe will keep the information confidential. Examples may include a secretary, mail carrier, or translator. *Id.*, cmt. f.

In federal court, the *Kovel* doctrine, arising from the Second Circuit decision in *United States v. Kovel*, extends the attorney-client privilege to experts, such as an accountant, whom the attorney retains to assist in understanding complex issues so that the attorney may provide legal advice to the client. Todd Presnell, "Court Rejects Privilege for Chipotle Consultant's Report to Outside Counsel," *Presnell on Privilege* (April 21, 2015), http://presnellonprivileges.com. For communication with these experts to be privileged, the communication must be made in confidence for the purpose of obtaining legal advice from the attorney. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *see also United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (applying the *Kovel* test). But merely providing a service, such as accounting services or advice, does not result in a privilege. *Kovel*, 296 F.2d at 922; *see also*, *e.g.*, *In re Grand Jury Proceedings, Involving Thullen and Dvorak*, 220 F.3d 568, 571 (7th Cir. 2000) (holding that documents used both in preparation of tax returns and in litigation are not privileged).

Minnesota courts, on the other hand, have held that a retained expert is not an "employee" of the attorney and therefore does not come within the ambit of the attorney-client privilege. *Leininger v. Swadner*, 279 Minn. 251, 256, 156 N.W.2d 254, 258 (1968); 1975 Advisory Cmtee. Note to Minn. R. Civ. P. 26.02 ("[E]xperts who are employed by attorneys in anticipation of trial or in preparation of trial cannot be considered as agents of the lawyer and therefore protected by the attorney-client privilege.")

C. In Confidence

For a communication to be protected, (1) the communicator, *See Bogle v. McClureKobluk v. Univ. of MinnesotaSee KoblukSchwartz v. WengerProtecting the Confidentiality of Unencrypted EmailId.See Muro v. Target Corp*.Other forms of electronic communication and electronic information storage remain questionable. All the state bar associations to consider the issue have found that attorneys may ethically use cloud storage, despite the fact that the information is stored on third-party servers. ABA, *Cloud Ethics Opinions Around the U.S.*, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html. The District of Minnesota has found messages sent through private chat on Facebook preserve a reasonable expectation of confidential communication because they are protected by password. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012). Whether other social medial communications are similarly protected remains to be seen.

D. For the Purpose of Obtaining Legal Advice

A communication is not privileged simply because it is made by or to a person who happens to be a lawyer. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977). Similarly, an email does not become privileged merely by copying an attorney; and a meeting does not become privileged merely because an attorney is present. *See Marvin Lumber v. PPG Indus., Inc.*, 168 F.R.D. 641, 646 (D. Minn. 1996) (holding a company's investigation not privileged merely because conducted by attorney: "the mere involvement of an attorney, in the ordinary business

activities of a party, cannot legitimately shield those activities from discovery"); *see also Canaday v. United States*, 354 F.2d 849, 857 (8th Cir. 1966) (holding tax returns not privileged where attorney acted merely as a scrivener in preparing the returns). Generally speaking, the claimant of privilege must have consulted the lawyer to obtain legal counseling or advice, document preparation, litigation services, or any other assistance customarily performed by lawyers in their professional capacity. A lawyer's assistance is legal in nature if the lawyer's professional skill and training would have value in the matter. *Restatement (Third) of the Law Governing Lawyers* § 72 (2000).

Difficulties can arise when communication between an attorney and client has a mixed purpose, such as obtaining both business and legal advice. For this reason, courts often apply a heightened scrutiny to communications with in-house counsel. Generally a presumption applies that communications with attorneys seek legal advice: "a matter committed to a professional legal adviser is prima facie so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice." *Kobluk v. University of Minnesota*, 574 N.W.2d 436, 442 (Minn. 1998) [quoting 8 John Henry Wigmore, *Evidence* § 2296, at 567 (McNaughton rev.1961)]. By contrast, courts sometimes presume communications with in-house counsel are more likely business than legal in nature. *See Kincaid v. Wells Fargo Sec., LLC*, No. 10-CV-808-JHP-PJC, 2012 WL 712111, at *2 (N.D. Okla. Mar. 1, 2012) ("Many courts have relied on two rebuttable presumptions (though often not stated expressly) regarding the role of the lawyer in determining the nature of the advice: (1) if outside counsel is involved, the confidential communication is presumed to be a request for and the provision of "legal advice"; and (2) if in-house counsel is involved, the presumption is that the attorney's input is more likely business than legal in nature. As a result, most of these courts apply "heightened" scrutiny to communications to and from in-house counsel in determining attorney-client privilege.").

Courts are divided on what test to apply to communications with in-house counsel or internal memoranda by in-house counsel. One test, called the "because of" standard, requires in-house lawyers to prove that, under the totality of the circumstances, including the nature of the document and the factual situation, the document was prepared because of litigation or a legal purpose. Todd Presnell, "Dual-Purpose Emails to In-House Counsel: Are They Privileged?" *Presnell on Privilege* (September 30, 2013), http://presnellonprivileges.com [citing *In re CV Therapeutics, Inc. Sec. Litig.*, 2006 WL 1699536 (N.D. Cal. June 16, 2006)]. Alternately, under the primary purpose standard, the privilege protects in-house lawyers' communications involving business and legal advice if the primary purpose of the communication is to obtain or give legal advice. *Id.* [citing *United States v. ChevronTexaco Corp.*, 1996 WL 264769 (N.D. Cal. May 30, 1996)]. The "because-of" standard requires a lesser burden of proof, demanding that in-house lawyers simply show that the putatively privileged communication was prepared because of legal issues. The primary purpose standard requires a higher burden of proof, focusing on whether each communication was for the primary purpose of rendering legal advice. *Id.* [citing *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615 (D. Nev. 2013)]. Minnesota courts have not yet adopted a particular test to apply to corporate communications with in-house counsel. *Peterson v. Seagate U.S. LLC*, No. CIV.07-2502(MJD/AJB), 2009 WL 3430150, at *4 (D. Minn. Oct. 19, 2009).

Finally, the privilege is narrower under the context of Minnesota's state open-meeting law. *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 440 (Minn. App. 2005). The privilege would "almost never extend to the mere request for general legal advice or opinion by a public body in its capacity as a public agency." *Id.* Instead, it should rarely be invoked in situations not involving pending litigation. *Id.* This procedure balances the competing policies of facilitating open communication between attorney and client and the public's right to be informed of actions taken by public bodies. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). Other states construe their open-meeting laws similarly. *See* 4 *McQuillin Mun. Corp*. § 13:15 (3d ed.).

Work-Product Doctrine

The Supreme Court memorably enunciated the work-product doctrine in *Hickman v. Taylor*:

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 507-09, 510-11 (1947). This protection has since been codified in Federal Rule of Civil Procedure 26 and in every state.

Minnesota's rule provides:

> Subject to the provisions of Rule 26.02(e) a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(b) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation....

Minn. R. Civ. P. 26.02(d). One major distinction between the federal practice and the Minnesota rule is that the Minnesota rules expressly require witness statements to be disclosed. To obtain witness statements in federal court, the party would be required to make a showing of need and undue hardship. *See* 11 Minn. Prac., Evidence § 501.05 (4th ed.); Minn. R. Civ. P. 23.02(d).

With regard to experts, both federal and Minnesota rules protect the opinions of non-testifying experts as work product, to encourage parties to consult experts to fully prepare their cases without incurring the risk that such an expert's opinion may be used against them. *See* 1975 Advisory Cmtee. Note to Minn. R. Civ. P. 26.02. The federal rules protect all drafts of an expert's written report as work product, and they protect most communications between the attorney and an expert witness who provides a written report. Fed. R. Civ. P. 26(b)(4)(B)-(C). Communications that (a) relate to the expert's compensation; (b) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions; or (c) identify assumptions that the party's attorney provided and that the expert relied on, are not protected, however. Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii). The comments to the rules provide that these exceptions should be "applied in a realistic manner" and clarify that the exception "applies only to communications 'identifying' the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected." 2010 Advisory Cmtee. Comments to Fed. R. Civ. P. 26(b)(4)(C).

The Minnesota rules do not contain an express rule against disclosure of drafts of expert reports, but to the extent those drafts reflect the thoughts and mental impressions of counsel, they are protected.

Work product itself is sometimes divided into two general types: opinion work product (or core work product) and ordinarily work product. Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories. *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000); *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986). Ordinary work product includes factual information, objective data, and generally everything that is not opinion work product. *Baker*, 209 F.3d at 1054; FRCP 26(b)(3). Opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud. On the other hand, while ordinary work product is generally not discoverable, but can be discovered if the party seeking discovery demonstrates (1) a substantial need for the materials and (2) that the party cannot obtain the substantial equivalent of the materials by other means. FRCP 26(b)(3); Minn. R. Civ. P. 26.02(d).

The work-product protection is broader than the attorney-client privilege in that it protects all documents and tangible things prepared in anticipation of litigation, not just communications between an attorney and client. On the other hand, the work-product protection is narrower because to be protected, the material must be prepared "in anticipation of litigation." The Eighth Circuit and Minnesota both follow a "because-of" test to determine whether materials are prepared in anticipation of litigation:

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987) [quoting 8 C. Wright & A. Miller, *Federal Practice and Pro.* § 2024, at 198–99 (1970)]; *see also* 11A Minn. Prac., *Courtroom Handbook Of Minn. Evid.* R 501 (quoting 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Pro.* § 2024). Other jurisdictions follow the more stringent "primary motivating factor" test: "litigation need not necessarily be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *See, e.g.*, *United States v. Davis*, 636 F.2d 1028, 1039 (5th Cir. 1981). Either way, whether the protection applies is a factual determination, based on the facts and circumstances of each case.

Practically speaking, these distinctions can be difficult to apply in practice. In *Marvin Lumber v. PPG Industries*, for example, the plaintiff had received complaints about its windows, and some of those complaints were accompanied by threats of litigation. 168 F.R.D. 641, 643 (D. Minn. 1996). Plaintiff, therefore, conducted an investigation into the cause of the problem under the supervision of outside counsel. *Id.* In subsequent litigation, defendants moved to compel production of the investigation's results. *Id.* at 644. The court, after a recitation of the principles underlying the attorney-client privilege and the work-product protection, concluded that plaintiffs "may not shield their investigation . . . merely because they elected to delegate their ordinary business obligations to legal counsel." *Id.* at 646. The court further specified that communications between plaintiff and its legal counsel about the investigation are privileged, but that the facts contained in the communications are not; and that while facts are not privileged, their compilation or categorization by counsel may be protected work product. *Id.* at 646. As a result, the court held that plaintiff could not assert a blanket privilege, but must instead sort out which facts and data to disclose under the general principles recited by the court.

Common-Interest or Joint-Defense Privilege

A joint defense agreement does not create a new protection for information that would otherwise be discoverable through standard methods—it is

merely an extension of the already-existing attorney-client work-product privileges to members of a joint defense group that share a common litigation interest. *See generally United States v. Paiz*, 2010 WL 5399216 *7 (N.D. Cal. Dec. 23, 2010) (JDAs "cannot extend greater protections than the legal privileges on which they rest."). A joint defense agreement protects disclosures between one party and the attorney of a closely-aligned party. *Holland v. Island Creek Corp.*, 885 F. Supp. 4, 6 (D.D.C. 1995); *see also Boyd v. Comdata Ntwk, Inc.*, 88 S.W.3d 203, 215 (Tenn. Ct. App. 2002). But the privilege protects only communications from client to attorney or between attorneys, not between clients. *In re Teleglobe Comm. Corp.*, 493 F. 3d 345, 364-65 (3rd Cir. 2007). Written joint defense agreements ("JDA") are generally not discoverable because they are attorney work product prepared in anticipation of litigation and not usually relevant to any claim or defense. However, the fact of a JDA, the parties to the agreement, and any tolling or settlement provisions in the agreement may be discoverable to show bias or for impeachment purposes. *See, e.g.*, *Biovail Labs. Int'l SRL v. Watson Pharm. Inc.*, 2010 WL 344187 (S.D. Fla. Aug. 30, 2010); *AMEC Civil LLC v. DMJM Harris, Inc.*, 2008 WL 8171059 (D.N.J. July 11, 2008); *Oklahoma v. Tyson Foods, Inc.*, 2007 WL 3128422 (N.D. Okla. Oct. 24, 2007); *Broessel v. Triad Guar. Ins. Co.*, 238 F.R.D. 215 (W.D. Ky. 2006).

Under the related joint-representation privilege, two or more clients must consult an attorney on matters of common interest; the communications between the clients and the attorney are privileged as against third parties, but not among the joint clients. *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012). Joint defendants may share information without waiving the privilege if: "(1) the disclosure is made due to actual or anticipated litigation; (2) for the purpose of furthering a common interest; and (3) the disclosure is made in a manner not inconsistent with maintaining confidentiality against adverse parties." *Holland v. Island Creek Corp.*, 885 F. Supp. 4, 6 (D.D.C. 1995); *see also Boyd v. Comdata Ntwk, Inc.*, 88 S.W.3d 203, 215 (Tenn. Ct. App. 2002) (adding a fourth qualification that "the person disclosing the information has not otherwise waived the attorney-client privilege for the disclosed information").

The "common interest" doctrine, by contrast, is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party, and it applies if the privilege-holder discloses privileged documents to a third party with which it shared a common interest. The doctrine permits disclosure without waiver as long as the party claiming the exception demonstrates that the parties communicating: (1) have a common legal, rather than commercial, interest; and (2) the disclosures are made in the course of formulating a common legal strategy. *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012). The common-interest privilege does not require litigation, merely a common interest in receiving shared legal counsel about a legal interest. *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989); *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215, 220 (W.D. Ky. 2006).

Subject-Matter Waiver

Minnesota law is not well-developed on this topic. The Minnesota Rules of Civil Procedure were amended in 2007 to provide:

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Minn. R. Civ. P. 26.02(f). This provision provides a procedure for when documents are inadvertently disclosed, but it does not provide guidance for the court in determining whether the privilege has been waived. *See* 2007 Advisory Cmtee. Comments to Minn. R. Civ. P. 26.02(f).

In other jurisdictions, the basic, well-settled rule is that when a client discloses to a third-party a privileged communication, that particular communication is no longer privileged and is discoverable or admissible in litigation. Michael H. Graham, Evidence: An Introductory Problem Approach 563 (2002), quoted in *Ctr. Partners, Ltd. v. Growth Head GP, LLC,* 981 N.E.2d 345, 356 (Ill. 2012). Furthermore, waiver of privilege for part of a communication waives privilege for the whole communication, and waiver of privilege as to any communication is a waiver as to all other communications on the same matter. 8 John Henry Wigmore, *Evidence* § 2327, at 638 (McNaughton rev. ed. 1961), *quoted in Ctr. Partners*, 981 N.E.2d at 356. The purpose of this waiver rule is fairness, to prevent a party in litigation from selectively disclosing privileged information helpful to it while shielding harmful information under claims of privilege. *See Zirn v. VLI Corp.*, 621 A.2d 773, 781–82 (Del.1993).

The federal rules of evidence have codified the common-law subject-matter waiver rule. Under Fed. R. Evid. 502, intentional disclosure of privileged communications in a federal proceeding or to a federal office or agency waives the privilege for disclosed and undisclosed communications or information concern the same subject matter if the materials "ought in fairness to be considered together." Conversely, unintentional disclosure of privileged communications do not operate as a waiver if the holder of the privilege or protection took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. Fed. R. Evid. 502.

Extra-judicial disclosures of privileged information may not result in subject-matter waiver. Some courts have held that subject-matter waiver applies only in litigation because the fairness rationale does not come into play outside of a litigation context:

Applying the fairness doctrine, we hold therefore that the extrajudicial disclosure of an attorney-client communication — one not subsequently used by the client in a judicial proceeding to his adversary's prejudice — does not waive the privilege as to the undisclosed portions of the communication. Hence, though the district court correctly found a waiver by [the client] as to the particular matters actually disclosed in the book, it was an abuse of discretion to broaden that waiver to include those portions of the four identified conversations which, because they were not published, remain secret.

In re von Bulow, 828 F.2d 94, 102 (2d Cir. 1987).

Non-waiver agreements and clawback agreements may be used to mitigate the effects of unintentional waiver in litigation.

Other Privileges

Minnesota Statutes Section 595.02 codifies several protections available to witnesses in Minnesota courts, such as a spousal privilege, parent-child, priest-penitent, and psychologist-patient privilege. This section reviews a few privileges that may be available when defending professionals. Each jurisdiction's treatment of these privileges differs, and they are not recognized everywhere.

A. Medical Peer Review Privilege

All 50 states have adopted some form of a medical peer review privilege by statute, although the protections granted vary widely. Charles G. Kels, "Odd Man Out? The Medical Peer Review Privilege in Federal Litigation," 60 *Fed. Law.* 52, 52 (Dec. 2013). Minnesota's statute, for example, protects "Data and information acquired by a review organization, in the exercise of its duties and functions, or by an individual or other entity acting at the direction of a review organization" from discovery or introduction into evidence. Minn. Stat. § 145.64 (2014). Information and records available from original sources, however, are not protected merely because they have been considered by a review organization. *Id.; Larson v. Wasemiller*, 738 N.W.2d 300, 310 (Minn. 2007).

Protections provided under federal law are narrower. The Healthcare Quality Improvement Act was enacted in 1986 to encourage honest peer review and prevent practitioners from moving from state to state without a record of prior negative performance. *Kels*, *supra*, at 53 (citing 42 USC §§ 11101-11152). HCQIA protects peer-review committees, committee mem-

bers, and witnesses participating in peer-review activities from tort liability, but it does not protect peer-review materials from discovery in litigation. 41 U.S.C. § 11111 (2014). Some courts have interpreted this silence to mean that Congress rejected a peer-review privilege. *Kels*, *supra*, at 53.

In addition, "Patient Safety Work Product" is protected under The Patient Safety and Quality Improvement Act of 2005. 42 U.S.C. § 299b-21 & -22 (2014). The PSQIA grants broad privilege and confidentiality protections to information generated as part of the cooperative analysis of patient safety events. To qualify, however, review must be analyzed as part of a "patient safety organization" certified by the Secretary of the Department of Health and Human Services. *Kels*, *supra*, at 53.

B. Self-Critical Analysis Privilege

The self-critical analysis privilege is a broad term for what has also been referred to by courts as the self-evaluative analysis privilege, the peer-review privilege, the deliberative privilege, and the self-evaluation privilege. First recognized in *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), it is a qualified privilege under federal common law, designed to protect an entity's internal reviews and investigations from disclosure based on the policy of encouraging companies to assess their compliance with regulations and laws and make any necessary changes without fear of reprisal in any future litigation. Elisabeth M. McOmber, "Self-Critical Analysis Privilege: Does It Protect Manufacturers Seeking to Review and Improve Internal Practices and Procedures?" *ABA Prod. Liab. Section Articles* (July 23, 2014), http://apps.americanbar.org/litigation/committees/products/home.html.

Application of this privilege varies widely between courts, with some courts reaching different results on the same types of documents. *Id.* Courts recognizing the privilege generally require the party asserting it to prove four general elements:

[F]irst, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed. To these requirements should be added the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential.

Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992) (recognizing the privilege for post-accident investigations into the cause of an accident but not for routine pre-accident safety analyses). Courts, however, have been reluctant to embrace this privilege because it excludes highly relevant information. For this reason, whether a court will apply the privilege in a particular fact situation depends in large part on "balancing the public interest furthered by self-assessment against the litigant's private interest in pursuing the search for truth." *Scott v. City of Peoria*, 280 F.R.D. 419, 424 (2011) (surveying cases).

The Minnesota Court of Appeals has expressly refused to adopt the self-critical analysis privilege. In a case involving licensing violations of a nursing home, the court of appeals held that documents generated by the quality assurance division of the corporate nursing home operator were not protected under Minnesota's peer-review statute because the quality assurance division was not a "review organization" made up of professionals. *In re Parkway Manor Healthcare Cntr.*, 448 N.W.2d 116, 119 (Minn. App. 1990). The court further refused to protect the documents from discovery under a common-law privilege for self-evaluative data. *Id*. at 120. The court reasoned that the primary source of law on evidentiary privileges has been statutory; accordingly, the legislature has indicated its intent to be the sole source of evidentiary privileges in Minnesota. *Id.* at 121.

C. Deliberative Process or Executive Privilege

Sometimes called the "executive privilege," the deliberative process privilege protects from discovery (and public records requests) documents reflecting opinions, recommendations, and deliberations that are part of the governmental agency decision-making process. Todd Presnell, "Delaware Court Rejects Deliberative Process Privilege," *Presnell on Privileges*

(Oct. 4, 2013), http://presnellonprivileges.com. The privilege originates in the terms of the Freedom of Information Act, which exempts from public disclosure documents that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This section calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153, (1975). This privilege has been used to protect, for example, a 1973 CIA draft volume about the Bay of Pigs operation, detailing the author's conclusions about the failed Cuban invasion, and an Office of Legal Counsel memorandum authorizing the FBI's collection of calling records from telephone companies without a subpoena. *See National Security Archives v. Central Intelligence Agency*, 752 F.3d 460 (D.C. Cir. 2014); *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1 (D.C. Cir.) cert. denied, 135 S. Ct. 356 (2014).

Minnesota recognizes a similar privilege for the decision-making processes of its administrative agencies. Under this rule, "it is true that it is generally not proper to permit discovery of the mental processes by which an administrative decision is made." *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minnesota Envtl. Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978). Nevertheless, the court permits limited discovery "to insure that the statutory scheme is not thwarted and that the validity of administrative decisionmaking does not become suspect." *Id.* Parties seeking judicial review of agency decisionmaking may seek information through discovery on whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process. *Id.* The inquiry does not extend to inquiries into the "mental processes of an administrator which, being part of the judgmental process, are not discoverable." *Id.*

D. Insurance

Minnesota rules and federal rules require the production of applicable insurance policies during discovery. Fed. R. Civ. P. 26(a)(1)(iv); Minn. R. Civ. P. 26.01(a)(1)(D). Increasingly, plaintiffs seek discovery of the insurance claim file and insurance reserve information. Courts are mixed on whether this information is discoverable. If, for example, an attorney is involved in setting the reserves, a court is more likely to agree the amount is protected by attorney-client privilege or work product. If an attorney is not involved, the admissibility of reserve information turns on whether the court believes the reserves are relevant to the case. *See generally* Sukel & Pipkin, *Discoverability and Admissibility of Reserves*, 34 Tort & Ins. L.J. 191 (Fall 1998).

Some courts hold that interviews and transcripts of interviews prepared by an insurance adjuster are protected work product prepared in anticipation of litigation. *See*, e.g., *Ashmead v. Harris*, 336 N.W.2d 197 (Iowa 1983); *Menton v. Lattimore*, 667 S.W.2d 335 (Tex. App. Fort Worth 1984) (holding tapes and transcripts of interviews by insurer work product). Other courts hold that initial interviews by the adjuster are prepared in the normal course of business and not protected, but that file materials compiled after litigation is threatened are protected work product. *See*, e.g., *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982); *see also State Farm Fire and Cas. Co. v. Perrigan*, 102 F.R.D. 235 (W.D. Va. 1984). Minnesota takes a case-by-case approach. A party claiming statements given to an insurance adjuster, for example, are privileged has the burden to prove that when the statements were made the party intended the information to be used exclusively in defense of any litigation arising out of the incident. *State v. Anderson*, 247 Minn. 469, 477, 78 N.W.2d 320, 326 (1956). In a case claiming bad-faith refusal to pay, broader discovery may be allowed. *See* § 26:14 1A Minn. Prac., *Civil Rules Annotated R 26.02* (5th ed.).

HOW TO WIN (OR LOSE) YOUR APPEAL IN THE TRIAL COURT

BY ERIC J. MAGNUSON (1989-90) AND KATHERINE S. BARRETT WIIK

An appeal is rarely a "do over" like giving the dice another throw. Appellate courts, both state and federal, are not designed to provide parties an opportunity to relitigate their case. Appellate courts have limited jurisdiction, and the focus is usually less about judging the merits of the case or claims than it is on judging whether the trial court did its job. And in making that inquiry, the implicit question is always whether the lawyer did his or her job in raising the right issues, and preserving them for appellate review.

For an appellant, the landscape on appeal is an uphill climb. The path to victory is narrow and steep. How you litigated issues at the trial court will have dramatic implications for your chances on appeal. Employing appellate-minded strategies and tactics at the trial court can maximize your chance of prevailing on appeal, and ensure that your client never hears the dreaded words, "That's a great argument, but it was not preserved."

This article is intended to hit the highlights of the many considerations that you need to keep in mind as you proceed from the start of your case to the end in the trial court. It is by no means a complete discussion. There are many excellent resources available to the practitioner on questions of appealability, procedure and strategy. For the Minnesota practitioner, those include: (1) Eric J. Magnuson, David F. Herr & Sam Hanson, *Minnesota Practice: Appellate Rules Annotated* (2015 ed.); (2) *Eighth Circuit Appellate Practice Manual* (Minnesota CLE, 6th ed., 2013); and (3) Eric J. Magnuson & David F. Herr, *Federal Appeals: Jurisdiction and Practice* (Thomson Reuters 2015 ed.). And there is no substitute for talking appellate issues through with colleagues. Sometimes the trees are hard to see in the forest, and a fresh set of eyes can be helpful.

I. Pretrial

A. Consider the Appellate Landscape Early and Often

Consider the appellate landscape early on in your case, ideally even before the lawsuit gets started. In some instances, it might be fairly clear early on that the case is likely to be headed to an appeal, perhaps because the case is high-value or high-stakes for your client, the parties are deeply entrenched in positions far apart, or because the dispute involves novel or unsettled legal issues. Counsel for plaintiffs may consider potential appellate issues in deciding whether to bring a case in state or federal court, or if the case could properly be brought in more than one federal court, in which federal district to file suit.

As a defense attorney, consider the appellate landscape when determining whether you might remove a case originally brought in state court to federal

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court, whether the case is in the right forum or venue, and whether and where you might seek to consolidate cases. Be sure you are aware of any differences between potential forums in substantive law, legal doctrines, rules of civil or appellate procedure and even judicial attitudes that might ultimately have appellate implications.

B. Preserve Issues through Precise Motion Practice

As your case proceeds through discovery, and the trial court is presented with disputes, it's important to carefully preserve any adverse discovery rulings for appeal. Appellate review of discovery decisions, including rulings relating to the application of the attorney-client privilege, is likely to come at the end of the case, in a post-judgment appeal. While it is the rare case where discovery issues result in appellate relief, that relief can never be granted if the issue is not preserved. *See Minnesota Practice: Appellate Rules Annotated*, § 103.16 (analyzing the scope of review on appeal and the need to raise issues before lower court).

Even if your trial court judge or magistrate prefers to resolve discovery disputes with less formality, it is important to always make your position on these discovery disputes part of the lower court record, and to raise before the trial court all arguments that you might want to advance in a later appeal.

Many appellate courts have a fairly low bar for preserving an issue in the trial court, meaning an argument or issue does not have to be elaborately developed to be preserved, but when a record is silent on an issue, it will be challenging to convince an appellate court that the issue was not waived.

File short legal briefs on all important discovery motions or issues, and renew objections at a later date, such as at summary judgment and trial, to continue to preserve the issues. Insist on a decision by the court on an important issue. Don't yield to pressure to stipulate or compromise; there will be no appellate review if you do.

C. Assess for Interlocutory Appeal Issues

As you receive favorable and unfavorable rulings through the life of a case, it is important constantly to assess whether an interlocutory appeal is appropriate. There are several pathways to interlocutory appeal. Some rulings, like the grant or denial of a preliminary injunction, are immediately appealable, and the right to challenge those rulings may be waived if not immediately appealed.

The need to appeal other issues may not be so apparent. For example, in Minnesota state court, if the district court denies a request to change venue as of right, the order is not appealable; the aggrieved party must seek immediate appellate review by writ of mandamus. If the decision to retain venue is not challenged at that point in time, it may not be challenged at the end of the case – any objection is waived. *See Minnesota Practice: Appellate Rules Annotated*, § 120.4; *Peterson v. Holiday Rec. Indus.*, 726N.W.2d 499, 504 (Minn. Ct. App. 2007) (declining to review issue of venue post-judgment, given appellants' failure to file a petition for mandamus following the district court's ruling on venue). Every decision that goes against your client should be carefully reviewed so that you can make a reasoned recommendation to your client about whether you can appeal, whether you must appeal, and whether you should appeal. The answer to the last question is sometimes the most important, because not every decision that can be appealed should be. But it is your responsibility to tell your client the options, so that the client can make a reasoned choice.

Other pre-trial rulings may be appealable depending on the outcome. For example, orders compelling arbitration generally cannot be appealed until after the arbitration, but orders denying a motion to compel arbitration are immediately appealable. There can be discretionary review from class certification decisions or remands to state court under the Class Action Fairness Act, where you need to petition the court of appeals to seek immediate appellate review. Finally, if you receive a partial judgments or rulings on dispositive legal issues that could substantially narrow the scope of the litigation, consider whether you might ask the district court to certify the question for appeal. Both federal and state courts have procedures for such interlocutory review. *See Federal Appeals: Jurisdiction and Practice*, §2.9; *Minnesota Practice: Appellate Rules Annotated*, § 103.5; *Contractors Edge, Inc.*

v. City of Mankato, A14-0223, Slip Op. (Minn. May 20, 2015) (discussing circumstances where a Rule 54.02 certification is appropriate and holding that certification was improper in this case).

Finally, some pretrial rulings can be appealed at the time they are issued, or at the end of the case. For example, in condemnation cases, an appeal can be taken either from the initial order of the district court finding public necessity, or from the final judgment after the conclusion of the condemnation proceedings. *County of Blue Earth v. Stauffenberg*, 264 N.W.2d 647, 649-50 (Minn. 1978). *See also Engvall v. Soo Line R.R. Co.*, 605 N.W.2d 738, 744-45 (Minn. 2000) (holding that certain interlocutory orders can be appealed immediately or after entry of judgment). Circumstances can change, and one danger in waiting to appeal is that the delay could enable your opponent to argue that subsequent events have made the issue moot. *See, e.g.*, *Housing and Redevelopment Authority v. Walser Auto Sales, Inc.*, 641 N.W.2d 885 (Minn. 2002) (analyzing respondent's mootness argument in condemnation case but concluding that issue was not moot). You need to know whether your case has such an issue, and what the advantages and disadvantages are in choosing to appeal sooner rather than later.

D. Preserve Your Arguments at Summary Judgment

Summary judgment is a critical point in every case, for a number of reasons. Even after a subsequent trial on the merits, the lower court's summary judgment rulings can in some circumstances be reviewed as part of a post-judgment appeal. *See Minnesota Practice: Appellate Rules Annotated*, § 103.19; *New York Marine & Gen. Ins. Co. v. Cont'l Cement Co.*, 761 F.3d 830 (8th Cir. 2014) (concluding that a denial of a motion for summary judgment based upon choice of law can be reviewed as part of post-judgment appeal after a full trial on the merits). It is critical for each party to put into the trial court record as part of the summary judgment briefing enough detail in terms of arguments and evidence to enable an appellate court to decide the legal issues down the road.

Raise all key arguments and issues as part of your summary judgment briefing. Use your best judgment to determine how to walk the line between the less-than-effective "everything but the kitchen sink" approach to argument and needing to keep all arguments and issues that may have merit in the mix for appeal.

Given how long it can take cases to move from summary judgment to post-judgment appeal, the legal terrain may change, or your understanding of the facts may change, and thus you could determine at a later date that one particular argument has more impact than you originally thought, but you would most likely need to have raised it in order to have preserved it. Thoroughness in terms of raising issues and evidence at summary judgment can also be helpful for clients responding to an appeal, as it can provide multiple paths to allow an appellate court to affirm the lower court's summary judgment rulings.

If you have taken the time to develop and use demonstrative exhibits during a summary judgment hearing, consider attaching those to a filing or otherwise making them part of the record, so that an appellate court can benefit from the demonstratives during an appeal.

II. Trial

Trials are challenging. Not only do you have to deal with witnesses and exhibits, motions, juries and the judge, but you have to keep one eye on the record at all times. If you don't take the right steps during trial to preserve issues, it will be as if the issue never existed.

A. Make Your Record Regarding Evidentiary Rulings

Obtaining reversal on appeal based on evidentiary rulings is rare, as the standard of review for procedural and evidentiary matters typically requires an appellate finding of an "abuse of discretion." But any chance at appellate review of the trial court's actions regarding admission or exclusion of evidence requires timely and proper objections. Motions in limine should be made on key evidentiary issues, and offers of proof are critical.

It is probably not possible to object too many times to prejudicial and inadmissible evidence. Even if evidence has been the subject of an unsuccessful motion in

limine, make sure to object on the record during trial. This is sometimes necessary to keep the issue alive for appeal, because the appellate court may conclude that the reasons for the court's ruling in limine don't control during trial, in light of changed circumstances. It is also sometimes critical to move to strike any inappropriately admitted evidence. Many trial lawyers are hesitant to be too lawyer-like at trial, and they shy away from the formality and repetition of objections when they know the objections will be overruled. Don't fall into that trap — make a clear record of your objection, and make sure that it is consistent and constant.

Objections to admission of evidence must be timely and the grounds for the objection stated specifically. Objections must be specific enough to make it clear to the trial court what action the party wants the court to take and why the court should take such action.

Objections to exclusion of evidence must also be renewed at trial even if the disputed evidence was the subject of a motion in limine. Trial counsel must make an offer of proof, again with enough specificity to allow the trial court to properly understand the relief sought and the basis for that relief. If possible, get excluded exhibits marked and made part of the record — even if not part of the evidence at trial — so that excluded evidence can be considered by the appellate court.

If witness testimony is excluded, ask the trial court to allow the witnesses to testify outside the presence of the jury as part of an offer of proof, so that the excluded testimony can be preserved and made part of the record. Being able to read the excluded testimony first-hand may make an appellate court more willing to overturn an evidentiary ruling than having to simply rely upon argument from counsel about what would have transpired if the witness had been allowed to testify.

Sometimes you can avoid irritating the judge, who may consider the issue conclusively decided, by submitting a written offer of proof — viz. — "If allowed to testify, witness X would have said ..." — so that the record is complete on what evidence was excluded. Remember, you not only have to show that the judge made the wrong evidentiary ruling, but that the error was prejudicial. The only way to show that in many instances is to have a detailed statement of what the excluded evidence was, so that the appellate court can fully weigh its significance.

B. Jury Instructions and Verdict Forms

Appellate arguments relating to jury instructions and verdict forms can play a central role in appeals, in part because they relate to the core legal standards in play. If you want to argue on appeal that the court should have given an omitted instruction, you must have asked for that instruction in writing. And if you want to argue that an instruction should not have been given, you need to have made a clear and concise objection on the record in order to preserve the issue for appeal — it is not enough to have simply offered an alternative instruction that the court turned down.

While these rules seem easy enough in the abstract, jury charge conferences usually come at the end of the trial. The court and the lawyers are tired, and in a hurry to get to the finish line. In addition, charge conferences are often informal sessions in chambers, where the details of the instructions are discussed and debated, compromises are proposed, and modifications made by agreement. Many judges don't have their court reporter take down this often free-ranging discussion. It is crucial that you don't let the informality stand in the way of the record. When all is said and done, and the final instructions are in place, you have to be sure that your objections to the final instruction — either as given or as to omissions — are clearly stated. It is good practice to make a short summary statement of your final objections, and the reasons for them. Sometimes that is the difference between getting appellate review and not getting it.

The record-making does not end there, however. The instructions may not be delivered by the court as agreed, or there may be some reason (something said in final argument) that requires supplemental instructions. Objections must be made before the jury retires to deliberate, in order to give the trial court the opportunity to cure the issue.

The same principles apply to preserving issues relating to a special verdict form. Rule 49.01 provides that

if an issue is not on the special verdict form, then the issue is submitted to the court for trial. Be sure that all of the key factual issues, or mixed issues of law and fact, are included in the verdict form that goes to the jury. If they are not, make a record. A party must object to the court's adoption of a verdict form that it opposes — it is not enough to just have offered one's own version that is not accepted or used by the Court.

C. Rule 50 Motions for Judgment as a Matter of Law

When litigating in federal court, it is critical to follow the two-step procedure under Federal Rule of Civil Procedure 50(a) and 50(b) regarding motions for judgment as a matter of law ("JMOL"). First, bring a Rule 50(a) motion at the close of your opponent's evidence, or at the close of all of the evidence and before the case is submitted to the jury. Your Rule 50(a) motion must specify the judgment sought and the facts and law that support your claim that you are entitled to such a judgment.

After the verdict, renew your JMOL with a Rule 50(b) motion. This has the same requirements in terms of content: specify the judgment sought and why you are entitled to that relief. Renewal is critical, because when the judge denies, or declines to rule on the earlier trial motion, the trial court is deemed to have withheld determination of the legal issues until it rules on the renewed motion. Failure to renew waives the right to appeal the denial of the motion for judgment as a matter of law.

Failure to bring a Rule 50(a) motion prior to submission of a case to a jury will preclude bringing a Rule 50(b) motion after a jury enters its judgment. And failure to bring both a Rule 50(a) motion later followed by a Rule 50(b) motion will preclude appellate review of the sufficiency of the evidence. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006) (reversing the decision of the court of appeals to vacate judgment and order new trial based on insufficiency of the evidence because defendant had failed to bring either a Rule 50(b) post-verdict motion for judgment as a matter of law or Rule 59 motion for new trial; Rule 50(a) motion alone was insufficient).

In Minnesota state court, while a failure to file a post-verdict motion for judgment as a matter of law may not preclude appellate review of the sufficiency of the evidence in all circumstances, as a general matter, attorneys should treat a post-verdict motion as mandatory in order to preserve appellate review of the sufficiency of the evidence. *See Minnesota Practice: Appellate Rules Annotated*, §103.19 ("When no motion is made, however, an appeal from the judgment in a jury case results in a review that is limited to whether the evidence sustains the verdict under any applicable rule of law.").

D. Preserving Error During Closing Argument

Objecting during closing argument can be awkward, and is often discouraged by trial court judges. Many seasoned trial attorneys consider it bad form and counter-productive to object even once during opposing counsel's argument. However, if your opposing counsel engages in objectionable conduct during closing argument, you must preserve this issue for appeal by objecting succinctly and clearly on the record, and asking the Court for the relief you desire. If the trial court is impatient or negative towards such objections, make it clear your objection is categorical and recurring, or consider renewing it at the close of your opponent's argument.

Sometimes lawyers wait until the close of argument to make their objections. While this is a judgment call, the law does require objections to be timely made, and some judges may not accept a late objection. Consider rising and asking for permission to approach the bench when making an objection to a final argument. It is more decorous, less intrusive, and gives the court and opposing counsel a chance to hear the objection before the jury does.

But under no circumstances should you allow an objectionable argument to pass by without taking some action, unless you are willing to waive any objection for the rest of the case.

The same thing goes for curative instructions or mistrial motions. As hard as it may be to make a mistrial motion at the end of a long and hard fought case, fail-

ure to make the motion may scuttle your argument for a new trial if the verdict goes against you.

III. Post-Trial

A. Motions for a New Trial

In Minnesota state court, a motion for a new trial is an absolute necessity if you intend to challenge the conduct of the trial on appeal — either based on things the court did or things your opponent did. In federal court, a new trial motion does not have the same mandatory quality, but it is still a good idea.

In state court, a motion for a new trial *must* be brought to preserve evidentiary and trial procedural issues for appeal. In order to preserve matters involving trial procedure, evidentiary rulings, objections to instructions, or other similar trial court rulings, when in Minnesota state court, a party must bring a motion for a new trial. *See Alpha Real Estate Co. v. Delta Dental Plan* 664 N.W.2d 203, 205 (Minn. 2003); *Appellate Rules Annotated*, §103.19(b). Without such a motion, the appellate court may only review whether the evidence supports the findings of fact and if the findings support the conclusions of law and the judgment.

In federal court, under Rule 59, a party need not bring a motion for new trial to preserve issues with respect to trial procedure or evidentiary rulings, but must object on the record at trial or make an offer of proof to preserve evidentiary issue for appeal. *See* Fed. R. Evid. 103(a)(1); *Sanders v. Clemco Indus*., 862 F.2d 161, 165 n.3 (8th Cir. 1988). However, some newer cases indicate that a party that does not move for a new trial could be prejudiced from raising sufficiency of evidence on appeal. *See, e.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc*., 546 U.S. 394 (2006) (reversing the decision of the court of appeals to vacate judgment and order new trial based on insufficiency of the evidence because defendant had failed to bring either a Rule 50(b) post-verdict motion for judgment as a matter of law or Rule 59 motion for new trial; Rule 50(a) motion alone was insufficient).

If a motion for a new trial is denied, an appeal should be taken from both the judgment and the order denying the motion for a new trial.

B. Motion for Amended or Additional Findings

Motions under Rule 52 for Amended Findings or Additional Findings are not required in order to obtain appellate review, but should be made if the Court failed to make a necessary finding. For the most part, motions for amended findings are the equivalent of telling the district court that it got the facts wrong. That is not a prerequisite to making a sufficiency of the evidence argument on appeal. But if the court failed to make a finding on a critical fact, you should consider making a motion asking for that finding, one way or the other. For example, if the case involves a question of agency, but the court does not make a finding that X was the agent of Y, and that fact is key to your case, it is necessary to ask the court to correct that error by making an additional finding.

There is one other thing to keep in mind. Even in court trials, a motion for a new trial is necessary to preserve evidentiary and procedural issues. While the result of a court trial is judicial fact finding and not a jury verdict, the same procedural rules on preservation of error, including new trial motions and Rule 50 motions, apply. *See Appellate Rules Annotated*, §103.19(e)(3).

C. Motions for Fees and Costs

In federal court, motions for attorney's fees and costs are considered collateral to the merits. Pending motions for fees and costs do not prevent judgment on the merits from being final and appealable. *See Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S. Ct. 773 (2014) (fact that claim for attorney's fees was based on contract did not mean unresolved motion for attorney's fees prevented merits judgment from becoming final). Orders entered by the district court after the entry of judgment, such as an order awarding attorney's fees, must be appealed separately from the final judgment if they are to be considered by the court of appeals. *Eighth Circuit Appellate Practice Manual* at §12.1 (citing *Goffman v. Gross*, 59 F.3d 668, 673 (7th Cir. 1995); *TAAG Linhas Aereas de Angola v. Transam. Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990)).

In Minnesota state court, if attorney's fees or sanctions still need to be decided, judgment is usually not

final. If only costs remain, it is final. *See* Eric Magnuson, *But What About My Fees?*, Minnesota Lawyer, Feb. 17, 2014; *Appellate Rules Annotated*, § 103.6.

IV. Conclusion

Most appeals are won, or lost, by decisions made during the course of the trial court proceedings. Taking an appeal is always an uphill battle, but you can meaningfully improve the odds of reaching the summit for your clients by being strategic and thoughtful about how you build your record and preserve issues for appeal.

There are lots of things to worry about in the course of a case, particularly during trial. Sometimes the best thing to do is take a step back and talk things through with a colleague not involved in the ongoing struggle. A fresh brain and an independent analysis can help you keep a broader perspective — the forest of appeal compared to the detailed trees of trial. However you accomplish it, you need to keep an eye to an appeal during the trial — when the record is still open and issues can be raised and framed. A little extra effort can often actually reduce the long-term legal costs to clients, and improve appellate odds, by strategically planning for appellate issues early.

PROFESSIONAL LIABILITY

BY PHILLIP A. COLE (1987-1988)

I. Tips for Representing Clients before a State Licensing Board or Regulatory Agency

The professional disciplines, whether law, medicine, accounting, engineering, beautician, etc., are regulated by the state offices that license them. Typically these licensing boards or agencies are staffed almost exclusively by members of the regulated profession. My experience has been confined to representing lawyers and physicians who have found themselves the subject of a complaint of misconduct usually, but not always, from a former client or patient. The claims of misconduct that are reviewed by the regulatory boards may be, but are likely not, a reiteration of a malpractice claim in civil court. Professional negligence such as a lawyer missing a statute of limitations deadline or a surgeon operating on the wrong knee, do not typically represent a departure from the ethical codes of conduct that govern professions. The rules of conduct for lawyers or doctors do not require perfection in performance, but focus on questions of loyalty, fidelity, diligence in the delivery of the service. Thus, a physician, for example, who operates on the wrong knee while under the influence of alcohol or drugs, will be disciplined.

It is also not a necessary element of professional misconduct that anyone suffers injury or damages. The complainant need not have been the client or patient but could be a bystander. My experience in lawyer discipline has seen several instances of complaints by persons who were opposing parties to the lawyer's client. In the case of physicians it is not uncommon for nurses to make a complaint.

A. Administrative Law: Take Charge Early

Representing professionals in these matters is an administrative law practice. It is not civil litigation as is expected in malpractice suits. The principal adversary in these matters is the board or agency that investigated the claim and has initiated the disciplinary procedure. The Board possesses significant authority to negotiate settlements in these matters as well. The Board also has a substantial record to inform the advocate of how it views appropriate discipline in the most common manner of violations.

The procedures in Minnesota under the Lawyers Professional Responsibility Board (LPRB) exemplify the administrative character of these proceedings across the range of most professions. The Board consists of 16 members appointed by the Supreme Court including nine non-lawyer members. Service on the Board is not compensated, but the Board is served by a full-time staff of lawyers and investigators whose function is to represent the Board in investigating and prosecuting complaints. The Director of the staff is a powerful position and the recommendations coming from the staff to the Board are rarely contradicted. Most complaints are referred initially to regional committees in the judicial districts for investigation and recommendations. The district committee sends its recommendation to the Director who may accept it, reject it or compose new violations not considered at the district level. The Director may propose to issue an admonition, the lowest level of discipline, which if accepted by the lawyer typically ends the matter. The complainant, however, may also object to the Director's disciplinary recommendation and thereby force the matter to the Board for resolution. At this level, the discipline is "private," meaning it is not published for general consumption. The Board and the lawyer can negotiate further and if no agreement is reached,

the matter goes to the Supreme Court. The Supreme Court will appoint a referee to conduct a hearing on the charge. The Director represents the Board at the hearing and must prove the allegations by clear and convincing evidence. The referee will make findings and will recommend discipline. The court gives great deference to the referee's findings but assumes full autonomy on the decision for discipline.

The first rule: do not ignore the Complaint. Unfortunately, especially in lawyer disciplinary proceedings, the initial notice of the Complaint is sometimes ignored while the lawyer expresses outrage with the process and the investigator for the local committee is accordingly dealt with abruptly and is motivated in consequence to develop a significant case where one may not exist. Lawyers typically are afforded limited coverage in their professional liability policies to permit funding a defense of a disciplinary complaint, usually up to five or ten thousand dollars. The time to use this coverage is at the outset of the case. If the matter goes beyond the local district, the lawyer will face expensive litigation to resolve the matter. Lawyers coming before a committee of lawyers in their own judicial district have an edge. They are probably acquainted with members of the committee. If the lawyer has a good reputation, that fact will do the most for him or her at this stage. At this stage the advocate should attempt to play an influential part in the investigation by producing statements of witnesses, helpful documents and a statement by the lawyer. It is unwise to take the Fifth in these proceedings unless the underlying matter is a crime, in which case the lawyer has bigger concerns than the committee's investigation.

It sounds axiomatic to get involved in the early proceedings and influence the recommendation coming from the Committee. There are many cases, unfortunately, where the professional's self-confidence produces disdain for the investigation and sometimes the investigator, who may be a lawyer 2 or 3 years out of law school, produces a report that besides being unfounded is embarrassing and humiliating.

I became involved in a lawyer case that illustrates this concern quite well. The lawyer was charged with neglecting the client's cases and deceiving the client about the neglect. The lawyer actually had a very strong defense that should have caused the matter to be dismissed in the original investigation. The committee's investigator was a young woman about two years out of law school. The lawyer was dismissive of her, and she developed a strong animus toward him. She reported to the Committee and recommended public discipline and suspension. The local Committee did not go this far and sent a recommendation to the Director for admonition only. In her report transmitting the recommendation, the investigator described a case of deplorable conduct that was simply not supported. The Director advised he would issue an admonition unless the lawyer appealed to the Board. At that point I became involved and filled out the investigation with facts not revealed in the report. The Director rejected the investigator's report in whole and dismissed the charges. If those charges had been addressed at the initial stages and if the investigator had not become an adversary, the matter would have been dismissed routinely.

The mandate to cooperate with the investigating and charging authorities is a hallmark of administrative practice. Such an approach does not assure a good outcome, but in cases where discipline is warranted, such an approach can mitigate the discipline to be recommended.

If the matter gets to an adversary proceeding before a referee, all gloves come off. This proceeding is a trial in every sense of the word. It matters, even here, that the record of the proceeding shows cooperation in the investigation. Indeed, it is a duty of the professional to cooperate in these matters. Even if the professional is ultimately acquitted of the charges, a failure to cooperate itself can be the subject of discipline.

I am attaching here the report of a referee in one of my recent cases. Exhibit A[1]. The names are stricken to protect the innocent; it is important to read the opinion to better understand the history of the case and learn how the threat to the professional could have been avoided.

1 This exhibit, 19 pages, is not printed in the print version of this book, but is contained in the electronic version on page 153. Please refer to the electronic version, or contact the Director of the MDLA to request a copy of Exhibit A if you are using the print version.

The matter began at the district level with two clients complaining of the lawyer's conduct of their cases in court. In fact, neither possessed grounds for a legitimate complaint. There was no complaint made of their fee arrangement with the lawyer. When the matter came from the district committee, the report was neutral and might have argued for an admonition for poor communication. The lawyer had dealt rather abruptly with the committee.

A young lawyer on the Director's staff received the report and thought there was more to the case. She believed there were grounds to charge the lawyer with misappropriation of client funds in both cases. Misappropriation, a euphemism in this setting for theft, is among the most serious charges a lawyer can face and it should be expected that if such a charge is sustained, the lawyer will be disbarred.

The lawyer, when contacted about misappropriation, was dismissive of the investigation and not entirely forthcoming with the staff lawyer. He knew there had been no misappropriation and could not imagine such a charge going anywhere. He was correct, there had been no misappropriation; but quite mistaken in his estimation of the Director and the Board. A determination to "get him" developed in the investigation. The Board recommended his disbarment, and the Supreme Court, following protocol, appointed a referee. I came in at that point.

By not taking charge of the issue at the earliest stage, the lawyer had allowed his position in defense to deteriorate. Of most significance in his deteriorating position was the increased determination of the Director and his representative to exact severe discipline on the lawyer. The complaint had morphed into a test of the competence of the Director and his staff and less about the merits of the complaints. In administrative law, challenging the staff or the Board as mistaken should be avoided in favor of offering to work constructively with the staff to reach a just solution. While this is not always possible, it is always worth the effort. Administrative law practice is part lobbyist and part advocate.

In the interim, before the hearing, the Director and the Board kept piling on charges. By the time the hearing commenced, the complaint had been supplemented twice, but the misappropriation charges trumped everything. The Director's evidence on misappropriation was inadequate by any standard, let alone the "clear and convincing" burden imposed in these cases. By the time the Director had convinced the Board to file charges of misappropriation and seek disbarment in an evidentiary hearing, the Director's position became inalterable. From the standpoint of its and the Board's administrative integrity, disbarment cannot be sought for theft and then compromised to lesser, even private, discipline. The objective in these matters is to seek resolution before matters reach this stage. Lawyers who practice criminal law will recognize this strategy.

B. Experts

The use of expert witnesses in disciplinary proceedings for lawyers is limited, but in the case of physicians often essential. Emphasizing the distinction between malpractice suits and disciplinary proceedings, lawyers are rarely called upon to defend their professional judgments before the LPRB. If the lawyer is on the carpet for a mistake in a presentation to a court, it is usually because the error is traceable to problems with alcohol or drugs. Physicians, on the other hand, do find themselves directly confronted by the Board for erroneous judgments in practice. The Medical Board, which is represented by an attorney from the Attorney General's staff (in Minnesota) typically engages an expert to examine the physician's performance in the matter in question. The physician's judgments in diagnosis and treatment will not infrequently dominate the discussion relative to a specific patient complaint. The Medical Board will engage directly on the question of the physician's competence, but the LPRB in Minnesota is rarely is engaged on that issue. In follow up on its rulings the Medical Board may, and often does, order the physician to retrain in some manner on an area of practice. The LPRB may order a lawyer to retake the Bar Examination or its ethics portion but almost always in connection with a period of suspension for misconduct.

II. Ethical Considerations in Professional Liability Cases

Lawyers must always be fully mindful of their ethical obligations in the representation of clients. There are no distinct ethical issues for lawyers representing professionals accused of malpractice or misconduct, but there are situations in professional liability practice that lawyers must be mindful of.

Almost always there is an insurer funding the defense of the client and obligated to indemnify the client in the case of a settlement or judgment. The lawyer will typically have a long standing relationship with the insurer that is important to the lawyer who seeks recurrent retention in professional liability cases. The importance of the business relationship notwithstanding, the client is the professional accused of malpractice, not his or her insurer. The duties of reporting to the insurer on the case as it progresses is derived not from the relationship of the lawyer to the insurer but from the client's obligation to keep the insurer informed. If there are coverage issues between the client and the insurer, the defense lawyer, usually, must stay apart from those because of conflict. In some jurisdictions the insurer in such situations must provide separate counsel to the insured to advise the client (referred to sometimes as "Cumis" counsel after a California case of that name) in an effort to assure the client receives impartial advice. Such separate counsel should not be necessary in the defense of the claim since advice for the benefit of the client is the duty of the defense lawyer.

The professional duties owed the client, however, must not be construed to require the lawyer to mislead the insurer or to adjust opinions about the case if the client insists. The client is entitled to the lawyer's loyalty but does not own the lawyer's integrity.

In order to advise a client with the necessary professional detachment, it is essential that the lawyer remain apart from the client's issues. For this reason it is usually a bad practice for the lawyer to join in business with a client. Doing so is not unethical per se, but the multiple exposures it creates for unethical conduct makes it difficult to avoid problems.

In putting a case together for a professional facing claims of malpractice, the use of expert witnesses is a necessity. The first challenge with expert witnesses is locating one. In medical malpractice my first option is to find discussions of the medical issue in the medical treatises and call the author. There is no assurance the author will be a good witness or will take a position favorable to the case, but there will be no question of the author's qualification and reputation as an expert. It is easier to find experts in legal malpractice. Lawyers asked to be experts in malpractice cases will often see their role as one of advocacy, the primary mindset of the profession. In all cases, however, the best expert is one committed to the issue as argued for the client and not to the cause of the client. In preparing experts, my purpose is to focus the expert as a witness on the subject of expert opinion and not to expand the discussion into the broader issues raised in the case. In medicine, this focus is usually not a problem because the issues for the expert tend to be more academic with a strong tie to learned treatises. In law the issues for the expert are often detached from the professional conduct of the lawyer defendant because they arise in the case within a case where legal malpractice is often defended.

Expert witnesses should be retained in writing with an openly stated fee basis for the services of the witness. There should never be an incentive or contingent element in the fee entitling the witness to profit if the case is successful. The witness should have no stake in the outcome of the case.

The preparation of witnesses in these cases presents no distinct ethical issues from civil litigation generally. A dilemma may arise for the lawyer when a witness is encountered whose testimony suggests an insurance coverage problem for the client or which might raise issues subjecting the client to discipline. If the witness is material to presentation of a successful defense, the client must be presented with the dilemma. If the disciplinary implications are serious, consultations with the client and insurer to pursue settlement should be undertaken. Fortunately this situation will rarely, if ever, be encountered, but this discussion is meant to underscore the fact that the client is not the insurer.

A common conflict in professional liability matters arises when the client wants the case settled to avoid the embarrassment and distractions of defending and trying the case. This is not an issue if the client is also funding the loss, but where the insurer is funding the loss, the client does not possess the authority to settle without the insurer's consent. The lawyer's duty in this circumstance is to offer a professional opinion about the merits of the case even if that opinion argues against the desired settlement.

The critical duty of the lawyer in any litigation setting, including professional liability matters, requires that the advice to the client and the insurer accurately identify the risks for the client in litigation. Professional liability cases are in that category of civil litigation where motions to dismiss and for summary judgment are almost always attempted. In legal malpractice cases especially, the claims often include issues of law that may preempt a jury trial. These motions and arguments must be aggressively pursued. No matter how confident one may be about the defense of a case, a jury trial harbors risks outside the control of the lawyer. These motions in legal and accounting malpractice are likely to transport the lawyer into areas of practice or business quite apart from the raw professional liability issues. Counsel is required to become knowledgeable in a variety of areas of law. In my experience, I have had to study and brief complex issues in patent law, bankruptcy law, real estate law, securities law, antitrust law, etc. More often than not, these underlying issues dominate the discussion rendering questions about professional negligence itself to secondary status.

As an example, and not an uncommon one, I am attaching a memorandum I filed in a legal malpractice case in Hennepin County, Minnesota District Court. Exhibit B[2]. In this case, the lawyer as counsel for a plaintiff in an underlying legal malpractice case had failed to file a timely expert affidavit to support the claims, and the court had dismissed the client's action. The professional negligence in failing to file the expert affidavit was indefensible, but the question of whether the underlying lawsuit would have been successful remained. The question in the underlying case dealt with the process in establishing mechanics liens on lots in an undeveloped subdivision and whether rulings in the underlying case had injured the client. It focused as well on the question of whether the lawyer in the underlying case had been negligent. The claim presented two underlying matters requiring the former client to show that his mechanics lien would have been valid but for the negligence of the lawyer he hired to file the liens. The defense of the case had virtually nothing to do with the standards of practice for lawyers. Experts on the mechanics lien issue, of course, abounded, but they canceled themselves out. The district court was the only expert that mattered. The malpractice case was dismissed on a motion to dismiss when the court found that Minnesota statutes would have barred the former client from obtaining any liens to enforce. The lawyer had failed to meet the standard of care by not producing expert witness disclosure in a timely manner, but the error was inconsequential to the client. The interesting aspect of the case is the fact that expert witnesses wanted to argue about the outcome when under the law it was reasonably clear the contractor client had no right to levy or enforce any mechanics lien. In legal malpractice there is always an expert available on an issue.

III. Legal Malpractice in the Arena of the Business Lawyer

No area of legal practice is secure from the legal malpractice claim.[3] A 1986 study by the ABA found that only 5% of the reported claims arose from representation of a client in business or corporate setting. The areas of practice with the most experience were real estate and personal injury. A mid 1990s study out of Oregon, however, showed that business practice accounted for over 17% of claims and was among the highest in experiencing claims. In truth, the experi-

2 This exhibit, 24 pages, is not printed in the print version of this book, but is contained in the electronic version on page 172. Please refer to the electronic version, or contact the Director of the MDLA to request a copy of Exhibit B if you are using the print version.

3 Except where indicated otherwise, the term "malpractice" as used in this article refers to errors by a lawyer claimed to be the product of negligence. Lawyers also possess fiduciary duties to their clients which can subject them to liability and discipline under the Rules of Professional Conduct. Negligent errors do not by themselves subject the lawyer to discipline. Lawyers like any actor in the economic sphere are exposed for liability to the victims of their intentional misconduct.

ence level will vary in relation to the economy. Legal malpractice claims arise out of client disappointment. When businesses are failing, the disappointment level rises and lawyers practicing in this area experience claims along with accountants. In this passage from *Viner V. Sweet*, 30 Cal. 4th 1232, 1241, 70 P.2d 1046, 1051 (2003), perhaps the most influential decision on this subject in the country, the California Supreme Court discusses the judicial concern with the vulnerability of the profession to claims by clients disappointed in business ventures:

> When a business transaction goes awry, a natural target of the disappointed principals is the attorneys who arranged or advised the deal. Clients predictably attempt to shift some part of the loss and disappointment of a deal that goes sour onto the shoulders of persons who were responsible for the underlying legal work. Before the loss can be **1052 shifted, however, the client has an initial hurdle to clear. It must be shown that the loss suffered was in fact caused by the alleged attorney malpractice. It is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments unless the courts pay close attention to the cause in fact element, and deny recovery where the unfavorable outcome was likely to occur anyway, the client already knew the problems with the deal, or where the client's own misconduct or misjudgment caused the problems. It is the failure of the client to establish the causal link that explains decisions where the loss is termed remote or speculative. Courts are properly cautious about making attorneys guarantors of their clients' faulty business judgment.

The concerns expressed in *Viner* are shared by the Minnesota Supreme Court. Our Court cites *Viner* in its decision in *Jerry's Enterprises v. Larkin Hoffman*, 711 N.W. 2d 811 (Minn. 2006) where it applied the elements of a legal malpractice cause of action to a business transaction. It cited the standard elements of the malpractice claim as applied to the loss of a cause of action, the usual claim arising out of a litigation error:

To bring a successful claim of legal malpractice, a plaintiff traditionally must show four elements: "(1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; [and] (4) that but for defendant's conduct, the plaintiff would have been successful in the prosecution or defense of the action." *Blue Water Corp. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983). If the plaintiff does not provide sufficient evidence to meet all of these elements, the claim fails. *Id.* at 816.

The fourth element, the "but for" causation element, could not be applied as stated, so the Court restated the fourth element in its application to alleged transactional malpractice:

> We hold that in an action for legal malpractice arising out of representation in transactional matters, the fourth element of the cause of action is modified to require a plaintiff to show that, but for defendant's conduct, the plaintiff would have obtained a more favorable result in the underlying transaction than the result obtained. *Id.* at 819.

This statement of the causation element constitutes the critical focus in the defense of these cases. Negligence is the province of the expert witnesses, and these are not hard to find even in the truly marginal cases.

The Supreme Court cited *Viner* in placing the "but for" causation burden on plaintiffs in transactional cases but it went further than the California Court by requiring the plaintiff to show that the more favorable result was available in the transaction in question. The requirement to stay in the transaction heavily favors the defense in these cases because the plaintiff/former client must rely upon evidence from sources with wholly different interests to prove a better bargain was available to him or her. The alternative is to permit the client, in the face of a failed business deal, to assert that if the lawyer had advised him more thoroughly on the risks of the deal, the client would not have done the transaction.

There are, broadly stated, two categories of lawyer error in transaction cases. The easiest for the plaintiff

is the plain error case where the client has sustained a loss because the lawyer failed to execute a required task such as recording a security interest. The other and most problematic category for plaintiff is the alleged failure to advise where the client, in the face of a default, for example, learns his remedy is more limited than he believed. The causation case is far more difficult in the latter category. As an interesting note, the California court in *Viner* did not require proof of the more favorable outcome be limited to the "underlying transaction." It would be a great concession to plaintiffs if the former client could build a causation case around the client's wholly subjective assertion that if he or she had known about the risk of the transaction omitted from the lawyer's advice, the entire deal would have been declined. The proof that the deal would have been declined is possessed entirely in the mind of the former client. Sellers of businesses are particularly prone to make a claim when the buyer ultimately does not perform and the seller posits damages based on the profits that would have been earned if the seller had not sold.

The "but for" element mandating a more favorable result in the transaction is the most critical factor in evaluating a claim in the area of business practice. The notion of an error by the lawyer is almost always arguable even in the weakest case. Experts abound in the legal malpractice arena to opine on the standard of care to support malpractice claims. This ease of obtaining criticism of a lawyer's performance by the required expert is not replicated in any other area of professional liability. There most often is not a role for the lawyer expert in "but for" causation, however, and the case returns to its facts.

IV. The Attorney Client Element

It is not uncommon in transactional cases that persons outside the attorney client relationship will claim losses alleged to be the product of malpractice by the lawyer. Common examples are corporate officers, shareholders, and creditors. With rare exception, however, only clients may claim damages for malpractice.

The element of privity, i.e. the requirement that there have existed an attorney client relationship between the plaintiff and the defendant lawyer at the time of the error, is a critical component of the legal malpractice cause of action. The attorney client relationship in the business setting is most often established by contract, and this is commonly done with a new client. Lawyers should describe their undertaking for a client in a retainer agreement when hired. Under circumstances where the lawyer has a long-time relationship with a client, the best practice when the lawyer is handed a new and particularized assignment, is to acknowledge the undertaking in a letter describing the scope of the assignment.

When a lawyer represents a corporation, the corporation alone is the client, and liability for an error will not accrue in favor of board members, officers or shareholders. The picture is muddied in small business situations where the lawyer and his or her firm commonly represent not only the corporation but the principal members of the corporation and often family members. If a corporation has a sole shareholder, there ordinarily should be no conflict between the shareholder and the corporation in a business transaction unless the corporation is insolvent. If insolvent, the corporation must be governed for the benefit of its creditors and in such a case, a lawyer should not attempt to represent both the principal and the corporation because of conflict of interest.

There are three examples of a professional relationship where an attorney might accrue a liability for malpractice. The Supreme Court has described two circumstances by which an attorney client relationship will arise. The most obvious and most prevalent, especially in a business transaction, is a contract for the attorney's services — what we typically call a retainer agreement. Although an agreement for an attorney's services may be oral (subject to some ethical imperatives especially in the case of contingent fee agreements), it is wisest to put the Agreement in writing. A principal advantage of a writing, among many, is the limitation on the scope of the services to be rendered. If an attorney representing a corporation in a stock transaction, for example, does not intend to advise the client on state and federal securities laws and their application to the transaction, it is critical to say so in the agreement. In the absence of the stated

limitation, it should be expected that the lawyer's advice in all areas of the law touching on the transaction will be deemed the lawyer's responsibility.

An attorney client relationship may also arise by what the Court denominates the "tort" method, whereby the lawyer induces reliance upon his advice or service in the absence of an agreement. The relationship may arise in the most disarming of circumstances. For the tort theory to impose upon the attorney a professional duty to a client, there must be direct contact between the attorney and putative client and the attorney must advise the putative client under circumstances where the client's reliance on the advice is reasonable.

The discussion in two cases demonstrate the application of the tort theory. In *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 448 (Minn. 2002) a liability insurer attempted to impose an attorney client relationship with the defense counsel it had retained to represent its insured in a covered claim. The Court made clear that when retained by an insurer to represent an insured on a covered claim, the attorney's client was the insured, not the insurer. The insurer then attempted to claim a relationship on the tort theory because it had reasonably relied on the advice of the defense counsel in managing the defense. The insurer's argument actually made a colorable claim for the application of the tort theory to create an attorney client relationship. The Court nonetheless declined, pointing out that the carrier's duty was to retain counsel for the insured and splitting the loyalty of the lawyer between the carrier and the insured would frustrate that duty.

The case of *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980) is an example of the application of the tort theory that has demonstrably changed practice in the litigation arena. In *Togstad*, the plaintiff had sought the advice of the law firm regarding the merits of a medical malpractice claim. The firm, in a meeting with the client, discouraged the plaintiff on the merits giving her an opinion the case was weak. The Court held whether on a contract theory or tort theory there was an attorney client relationship and considering the lawyer was turning down the case, the lawyer had a duty to advise the client on the statute of limitations. Because of that decision, lawyers rejecting cases decline in connection with their rejection to offer any opinion on the merits of the case, advise contacting other counsel and always warn on the loss of the action on limitations grounds.

In a transactional setting the "tort" relationship might arise where a lawyer extends erroneous advice to a friend or occasional client on the tax implications of a transaction where the lawyer has not been engaged. This "friendly advice" scenario represents a common experience for lawyers. The best practice, nonetheless, is to withhold advice suggesting that the lawyer or his firm might be able to help with the problem and inviting the putative client to call the office. Lack of clarity in the relationship will always work to the disadvantage of the lawyer.

The third relationship allows a non-client to sue the lawyer for malpractice. Where the "sole" or "central" purpose of the lawyer's services to the client is intended to benefit directly a third person, that person may possess a cause of action if an error by the attorney frustrates the intentions of the client. This situation arises most commonly in the case of wills and trusts where a gift to a beneficiary is frustrated by the lawyer's error, but this circumstance is nonetheless a ripe concern for the transactional lawyer. Two Minnesota Supreme Court cases deserve our focus in understanding the nature of the exposure to "direct and intended beneficiaries."

Marker v. Greenberg, 313 N.W.2d 4 (1981), was the first case in Minnesota where this exception to the privity element in legal malpractice was acknowledged. The Court makes clear that claims seeking to use this exception will be heavily scrutinized:

> The cases extending the attorney's duty to non-clients are limited to a narrow range of factual situations in which the client's sole purpose in retaining an attorney is to benefit directly some third party. . . In determining the extent of an attorney's duty to a non-client, courts frequently consider the factors expressed by the Lucas court: (T)he determina-

> tion whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm. (*citing Lucas v. Hamm*, 56 Cal.2d at 588, 364 P.2d at 687, 15 Cal.Rptr. at 823*).*

Id. At page 5.

The *Marker* circumstances are a revealing example of the application of the rule it adopts. In *Marker*, the plaintiff had been the donee of a gift from the lawyer's client of a joint tenancy interest in valuable real estate. The lawyer had arranged for the gifting to the plaintiff as instructed by the client. Later the client died, and the plaintiff learned that value of the real estate would be included in the client's estate including the portion gifted to him in life. He claimed that the lawyer erred by not arranging for the gift to be structured as tenancy in common interest because doing so would have removed his half interest from the donor's estate. The lawyer's defense was that he had structured the gift as directed by the client. The Court acknowledged the standing of the plaintiff as the direct and intended beneficiary of the service rendered by the lawyer but ruled that the manner of the gift was at the direction of the client and the lawyer could not be found to have breached a duty to the plaintiff if he had abided by the client's instructions. The decision does not explore questions of how well the lawyer performed in fulfilling the wishes of the client. For example, the case does not question whether the lawyer was obligated to advise the client on the tax saving strategy in making the gift. It was enough, at least in 1981, simply to carry out the client's instructions.

The discussion in *Marker* is ambiguous and has confused the bench and bar in more than one instance. The Court begins by requiring that the "sole purpose" in retaining the attorney must be to benefit the third person but then goes on to discuss consideration of the so-called *Lucas* factors which talk about balancing tests, the "degree" of the connection between the lawyer's "conduct" and the injury claimed.

For the business lawyer the Supreme Court decision in *McIntosh County Bank v. Dorsey & Whitney*, 745 N.W.2d 538 (2008) has direct application to the practice experience. Dorsey was retained by Miller & Schroeder "to assist in structuring, documenting, and securing" a loan to an Indian Tribe for the development of a casino property on tribal land in New York. The Plaintiffs, McIntosh County Bank along with other institutions, signed up on the Miller loan as participants. The participants acquired portions of the loan transaction based on their percentage of contribution to the loan. Dorsey mistakenly advised M&S that it could close the loan and fund the Tribe in advance of approval of the underlying pledge agreement from the National Indian Gaming Commission which approval was a prerequisite to the enforceability of the security for the loan. NIGC approval never issued. When the tribe defaulted, M&S could not enforce its security interest because of the absence of NIGC approval. In this lawsuit, the Bank participants claimed to be the direct and intended beneficiaries, if not the direct client, of Dorsey's services and therefore eligible to sue for malpractice in allowing the loan to close without NIGC approval. The Court denied standing to the participants in the loan, making clear that one's stake in an enterprise where the lawyer may be advising a principal does not give rise to either an attorney client relationship or a claim as a direct and intended beneficiary of the lawyer's advice.

This principle carries over to a wide variety of transactional circumstances where investors, governmental bodies and lenders may have an economic stake in the outcome of a client's venture but do not acquire a claim against the client's lawyer if an error causes losses to the various participants. Among the material considerations in *McIntosh County Bank* was the fact that Dorsey had no contact with the participants directly and in most cases could not identify them. The participants did not commit to the participation until after the M&S closing. It is being argued that these facts have added the requirement to the third party beneficiary rule that the lawyer must know the bene-

ficiary and have had some direct contact. It would be a mistake to rely on such an argument. Lawyers rarely know the beneficiaries to a will or trust and some might not even be born at the time of the instrument. Direct contact with beneficiaries is not typical, but it has not been plausibly argued in the will and trust setting that these factors rule out the standing of the beneficiary under the *Marker* doctrine.

The confusion in the *McIntosh County Bank* situation lies in contrasting the *Marker* standard that the "sole purpose" of retaining counsel was to "benefit directly" the third person with the *Lucas* factors cited in both the *Marker* and *McIntosh* decisions. Clearly the sole purpose in retaining Dorsey was not to benefit the participants. One might, however, craft a credible argument for participant standing under the *Lucas* factors. Even though Dorsey was aware of the "participation model" employed by M&S, it was deemed not to be aware of the "intent" to benefit them. The attorney's awareness of the intention to benefit the third party is a necessary, even common sense, requirement for the application of the *Marker* rule to allow standing.

In a transactional setting, lawyers issuing opinions to a client's counterparty or lender on certain matters will give rise to an attorney client relationship with the recipient of the opinion, but only with regard to subject of the opinion. It is advisable and customary in the letters offering the opinion to limit the right of reliance on such opinion to the addressee.

What seems evident in putting together the decisions in *Marker, Pine Island* and *McIntosh County Bank*, is that the Court is reserving to itself a large policy component to the final endorsement of an attorney client relationship or "direct and intended beneficiary" standing given the facts of an individual case. In close cases, therefore, this issue will be fought primarily as a matter of law because the governing factors are debatable. It is rare to see this issue go to a jury, and the tone of the cited cases suggests the issue should be decided by the court.

THE TRIPARTITE RELATIONSHIP

THE MUCH-DISCUSSED, LITTLE-UNDERSTOOD, ETHICAL AND LIABILITY TRAP FOR THE UNDERINFORMED

BY RICHARD J. THOMAS (1997-1998)

A. INTRODUCTION

With its inherent risk-spreading mechanism, it may safely be said that insurance is the grease upon which modern commerce may spin. It allows us to unfurl the sails, advance into the unknown, and conquer that which, but for this protection, cowards would be made of us all. The benefits, of course, come with an inherent cost: in exchange for taking on the risk, the insured against whom responsibility is charged gives up the inherent control that previously united lawyer and client and kept their relationship sacred, private and distinct. The insurer now sits at the table and has much to say about how matters will be resolved. Indeed, with many policies, the insurer picks the defense counsel, controls the defense, and decides if, when and for how much the matter will be resolved. The insured, the essential actor in the dispute, becomes a bystander. In truth, the insured is anything but. The duties owed are, as defined by any jurisdiction, primarily to the insured. The duties owed to the insurer, arising out of the agreement of insurance, depend in significant part upon the jurisdiction answering the question. Some jurisdictions deem counsel representing the insured as being, in essence, representing two parties. Minnesota takes a different view. Since *Pine Island*,[1] it is clear that the lawyer's client is the insured (absent express agreement to the contrary). The duties to the carrier arise out of the insured's obligations under the contract of insurance — notably the duty to cooperate such that information provided to the carrier, analysis of the defensibility and exposure represented by the claim — are necessitated not primarily by an independent duty to the carrier but to fulfill the insured's own duty to cooperate. The relationship between lawyer, client and insurer is commonly called the tripartite relationship. It encompasses occasionally blindingly complex questions of conflict of interest, duty to disclose and inform, the seeking and receiving of informed consent for continued representation, when to withdraw, when not to withdraw, when and if actions can be taken contrary to the desires of the carrier but favored by the insured, scope of representation, and potential liability to the insurer and the insured when these concepts clash and the lawyer has failed in some regard to meet the professional obligations inherent arising out of this relationship.

This chapter will discuss the tripartite relationship as it relates to the Minnesota Rules of Professional Conduct. It will attempt to bring some clarity to common questions and, equally important, recognize where there are no good answers and clarity must necessarily await another day or simply remain the conundrum that currently exists.

Finally, some time will be spent discussing the professional liability exposure under Minnesota law and, in light of the *Pine Island* decision which denied a carrier the ability to assert a malpractice claim against defense counsel **under the facts of that case,** whether defense counsel's only exposure remains to the insured.

1 *Pine Island Farmers Coop v. Erstad & Riemer, P.A.,* 649 N.W.2d 444 (Minn. 2002).

B. THE MINNESOTA RULES OF PROFESSIONAL CONDUCT AS THEY RELATE TO THE DEFENSE ATTORNEY AND THE TRIPARTITE RELATIONSHIP

In 2003, the Minnesota Bar Association created a task force on the ABA Model Rules of Professional Conduct that significantly rewrote many of the Minnesota Rules of Professional Conduct. One of those significant changes was the introduction of the concept of "informed consent" and the not-infrequent requirement that "informed consent" be obtained and memorialized in writing. Rule 1.0(f) defines informed consent as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

An essential element of the insurance policy is the carrier's right to control the defense. Generally, but not exclusively, this involves the selection of counsel. In addition, the selection of counsel is met with, depending upon the carrier, insuring guidelines. As will be seen, the nature, extent and any restrictions contained within such guidelines may give rise to disclosures and the lawyer's need to provide "informed consent" to the insured to allow for representation under these circumstances.

Without question, the greatest gift that lawyers give to those they serve is independent judgment. This is encased in Rule 5.4(c) which, although it allows for a third party to pay legal fees, does so under this express condition:

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

Conflicts of interest can quickly arise out of the simple fact that the insurer is a source of ongoing business, a source of payment, and the defense lawyer has the inherent desire to please that carrier so that additional business will be forthcoming. The Rules understand and contemplate this, as well. Rule 1.7, dealing with the conflict of interest involving current clients, is most frequently understood to prevent a lawyer from representing clients directly adverse to each other. That is, of course, only part of the equation. Rule 1.7(a)(2) recognizes that even when parties are not in direct conflict with one another, a lawyer cannot represent an insured if:

> [T]here is a significant risk that the representation of one or more clients will be **materially limited** by the lawyer's responsibilities to another client, a former client **or a third person,** or by **a personal interest of the lawyer**. (Emphasis added.)

As a result, a lawyer cannot take on representation that will be limited by any concerns that the lawyer may have with respect to another entity (insurer) arising out of the lawyer's "personal interest" (desire for ongoing business). In many cases, this concern, alone, will prevent a lawyer from giving an insured any advice that would be to the disinterest of the carrier who has retained the lawyer thus forming one more legitimate reason to avoid opining on coverage issues when hired to defend the action itself.

The Rule is not an absolute prohibition, however, and notwithstanding a Rule 1.7(a)(2) conflict (personal interest), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Again, the concept of "informed consent" arises, and is significantly concerned with, the tripartite relationship and its inherent effect on a lawyer's representation.

Comment 13 to Rule 1.7 specifically addresses "Interest of Person Paying for a lawyer's Service":

> A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (B) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Rule 1.8(f) provides:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent **or the acceptance of compensation from another is impliedly authorized by the nature of the representation;**
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.
>
> (Emphasis added.)

Defense lawyers, who are representing clients pursuant to policies of insurance giving the insurer the right to retain counsel, are not obligated to give informed consent as defined by the Rule for this representation. That is what Rule 1.8(f)(1) means and intends. This does not, however, eliminate the obligations to make the necessary disclosures *if* the relationship with the insurer is such (through guidelines or otherwise) whereby the lawyer believes that his or her independence and/or abilities are affected. This must be determined on a case-by-case basis.

When, however, the judgment is made that a lawyer's ability to fully represent the client is being affected by the lawyer's relationship to the carrier, or the obligations placed upon the lawyer **by** the carrier, the duty to give the client "informed consent" arises and that consent (the explanation and the agreement) must be "in writing." Rule 1.7(a)(2)(4).

In many circumstances, it can be argued, guidelines enhance rather than detract from a lawyer's ability to represent a client by clarifying what must be communicated, when it must be done, how evaluations must occur, etc. Others, however, may be draconian. The point being that a lawyer has an independent obligation, separate and distinct from that which arises in the relationship with the carrier, to keep the client's interests paramount and the client fully informed when any actions of an outside third party can implicate the unfettered professional judgment of the attorney.[2]

2 The extent to which "guidelines" trigger this obligation has been the subject of serious comment. *See*, Susan Randall, "Managed Litigation and the Professional Obligations of Insurance Defense Lawyers," 51 *Syracuse L. Rev.* 1, 21 (2001) ("Specifically with regard to third-party payment and management of the litigation, the lawyers must communicate more than mere fact of both. The insured client must also understand their implications. The lawyer must explain that, as a matter of contract, the insured ceded to the non-client insurance company some of the basic rights afforded to litigants, including the rights to choose counsel and to control settlement; that the lawyer's fees are paid by the insurer, as provided by the insurance policy; that the lawyer represents only the insured because of a potential or actual conflict between the insurance company and the insured, the nature of the conflicts, and its possible effects on the insured's right to indemnification under the insurance policy; that the representation of the insured is limited to defense of the covered litigation; that the insurer has asserted the right to manage the lawyer's conduct of the insured's defense, but that right is subject to the insured's consent, and limited by the lawyer's professional obligation of competence, diligence, and independence to the insured; and finally, the consequences of the insured's refusal to consent.").

Arguably, if the guidelines are sufficiently draconian, the defense counsel should reject the representation under Rule 5.4(c). This is the position taken by the American Bar Association.[3] What is clear, however, is that if, during the course of representation, the defense lawyer recommends one course of action, and the insurer rejects that recommendation, the client must be informed of this occurrence and advised that the client may need independent counsel to address the circumstance with respect to the insurer's obligation to fully defend. Absent such disclosure, the defense lawyer runs the risk of a subsequent ethical complaint and, indeed, a claim for breach of fiduciary duty which may implicate a return of fees as a sanction. *See, Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982).

C. DUTY TO DISCLOSE

Virtually every insurance policy carries with it the insured's duty to cooperate. The failure to cooperate can jeopardize coverage. The defense attorney, in fulfilling contractual obligations of the client (and thereby her professional obligations to the client), must take all steps necessary to ensure that the client's insurance coverage is not jeopardized by a failure to cooperate.

When the defense is being provided without a reservation of rights, little stands in the way of information sharing. The insurer is entitled to know everything necessary to evaluate the extent of the claim, the likelihood of success, and the financial risk associated with settlement or trial.

Issues arise, of course, when the defense is provided pursuant to a reservation of rights and facts arise which implicate coverage.

Rule 1.6 provides the basic rule that a lawyer may not reveal confidential information obtained from a client:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

One might argue that the duty to cooperate, embedded in every insurance policy, provides the "implied authorization" to disclose this information as the client is duty-bound to provide candid responses to the carrier. Comment 5 to the Rule discusses the extent of "authorized disclosure" and provides:

> [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

It is generally accepted that the insurance policy's cooperation clause does impliedly authorize defense counsel to provide the insurer with all information material to the defense and settlement evaluations. *See*, e.g., *New Hampshire Bar Ass'n Ethics* OP 2000-01/05 ("The policy will also typically contain a provision requiring the insured's cooperation in its defense. Accordingly, the insured's execution of this contract will generally constitute an implicit consent (or 'implied authorization' for purposes of Rule 1.6(a)) for the exchange of information necessary for the carrier to monitor and evaluate the case. . . .").

It is equally understood, however, that the "implied authorization" contemplated by the Rule does not extend to providing information to the carrier that would jeopardize coverage. Indeed, Rule 1.8(b) would

3 *See*, American Bar Association Formal Opinion 01-421 (if lawyer believes his representation of the insured will be materially impaired by insurer's guidelines, or if the insured objects to the defense as limited by the guidelines, the lawyer should consult with the insurer and the insured; and if the cause of the material impairment of the representation is not resolved and the insured refuses to consent to the limitations imposed, then the lawyer must withdraw, either under Rule 1.7(b) or Rule 1.16(b)).

seem to trump any suggestion that the defense lawyer has the authority to reveal this information given the fact that it would distinctly disadvantage the client:

> b) A lawyer shall not use information relating to representation of a client **to the disadvantage** of the client unless the client gives informed consent, except as permitted or required by these rules. (Emphasis added.)

In "Defense Counsel and Coverage Implications of the Tripartite Relationship," 13 Litigation No. 7 (Nov/Dec 2003), Danny Howell[4] states the conflicts succinctly as follows:

> First, the easy part: in the absence of any reservation of rights, there is no conflict between the insurer and insured with respect to the defense of the claim.
>
> Secondly, even where an insurer defends under a reservation of rights, this does not, in most jurisdictions, constitute an actual conflict precluding dual representation or requiring the insurer to surrender control of the defense.
>
> Instead, an actual conflict has been traditionally viewed as one where mutually exclusive theories of recovery, only one of which would be covered, are asserted against the insured, creating incentives for insurer and insured to offer mutually exclusive defenses.

It is generally accepted, however, that a defense lawyer is simply prohibited from providing information to the insurer that would jeopardize coverage.[5]

Surprisingly, there are commentators who argue otherwise. *See*, Charles Silver & Kent Syverud, "The Professional Responsibilities of Insurance Defense Counsel," 45 *Duke L.J.* 255, 358 (1995). The leading commentators, in their legal malpractice treatise, take the view that the information must not be disclosed. 4 Malin & Smith, *Legal Malpractice* § 29.8 at 245.

While a failure to disclose information could, potentially, constitute a failure to cooperate, the defense lawyer must never assist in establishing the non-cooperation defense. An example of how this can go terribly wrong can be found in *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d at 281, 294 (Alaska 1980). In *Continental*, the insured allegedly gave false testimony at a deposition. Defense counsel, in response, recommended that the insurer issue a reservation of rights, went on to draft the reservation of rights letter, and then, after sanctions were imposed against the insured by the court for giving false testimony, left the carrier to decide whether to appeal the imposition of sanctions. Later, the court relied on this action by defense counsel, together with a finding that defense counsel failed to take steps to have the insured correct the testimony before trial, in determining that not only was the carrier stopped from relying on the defense of non-cooperation but in finding the carrier liable for damages in excess of policy limits. *See*, also, 4 Malin & Smith, *Legal Malpractice* § 29.23 at 385 ("If the issue of cooperation concerns the veracity of the insured's statements to the insurer, counsel should not undertake an investigation under the pretext of defending the insured to establish that the insured lied to the insurer.").

4 The author knows Mr. Howell, has been involved in cases with Mr. Howell, is very fond of Mr. Howell and is aware of Mr. Howell's significant expertise in this area. Mr. Howell practices in Virginia with Sands Anderson, PC.

5 *See*, e.g., *Farmers Ins. Co. v. Vagnozzi*, 138 Ariz. 443, 675 P.2d 703, 708 (1983) ("We emphasize that the attorney who represents the insured owes him an undeviating allegiance whether compensated by the insurer or the insured and cannot act as an agent of the insurance company by supplying information detrimental to the insured."). *See*, also, *Restatement of Law Governing Lawyers* § 134 cmt. f at 410 ("When there is a question of whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see section 60) without explicit informed consent of the insured (see section 62). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a reservation of rights with respect to the defense of the insured (**compare** section 60, comment l (confidentiality in representation of co-clients in general)."); *Finley v. Home Ins. Co.*, 90 Haw. 25, 975 P.2d 1145, 1156 (1998) ("[A]s a general rule, a defense attorney should never share with the insurer confidential information communicated by the insured. If defense counsel learns of information suggesting coverage defenses, such information must be kept confidential.").

There are, of course, other limits. Rule 1.2(a) requires the defense counsel to abide by a client's decisions regarding the objective of the representation unless that objective exceeds the scope of the representation, or is criminal or fraudulent. If a lawyer becomes aware that a client has, for example, fraudulently misrepresented facts in an insurance application to get coverage, the lawyer need not participate in that fraud by way of silence and continued representation. The solution, however, is not disclosure but withdrawal. This seemingly "simple" solution will be discussed more fully below.

It is generally understood that it is the defense lawyer's duty and obligation to recognize when a conflict of interest arises, as described above, when informed consent must be obtained and when that informed consent must be memorialized. A failure to abide by these rules, and the duties attendant thereto, can expose the lawyer not only to professional liability sanctions but, in addition, a claim of breach of fiduciary duty which, in turn, can result in a return of fees. Typically, a claim for return of fees is uncovered with most professional liability insurance policies.

D. MITIGATING THE RISK

Although a written engagement letter is not typically required, it is always advisable when a new case assignment is received from a carrier to adequately communicate with the insured the scope of what is being done and what is not being done on behalf of your new client. Rule 1.2(c) provides:

> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Where coverage issues are of concern, particularly when a reservation of rights letter has issued, the lawyer is advised to: (1) always be aware of the contents of the reservation of rights letter and whether it changes as the case changes; and (2) clarify, in writing, with the insured/client that his or her engagement is involved in the direct defense of the case and issues involving insurance coverage must be addressed by independent counsel because if defense counsel provides such representation, it will invariably violate Rule 1.7(a)(2) or other such rules.

Learning of information that will jeopardize coverage is one of the areas where the law does not provide a distinct or satisfying answer that recognizes the need of defense counsel to maintain his or her fiduciary duties to the client, mitigate or avoid the client's potential breach of the duty to cooperate, and provide the insurer with information needed to be known and not tip off everyone to what is actually happening. Here is where the suggestions of authors and the reality of practice and the Rules designed to insure basic fairness all collide into uncertain chaos. "Withdrawal" (which protects the lawyer but does nothing for the client) seems simple enough but it is easier to write about than do. Such circumstances are not benign. They leave the insured, perhaps deservedly so, in precarious limbo. And does so with sophisticated players (insurers, courts, other counsel) who also know these Rules, know what is required when "A" occurs, and conclude that when a lawyer "withdraws" "A" must have occurred. The result is, of course, that all of this inherent protection against disclosure results in a type of disclosure through action to all but the most uninformed. Hardly a good solution. But life is hard, the practice of law is hard, and decisions such as this are not easy. Counsel facing such dilemmas are advised to seek the advice of other practitioners sophisticated in this area. The Rules contemplate this, too, and specifically allow a lawyer to consult with another lawyer, for purposes of guidance to assure compliance with the Rules, and information disclosed under such circumstances is permitted. See, Rule 1.6(b)(7).

One approach has been provided by the Pennsylvania Bar Association in a 1997 opinion, which provides:

> Generally, an attorney representing an insured need only inform the insurer of the information necessary to **evaluate a claim**. For example, assume an attorney represents an insured in a premises liability slip and fall. During the course of the representation, the attorney discovers that the subject property is a rental

> property, not a residential property as set forth in the policy.
>
> Although this information may radically affect coverage, the attorney is prohibited from releasing this information to the insurer or any other third parties. In the foregoing hypothetical, the attorney would simply inform the insurer of the nature of the injuries claimed by the plaintiff and the circumstances surrounding the incident. The insurer would have all the information necessary to evaluate the value and basis for the claim and the insured's confidentiality would be protected.

PA Bar Ass. Com. On Legal Ethics and Prof. Resp. Informal Op. No. 97-119, 1997 WL 816708 at *2 (Oct. 7, 1997) (emphasis added).

There is safety in clear boundaries. Here again, clarity of the scope of representation in the original engagement letter, clarifying that the defense lawyer's job will be to defend the case independent of coverage concerns, will relieve the client of any expectation that the defense lawyer will engage in coverage issues and, conversely, limit what is necessary to reveal to the insurer pursuant to the clear understanding of the scope of the representation.

Not surprisingly, this is an easy area for a lawyer to trip into liability — either with a professional liability claim or a claim of breach of fiduciary duty from the insured. As a result, it is essential that defense lawyers be aware not only of the issues directly at hand but, in a general sense, the scope of the policies involved, the application process to get those policies, and whatever representations have been made by the insured to get coverage in the first place or which may affect the resolution of the claim itself, particularly prior to tender. Only this knowledge will provide the sophistication necessary to avoid an unintended, but significantly deleterious, disclosure to the insurer in an attempt to fully engage by keeping the carrier "fully advised" of all particular facts. Needless to say, there is no such thing as a conversation "between you and me" when that "you" is you and "me" is the insurer who has hired you to defend the insured when coverage concerns are lurking. The temptation to "make a friend" will be the first step to disaster.

Examples of what the defense lawyer must be careful in revealing are:

(1) Lack of insured's candor at a deposition;
(2) Facts giving rise to when the insured is first aware of the claim;
(3) Facts giving rise to a conclusion of an intentional versus an unintentional action giving rise to injury or liability;
(4) Facts giving rise to the location of the accident/identity of the injury-causing instrument if the risk insured is location/instrument-specific;
(5) Any facts that would suggest the client has engaged in negotiations prior to reporting the claim and, thereby, made any inadvertent admissions or claims of "claim resolution" prior to carrier involvement (that the carrier will later argue prejudiced its ability to resolve the matter favorably); and
(6) Any facts that would support a rescission action based upon the specific policy involved.[6]

E. SPECIFIC AREAS OF CONCERN

1. The Declining Limits Policy

Increasingly, particularly in a professional liability setting, carriers are selling policies with declining limits. That is to say, the limits are reduced by the defense costs incurred. Such policies place great demands upon defense counsel and the insurer because each may have goals separate and distinct from those of the insured. The insured wants protection; the insurer wants to avoid unnecessary payment. One commentator has addressed the issue as follows:

6 It is beyond the scope of this article to discuss the various facts that could arise that could give an insurer a basis for denial of the claim. For example, in a medical malpractice setting, involving a psychologist, a client, and sexual relations, coverage is highly dependent upon personal intent. Other fact scenarios present similar coverage dangers/disputes. It is incumbent upon the defense lawyer to be cognizant of the coverage issues in the types of cases he or she defends.

> Under the [declining limits] policy, there is an inherent conflict between the insured and the insurer in every case where payment of loss plus payment of defense costs could exceed the limits of liability, since every dollar spent on defense of the claim is a dollar that will not be available for settlement or satisfaction of judgment. There is no problem as long as the insured and insurer fully agree (and continue to agree) on the merits of settling versus defending including issues of timing and resources invested in the process.
>
> The problem is that the insured has a direct interest in assuring that the limit of liability is available for settlement or payment of judgment, while the insurer may seek to defend on the merits. It may be in the financial interest of a risk-adverse insured to offer the entire limits even in a case of poor liability rather than run the risk that a hard-fought defense will deplete the limits and block settlement later or leave an unsatisfied judgment. On the other hand, it may be in the insurer's interest to establish through a hard-fought defense that "nuisance" claims will not invoke any settlement offers from the insurance company. Hence, a conflict is born.[7]

This is an area rank for bad faith where available indemnity dollars are exhausted on defense costs and the insured has not been properly informed of these declining limits and their effect on indemnity. Defense lawyers are advised to keep their clients well-advised of the remaining limits and, when it appears that settlement/exposure can exceed those limits, that independent counsel be suggested and recommended.

2. The Excess Claim

Minnesota generally has favorable bad faith law insofar as insurers are involved. Under *Short v. Dairyland*, 334 N.W.2d 384 (Minn. 1983), an insurer may defend a case, even where the exposure is clearly in excess of the policy limits, in the absence of clear liability. Whether *Short* remains good law is an open question as its approach has been severely criticized by the court of appeals in *Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 545 N.W.2d 57 (Minn. Ct. App. 1996) with the court taking the extraordinary position that the *Short v. Dairyland* formula should be reevaluated in light of the fact that it is clearly an outlier when compared to the law in most states. While the supreme court accepted certiorari of the *Northfield Ins. Co.* case, it was wisely settled before the *Short* standard could be reevaluated by the Minnesota Supreme Court.

The excess possibility is yet another area where defense lawyers must be careful to advise insureds whenever the policy of insurance available for indemnity may be insufficient to cover the exposure and, in writing, should recommend that independent counsel be retained to address the situation.

3. Settlement of a Claim in Excess of Limits

Here again, communication is the key. Bad faith can arise, easily, because the insured has not been properly advised of an ability to settle a claim even where the insurer lacks the obligation and settlement will require the insured's own contribution. This, too, is a place for independent counsel to play an indispensible role.[8]

Significantly, however, defense counsel makes a mistake when they assume that they cannot advise the client on excess issues. They can. And, in fact, they must. Indeed, in certain circumstances, their duty obligates them to engage in a settlement that is to the disadvantage of the insurer. Recall that in the original *Miller v. Shugart*[9] case, the lawyer who did the consent settlement potentially obligating the carrier to a judgment the carrier did not believe to be insured, it was the defense counsel hired by the carrier to defend, pursuant to a reservation of rights, who negotiated the settlement. While this may have done nothing for future referrals, the lawyer clearly fulfilled his duties to the client. Rule 1.7 would likely not allow

7 Gregory S. Monroe, "Defense Within Limits: The Conflicts of 'Wasting' or 'Cannibalizing' Insurance Policies," 62 *Mont. L. Rev.* 131, 148-49 (2001).

8 If the reader is finding fatigue in the repeated recommendation for "independent counsel," be advised that your author defends lawyers as a significant part of his practice and has defended defense counsel, whose only sin was to dissuade an insured from hiring independent counsel (believing there was sufficient coverage and the insurer made the decisions in any event) which resulted in a finding of bad faith by the trial court based upon that recommendation alone.

9 316 N.W.2d 729 (Minn. 1982).

a lawyer to represent the insured in a declaratory judgment action against the lawyer's favorite carrier. To clarify, however, this prohibition does not result from, and should not be analyzed as, a prohibition under Rule 1.7 (b)(2) (3), which provides an absolute prohibition against lawyers representing one client against another client in the same litigation or other proceeding before a tribunal. Under *Pine Island*, the lawyer representing the insured under Minnesota law does not represent the insurer. Instead, the prohibition arises out of Rule 1.7(a)(2) which does not allow the representation because of the conflict the lawyer will have "to the third party" (insurer) as the lawyer fulfills the client's duties to that third party and the lawyer's own self-interest in pleasing that third party which would invariably materially limit the lawyer's representation. The overarching duty is to the insured and, when necessary, even these painful decisions must be made in favor of the insured to zealously represent the client.

4. Special Interrogatories to the Jury

On occasion, coverage will depend upon the answer to a specific question. Did the insured act intentionally? Was the therapist attempting to induce transference, as a therapeutic tool, to advance a course of therapy or was the sexual affair purely personal? Sometimes, to get these questions asked, an insurer must intervene. Jurisdictions differ as to whether an insurer is or is not in privity with its insured with respect to jury findings and, in addition, those jurisdictions differ when a conflict of interest with respect to the answer exists.

What remains clear, however, is defense counsel cannot act on the insurer's behalf to request that specific interrogatories be submitted when those questions implicate coverage. Such a request breaches the defense counsel's duty of loyalty to the insured.

To submit such special interrogatories, the insurance carrier must utilize coverage counsel to represent it in seeking to intervene in the suit against the insured to submit the special verdict forms or special interrogatories. And, as expressed by one commentator:

> [T]he general wisdom seems to mandate that defense counsel, whose only client is the insured to whom she owes a duty of loyalty, must oppose such a motion by the insurance company who pays her.[10]

10 K. Bowdre, "Enhanced Obligation of Good Faith: A Minefield of Unanswered Questions after *L&S Roofing Supply Co.*," 50 *Ala. L. Rev*. at 802.

"I DON'T REPRESENT THE INSURER; WHY IS THAT INSURER STILL SUING ME?"

A. Introduction

The previous section of this chapter discussed the inherent problems associated with the tripartite relationship and the areas where a defense attorney could find him- or herself in ethical dilemmas facing potential professional responsibility claims and/or claims of breach of fiduciary duty. The overarching point was made (at least attempted) to clarify that the insured is the client and the insurer is not. Despite the expansion of potential claims against lawyers brought on by the *Dorsey & Whitney*[11] case, which allows non-clients to sue lawyers if that non-client is the direct and intended beneficiary of the services, the law fundamentally requires that the first element of most legal malpractice claims is the establishment of an "attorney-client" relationship.[12]

Since 2002, in the supreme court's decision of *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444 (Minn. 2002), Minnesota law is clear that when a defense lawyer is retained to represent an insured, absent a express agreement to the contrary, the defense lawyer's client is the insured, not the insurer. As such, it would appear that defense lawyers are bullet-proof with respect to claims by insurers disappointed with result. That comfort, however, is subject to significant concern and question.

B. The Formation of the Attorney-Client Relationship

The attorney-client relationship is established, under Minnesota law, employing either a contract or a tort theory. *See, Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980).

The contract, of course, is a retainer agreement. Nevertheless, a "contract for legal services can be express or implied from the conduct of the parties." *Ronnigen v. Hertogs*, 294 Minn. 7, 11, 199 N.W.2d 420, 422 (1972). Clearly, a lawyer can behave in a manner sufficient to form a contract. In addition, duty to a client also can arise under the "tort theory." Under this theory, an attorney-client relationship is created simply by virtue of the fact that a person sought and received legal advice from an attorney in circumstances in which a reasonable person would have relied upon that advice. *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265-66 (Minn. 1992); *Togstad*, 291 N.W.2d at 693 n.4. In communications with the carrier, given the intimacy of the communication, the advice sought, and freely given, it can be a short step, indeed, to the creation of an "attorney-client" relationship. Note that the *Pine Island* limitation on the finding of an attorney-client relationship between carrier and defense counsel results only when there is no agreement to the contrary. Indeed, the failure to recognize and find an attorney-client relationship in this setting between defense counsel and carrier, where the nature and extent of their interaction would clearly create an attorney-client relationship in other settings, was brought up by Justice Gilbert in his dissent in *Pine Island*:

> Under our traditional contract and tort principles, when an individual is licensed as a lawyer, looks like a lawyer, sounds like a lawyer, acts like a lawyer, gives advice like a lawyer, bills like a lawyer, and the client believes he's being represented by a lawyer, the client is being represented by a lawyer.

Pine Island, 649 N.W.2d at 453.

As we have discussed above, the tripartite relationship is virtually defined by the potential conflicts it creates such that even the *Pine Island* court went so far as to say, "the potential for conflicts exists in every case and actual conflicts are frequent." *Pine Island*, 649 N.W.2d at 450. In *Atlanta International Ins. Co. v. Bell*, 438 Mich. 512, 475 N.W.2d 294, 297 (1997), quoted by Justice Page, "courts and commentators recognize universally that the tripartite relationship between an insured, insurer and defense counsel contains rife possibility

11 *McIntosh County Bank v. Dorsey & Whitney*, 745 N.W.2d 538 (Minn. Ct. App. 2008).

12 *See, Ross v. Briggs and Morgan*, 540 N.W.2d 843, 847 (Minn. 1985); *Blue Water v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983).

of conflict" and that the "interest[s] of the insured and the insurer frequently differ." This concern is echoed by commentators Robert E. Keaton and Allen I. Widiss, in *Insurance Law* § 7.6(a)(1) at 809-10 (1988) wherein they state that "the very substantial prospect that actual potential conflicting interests between insurer and insured will exist in regard to almost any tort claim that may be covered by liability insurance...."

Despite these conflicts, and traps for the unwary, one thing is abundantly clear — the insured is the client of the defense lawyer who has a duty of undivided loyalty to the insured:

> [A]n attorney retained by an insurer to defend its insured, as long as he represents the insured, is under the same obligations of fidelity and good faith as if the insured had retained the attorney personally. The relationship of client and attorney exists the same in one case as in the other.

Crum v. Anchor Casualty Co., 264 Minn. 378, 392, 119 N.W.2d 703, 712 (1963).

We know the insured is a client. *Pine Island* addressed the second question as to whether the insured is the "sole" client of the attorney under Minnesota law. The court of appeals concluded that the insured was the sole client of the attorney but hedged its bet by stating this position is not "firmly established" under Minnesota law. *Pine Island*, 636 N.W.2d at 609.

Any other holding creates any number of conflicting and difficult issues not easily resolved. It is little wonder, then, that a number of courts have reached the "sole client" conclusion to eliminate these considerations. *See*, e.g., *First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669, 671 (1990); *Higgins v. Karp*, 239 Conn. 802, 687 A.2d 539, 543 (1997); *Bell*, 475 N.W.2d at 295, 296; *In re Rules of Professional Conduct*, 299 Mont. 321, 2 P.2d 806, 814 (2000).

In *Pine Island*, however, Justice Page suggested, as other jurisdictions hold, that nothing prevents a finding of dual representation:

> However, we have never gone so far as to hold that defense counsel cannot have an attorney-client relationship with both the insured and the insurer, *see Kleman*, 255 N.W.2d at 235; *Friesen's, Inc. v. Larson*, 443 N.W.2d 830, 831 (Minn. 1989), **and we decline to do so now**.

Pine Island, 649 N.W.2d at 449 (emphasis added).

Kleman was an interesting citation and caused those interested in these issues no little amount of head-scratching. As virtually every commentator points out, if the sole issue is whether the insured is liable, the degree of liability, and damages, there is no need to represent the insurer in a typical defense case. If, however, there are issues between the insured and the insurer (i.e., coverage), the same lawyer cannot represent both. What, then, was *Kleman* all about?

Kleman was the exception that proves the rule. It is perhaps surprising that Justice Page devoted so much analysis to the potential for "dual representation" when "dual representation" essentially never occurs and occurred in *Kleman* only pursuant to an anomaly. In *Kleman*, a 16-year-old, without permission, and without knowledge of his invalid father, "borrowed" the car one evening. In turn, he let another person get behind the wheel. That driver hit and injured a motorcyclist. The insurer brought a declaratory judgment action to determine that the policy did not apply because there was no consent to use. The same lawyer was retained by the insurer to represent the 16-year-old in the event that he (a passenger) was ever sued. The facts revealed that before this representation was undertaken, the insured was advised of the potential conflict, and the 16-year-old was advised that in the event suit was brought against him, the insurer would defend him and provide him protection. An independent attorney reviewed the situation and agreed that, given the insurer's commitment to coverage, there was no conflict. This situation is unique and hardly addresses the question of whether, pursuant to a standard case where an insured hires counsel to defend its insured, the lawyer also represents the carrier. Again, the Page focus is mysterious.

Returning to *Pine Island*, the supreme court declined to hold that the insurer could never be a client such that the insured was always the "sole client" of the defense attorney. In making that decision, however, the court made it clear that fundamental steps would have to be taken before the insurer would be deemed to be an additional client of the defense attorney thus essentially negating the "tort theory" of forming this relationship under these circumstances.[13] The court clarified that overt steps must be taken before the defense attorney will be found to be representing the carrier as well. Before such representation can even occur, there must be a total absence of conflicts of interest between the insurer and the insured. Second, the insured must expressly consent to the dual representation after consultation with counsel. *Pine Island*, 649 N.W.2d at 451. The court found that this approach provided a "bright-line rule" to determine whether defense counsel represents the insurer as well as the insured. Since *Pine Island*, I would venture this has never happened. In the absence of any conflict, there is no reason for the lawyer to represent the carrier, as Minnesota does not recognize a direct action against the carrier and, in the absence of any party status, there is no reason for this representation. Absent these extraordinary steps, the insured remains defense counsel's "sole client." *Id.* at 451. As the relationship goes, presumably, so goes the duty that would otherwise follow.

Significantly, the Minnesota view, eliminating a duty to the carrier, is contrary to the position taken by the *Restatement (Third) of the Law Governing Lawyers* § 53(3) (2004):

> [A lawyer may owe a duty of care to non-clients when and to the extent that]
>
> (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client;
>
> (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
> (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

To the extent one takes comfort in the vagaries of the language, comment f states, in part:

> Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer.

C. IF NO LAWYER TAKES ON THE "DUAL REPRESENTATION" CONTEMPLATED BY PINE ISLAND, CAN AN INSURER EVER SUE A DEFENSE LAWYER FOR MALPRACTICE ON THE BASIS THAT NO DUTY IS OWED?

To answer this troubling question, one must begin with the concept of "equitable subrogation" which was expressed in the Michigan decision of *Atlanta Int'l Ins. Co. v. Bell*, cited above, upon which the Minnesota Supreme Court relied heavily in the *Pine Island* decision itself.

Bell stood for the proposition that an attorney representing an insured does not represent the insurer. So far, so good. Despite this, and the helpful reasoning employed by *Bell* and adopted by the *Pine Island* court, the *Bell* decision **allowed** the insurer to nevertheless sue the insured under the doctrine of "equitable subrogation."

Under "equitable subrogation," an insurer which pays a loss on behalf of its insured can pursue the rights its insureds had against third parties whose negligence or wrongful act caused the loss. *See*, e.g., *Medica, Inc. v. Atlantic Mutual Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1977); *Travelers Indemnity Co. v. Vaccari*, 310 Minn. 97, 99, 245 N.W.2d 844, 846 (1976).

13 Notwithstanding Justice Gilbert's concern for what happens when an attorney "sounds like a lawyer, acts like a lawyer, gives advice like a lawyer, bills like a lawyer, and the client believes he is being represented by a lawyer. . . ."

This concept has traditionally been employed by first-party carriers seeking recoveries against tortfeasors for the damages caused by those tortfeasors that have been paid by the carriers. Nevertheless, liability carriers, saddled with loss caused by the malpractice of lawyers representing their insureds, also want to step into the shoes of those insureds and seek the recovery the insured would have in the absence of a policy that has paid the damage. "Equitable subrogation" is the path to this recovery and the same Michigan court relied on by the Minnesota court in *Pine Island* allowed the claim because:

> Defense counsel's immunity from suit by the insurer placed the loss for the attorney's misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances.

Id. at 298.

Despite this quest to right the perceived wrong, the concept is not quite so simple as the Michigan court would have it. As the Ohio Court of Appeals found in *Swiss Re v. Roetzel & Andres*, 163 Ohio App. 3d 336, 837 N.E.2d 1215 (2005) (a case citing *Pine Island*), equitable subrogation was not employed, despite the "only winner" concept expressed by the Michigan court in *Bell*, because of the following:

> Appellants, however, failed to recognize a key fault in their analysis: they ignore the conflict that existed with Dr. Robinson. Appellants' claim of malpractice alleges that Treadon failed to properly prepare a defense for Dr. Robinson ... Accordingly, from the *insured's* perspective, Treadon had complied with the *insured's* stated interests. In contrast, appellants would like to place Treadon in the untenable position of somehow fulfilling the conflicting interests of both parties. We find that equity compels a holding that when the interests of an insured conflict with the interests of the insurer, equitable subrogation will not exist to permit a claim of legal malpractice when the record reflects that the attorney has complied with the interests of his client to the detriment of the insurer.

837 N.E.2d at 1224 (emphasis original).

In other words, if a claim for equitable subrogation exists, at all, it can only exist when the interests of the insured and the insurer are parallel and no conflict exists between them and the malpractice inures to the detriment of the insurer just as it would the insured had there been no contract of insurance.

This is a point worth reflecting upon. Conceivably, there are cases where the insured is not adverse to a judgment to compensate for a perceived injury that the carrier wants to defend. This is of particular concern in professional liability settings where concepts of personal honor and integrity still surface. What happens to the defense lawyer caught between those mutually exclusive concerns?

The issue of equitable subrogation was argued in *Pine Island* but was not employed. To understand why, we must look at the background giving rise to the *Pine Island* case. *Pine Island* involved a claim when a farmer installed a milk metering system that was manufactured by someone else. A number of his dairy cows were contaminated with bacteria and he brought suit. The defense largely rested upon an assertion that the dairy farmer didn't know how to farm. A third-party action was brought against the manufacturer on a theory that it had either made a defective metering system or failed to properly instruct for sanitary use. The jury found Pine Island 90 percent at fault and the farmer 10 percent at fault. The resulting judgment exceeded a million dollars. While the case was on appeal, Pine Island and its insurer, Farmland Mutual Insurance Company, settled for something just shy of the verdict and brought a suit against the defense counsel arguing over the third-party. Pine Island joined in the malpractice suit ***to recover its $10,000 deductible***.

The court of appeals rejected the equitable subrogation claim by finding that when Farmland settled the case it did so without seeking input from the lawyers whom it sued and, as such, lacked "clean hands" necessary to support an equitable subrogation claim.

When it got to the supreme court, however, the supreme court rejected the invitation to follow Michigan, and its employment of equitable subrogation, and it did so based less on substantive policy and more upon the unique facts presented in the case.

It began its analysis by noting that in *Bell*, the insured in that case did not bring a legal malpractice case against defense counsel. The court went on to reason that since the *Bell* court's holding was motivated "in part" by a concern that defense counsel "would escape malpractice liability if the insurance company were not permitted to go forward with its claim," this was not of concern here because Pine Island had brought its own malpractice action (again, seeking $10,000 of the deductible on a $1,000,000 case). As a result, the inability of Farmland to bring an equitable subrogation claim "will not have the effect of rendering Erstad & Riemer immune from malpractice liability." *Id.* at 452, 453. The court then took this extraordinary, but helpful to lawyers, leap:

> Thus, the reasoning of the Michigan Supreme Court in *Bell* does not apply to the present case. Similarly, because Pine Island has sought to vindicate its own rights by bringing a malpractice action in its own name, there is no need to allow Farmland to step into Pine Island's shoes to assert Pine Island's rights.

Id. at 453.

To make clear what may not be clear — the court did not allow an insurer which paid over a million dollars of exposure as a result of alleged malpractice to be subrogated for that recovery because its insured independently sought recovery of a $10,000 deductible eliminating all need to "allow Farmland to step into Pine Island's shoes to assert Pine Island's rights," never mind that the result is a windfall for the firm which has now avoided the million dollars of damages it will never have to pay to anyone.

The court concluded, however, with language most frightening to defense lawyers:

> Therefore, based on the particular facts and circumstances of this case, we decline to apply the doctrine of equitable subrogation, and we affirm the district court's order dismissing with prejudice all of Farmland's claims.

Id.

From this, we can conclude the following: *Pine Island* followed the Michigan decision of *Bell*. *Bell*, while holding that the lawyer did not represent the insurer and whose sole client was the insured was, nevertheless, exposed to the same malpractice claim that the lawyer would be exposed to if the insurer were his client pursuant to equitable subrogation. The claim of equitable subrogation was not allowed in Minnesota because the insured, fortuitously, sought to directly recover its $10,000 deductible and, thus, eliminated the carrier's right to be subrogated for its exposure in excess of a million dollars. If, however, the insured doesn't seek any direct recovery, there is nothing barring the claim for equitable subrogation under *Bell* expressed in the *Pine Island* decision unless the supreme court revisits the issue and follows the rationale expressed by the Ohio supreme court in *Swiss Re v. Roetzel & Andres*, 163 Ohio App. 3d 336, 837 N.E.2d 1215 (2005).

As a result of the concluding *Pine Island* language, defense lawyers simply cannot know whether Minnesota will or will not allow an equitable subrogation claim in those cases where the insured has not brought suit to enforce at least a portion of the malpractice damages alleged. That decision awaits another day, but no defense lawyer should rest too easily upon the holding of *Pine Island* under the theory that the court made clear the insurer cannot sue on the basis that it's a third-party beneficiary of legal services, or was a "client" of the defense attorney absent express agreement to the contrary with notice and consent.

III. CONCLUSION

The tripartite relationship is much discussed but not sufficiently understood given the varieties of conflict of interest that can occur and the need to be circumspect with regard to any information flowing from the defense lawyer to the insurer in efforts to maintain the client's cooperation duties.

To minimize problems associated with the tripartite relationship, a lawyer should:

1. Make clear the scope of representation in the original engagement letter;
2. Address the insurer with information necessary to evaluate breach, causation and damage and leave alone all information that relates to facts surrounding insurance coverage issues;
3. Never disclose facts that would implicate coverage but, at the same time, never participate in an ongoing fraud to establish coverage. Once facts of an actual misrepresentation or a fraudulent misrepresentation are discovered, withdraw;
4. Keep the insured advised of all settlement offers, the exposure, remaining insurance available, and the need to employ independent counsel to address reservation of rights restrictions, exposures, and the desire to settle;
5. Recall that your duty is always to the insured and, where necessary, settle a case to the advantage of the insured (pursuant to a Miller-Shugart) where the carrier is denying coverage and settlement can be accomplished with a consent judgment;
6. Never value the insurer over the insured by thought, action, deed or representation;
7. Take no comfort that an insurer, though not your client, is forbidden from bringing a malpractice claim; and
8. Be aware of facts that would support a rescission action by virtue of the specific policy involved and never disclose facts that would support such a claim.

MINNESOTA EMPLOYMENT LAW FOR THE DEFENSE LAWYER

BY THOMAS E. MARSHALL (2009-10)

This article is intended to offer an overview of Minnesota employment law with an emphasis on defense considerations. In the article, we'll discuss various claims and potential damages as well as defense issues relating to the defense of claims against private, as opposed to government employers. While many laws are mentioned, I deliberately avoided going into the federal scheme due to space and time constraints.

CONTRACT CLAIMS

At-Will Employment — This is not a claim in and of itself but the basic premise of employment law. When one is employed "at-will," he or she is free to leave the employment at any time for any or no reason. The employer is free to end the employment relationship at any time for any or no reason. No contract exists because the bilateral power of both parties to terminate their performance renders their promises illusory. *Grouse v. Group Health, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981). While Minnesota employment is generally considered to be at-will, *see Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 741 (Minn. 2000), for the most part, the exceptions found in statutory and common law have swallowed up the rule. As for damages, cases involving at-will employment apply contract law damage principles if a contract exists. *See Portlance v. Golden Valley State Bank*, 405 N.W.2d 240, 243 (Minn. 1987).

Minn. Stat. § 181.55 — Again, this is not a claim but a very important statute. This statute says that an employer "***shall*** give to the employee a written and signed agreement of hire, which shall clearly and plainly state" the basic conditions of employment such as pay, hours of service and related issues. (Emphasis added). If an employer does not provide this information, the burden of proof for the terms of the agreement shifts to the employer under Minn. Stat. § 181.56. This presents a pitfall for an employer who says one thing but has no writing to back it up. However, note the case of *Fischer v. Steelock*, 168 N.W.2d 10 (Minn. 1969), where the Minnesota Supreme Court held that the employee's claim for breach of contract of a verbal agreement failed for lack of evidence where both sides disagreed. There was no mention of Minn. Stat. § 181.56 in that case.

Breach of Contract — Like any contract, an employment contract must have an offer, consideration and acceptance. The contract will govern the formal relationship. "Minnesota also has a strong interest in having contracts executed in this state enforced in accordance with the parties' expectations." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 456 (Minn. Ct. App. 2001). Many defense matters involve areas where the employment relationship is at-will, but aspects of that relationship are still governed by other contracts. Typical contracts are restrictive covenants and non-disclosure agreements.

Restrictive Covenants — Minnesota recognizes the validity of restrictive covenants provided the following criteria is met: (1) the parties reached a valid agreement supported by adequate consideration; (2) the agreement protected a legitimate interest of the employer; and (3) the agreements' restriction upon employee's activities is reasonable in scope. *See Satellite Indus., Inc. v. Keeling*,

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396 N.W.2d 365, 639-40 (Minn. Ct. App. 1986). The job itself is sufficient consideration for a restrictive covenant as long as the restriction is known before the employee accepts employment. *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993); *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983). Generally, if the restrictive covenant is entered after employment is accepted, then independent consideration will be required. What is sufficient consideration after that point will depend on the facts of each case. *See, e.g. Bess v. Bothman*, 257 N.W.2d 791 (Minn. 1977) (a payment of $10,000 was sufficient consideration for a person to stay out of a certain business in a specific area for five years). Legitimate interests that may be protected include the company's goodwill, clientele, trade secrets, and confidential information. *See, e.g. Roth v. Gamble-Skogmo, Inc.*, 532 F.Supp. 1029, 1031 (D. Minn.1982); Bennett *v. Storz Broadcasting Co.*, N.W.2d 892 (Minn. 1965); *Saliterman v. Finney*, 361 N.W.2d 175, 177-78 (Minn. Ct. App. 1985) *citing Walker Employment Service, Inc. v. Parkhurst*, 219 N.W.2d 437 (Minn. 1974); *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924). The test for reasonableness is stated in *Bennett at* 899-900:

> The test applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends. The validity of the contract in each case must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and the employee.

The employee bears the burden of proving unreasonableness. *Overholt Crop Ins. Service Co., Inc. v. Bredeson*, 437 N.W.2d 698, 703-04 (Minn. Ct. App. 1989).

Good Faith and Fair Dealing — While many contracts have an implied covenant of good faith and fair dealing, an employment relationship does not. Minnesota does not recognize an implied covenant of good faith and fair dealing in employment contracts. *See Wild v. Rarig*, 234 N.W.2d 775, 790 (1975); *Hunt v. IBM Mid Am. Emps. Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986). Unless expressed in some fashion, this claim if pled, should be dismissed at the Rule 12 stage. *See Lee v. Metro. Airport Comm'n*, 428 N.W.2d 815, 822 (Minn. Ct. App. 1988) (Court reviewed handbook for evidence of good faith and fair dealing).[1]

Unilateral Contract — If an employer has a handbook with certain provisions, such as a just cause termination provision or a progressive discipline policy, the employee may gain certain employment rights. "Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983). Certain terms in a handbook may constitute terms of an employment contract if (1) the terms are definite in form; (2) the terms are communicated to the employee; (3) the offer is accepted by the employee; and (4) consideration is given. *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 707 (Minn. 1992) (citation omitted). The employee has the burden of proving the parties intended to limit discharge to just cause. *See LeNeave v. N. Am. Life Assurance Co.*, 854 F.2d 317, 319 (8th Cir. 1988). Generally, most employers use disclaimers which effectively eliminate most unilateral contract claims.[2] *See, e.g., Audette v. Northeast State Bank of Minneapolis*, 436 N.W.2d 125, 126 (Minn. App. 1989).

Reliance Claims

Brussard v. College of St. Thomas — *Brussard v. College of St. Thomas*, 200 N.W.2d 155 (Minn. 1972) stands on its own unique circumstances. The employee gave additional consideration to the employer to ensure

1 Also, a covenant of good faith and fair dealing doctrine applies to the performance of a contract, not contract formation. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995).

2 However, depending on how broadly an employer drafts a disclaimer, it may find itself in other trouble. For example, a National Labor Relations Board administrative law judge held that the sentence "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way" interfered with organization rights under federal law. *See American Red Cross Ariz. Blood Servs. Div.*, Case No. 28-CA-23443.

permanent employment but brought suit when he was fired without cause. The employee had given St. Thomas a substantial stock gift and "conditioned his gift of stock to defendant [as publisher of a magazine as long as he wanted] and because defendant accepted the gift subject to the condition." *Id*. at 160. Giving this additional consideration for the promise created an issue of fact for trial. *Id.* at 163.

Promissory Estoppel — Promissory Estoppel provides contract rights in the absence of a contract provided certain conditions are met. The classic Minnesota case is *Grouse v. Group Health, Inc*., 306 N.W.2d 114, 116 (Minn. 1981). Mr. Grouse, after accepting employment, quit his existing job and moved to Minnesota only to find that the employer no longer had a position for him. An estoppel claim requires the following: (1) the employer "made a promise;" (2) the employer "expected or should have reasonably expected the promise to induce substantial and definite action" by the employee; (3) the "promise did induce such action;" and (4) the "promise must be enforced to avoid injustice." *Rognlien v. Carter*, 443 N.W.2d 217, 220 (Minn. Ct. App.1989), *review denied* (Minn. Sept. 21, 1989); *See Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992). Damages for promissory estoppel are measured by what the plaintiff lost when he gave up his former employment. *Grouse*, 302 N.W.2d at 116.

Misrepresentation/Fraudulent Inducement — Occasionally the defense lawyer will see an employment claim based on negligent or intentional misrepresentation. Minnesota follows the Restatement of Torts definition of negligent misrepresentation:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Reinsurance Ass'n of Minn. v. Timmer, 641 N.W.2d 302, 312-13 (Minn. Ct. App. 2002); *Bonhiver v. Graff*, 248 N.W.2d 291, 298-99 (1976). "A misrepresentation is made negligently when the misrepresenter has not discovered or communicated certain information that the ordinary person in his or her position would have discovered or communicated." *Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986). The misrepresenter owes a duty of care when "supplying information for the guidance of others in the course of a transaction in which one has a pecuniary interest, or in the course of one's business, profession or employment." *Safeco Ins. Co. v. Dain Bosworth, Inc.*, 531 N.W.2d 867, 870 (Minn. Ct. App.1995), *review denied* (Minn. July 20, 1995). Note however, that when "adversarial parties negotiate at arm's length, there is no duty imposed such that a party could be liable for negligent misrepresentations." *Id.* at 871. Moreover, a negligent misrepresentation claim cannot exist in the face of a disclaimer. *See Dakota Bank v. Eiesland*, 645 N.W.2d 177, 182 (Minn. Ct. App. 2002).

An intentional misrepresentation requires that: (1) the employer made a representation; (2) that was false; (3) having to do with a past or present fact; (4) that is material; (5) and susceptible of knowledge; (6) that the employer knows to be false or is asserted without knowing whether the fact is true or false; (7) with the intent to induce the other person to act; (8) and the person in fact is induced to act; (9) in reliance on the representation; (10) that the plaintiff suffered damages which are; (11) attributable to the misrepresentation. *M.H. v. Caritas Fam. Servs*., 488 N.W.2d 282, 289 (Minn. 1992). The misrepresentation may be made either (1) by an affirmative statement that is itself false, or (2) by concealing or not disclosing certain facts that render the facts that are disclosed misleading. *Id.* A fraudulent misrepresentation based on the non-disclosure of a fact occurs when one party knowingly conceals a material fact that is "peculiarly within his own knowledge," and the other party relies on the presumption that the fact does not exist. *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648, 650 (Minn. 1976). Note however, "there must be a suppression of facts which one party is under a legal or equitable obligation to communicate to the other, and which the other party is entitled to have communicated to him." *Id*. Also note that indefinite statements are not statements of fact that can form the basis of action-

able fraud or misrepresentation. *Evertz v. Aspen Med. Group*, 169 F.Supp. 2d 1027, 1031 (D. Minn. 2001). Fraud cannot be implied or assumed. *Martens*, 616 N.W.2d at 747; *Anderson v. Alorica*, 2004 WL 1118635 (D. Minn. 2004).

Under Minnesota law, a party is not entitled to recover tort damages for a breach of contract, absent an "exceptional case" where the breach of contract "constitutes or is accompanied by an independent tort." *Wild v. Rarig*, 234 N.W.2d 775, 789-80 (1975). "In such cases the duty is an incident of the relationship rather than the contract...." *Id.; see also Hanks v. Hubbard Broadcasting, Inc*., 493 N.W.2d 302, 308 (Minn. App. 1992) (stating that test for independent tort is "whether a relationship would exist which would give rise to the legal duty without enforcement of the contract promise itself"), *review denied* (Minn. Feb. 12, 1993). A court generally should not convert a contract claim into a tort claim and to have a cause of action in tort, a duty must exist independently of the performance of the contract. *Hanks*, 493 N.W.2d at 307-08.

The general measure of damages arising from fraud and misrepresentation is the plaintiff's out-of-pocket loss. *B.F. Goodrich Co. v. Mesabi Tire Co*., 430 N.W.2d 180, 182 (Minn. 1988). A limited exception may apply, allowing a plaintiff to recover the difference between the value of the property received and the value it would have had if the representation had been true, if out-of-pocket damages will not make the party whole. *Id*. at 182-83; *Hanks v. Hubbard Broadcasting, Inc*., 493 N.W.2d 302, 310-11 (Minn. App. 1992) (where misrepresentations caused news anchor to forego other business opportunities, damaging her career beyond any out-of-pocket losses, benefit-of-the-bargain damages proper), *cert. denied* (Minn. Feb. 12, 1993); *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 128-29 (Minn. App. 1992) (attorney whose career was damaged beyond out-of-pocket losses by misrepresentations entitled to benefit-of-the-bargain damages), *review denied* (Minn. Apr. 29, 1992).

Minn. Stat. § 181.64 — Minnesota has an old and interesting statute, Minn. Stat. § 181.64 which proscribes it as unlawful:

> for any person, ... or organization ... to induce, influence, persuade, or engage any person to change from ... any place in any ... country to any place in this state, to work ... through or by means of knowingly false representations, whether spoken, written, or advertised in printed form concerning the kind or character of such work, the compensation therefore....

The representations made by the employer are not under a "knew or should have known" standard, but require the "knowingly false representation" means made with knowledge of falsity. *Vaidynathan v. Seagate U.S., L.L.C.*, 691 F.3d 972, 978 (8th Cir. 2012).

Under Minn. Stat. § 181.65, plaintiff is entitled to recover:

> all damages sustained in consequence of the false or deceptive representations… used to induce the person to enter into or change a place of employment directly or indirectly causing such damage, and, in addition to all such actual damages such person may have sustained, shall have the right to recover such reasonable attorney fees.

COMMON LAW CLAIMS

Duty of Loyalty — Minnesota law imposes a common law duty not to disclose or use confidential information gained at the expense of the employer. *See Bellboy Seafood Corp. v. Nathanson*, 410 N.W.2d 349, 353 (Minn. Ct. App. 1987); *Aries Information Systems, Inc. v. Pacific Management Systems Corp.*, 366 N.W.2d 366, 369 (Minn. Ct. App. 1985); *Saliterman v. Finney*, 361 N.W.2d 175, 178 (Minn. Ct. App. 1985); *Cherne Indus. Inc.*, 278 N.W.2d at 92. That common law duty prevents an employee from disclosing or using its employer's confidential information; relief is available even if the information used by the employee does not rise to the level of a "trade secret" as defined by the Trade Secret Act. *Saliterman*, 361 N.W.2d at 178.

Unjust Enrichment — At some point, you will likely run into a claim where the employee argues that an employer was unjustly enriched and undercompen-

sated for his or her services.[3] A claim for unjust enrichment requires "the claimant to show that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the benefit." *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001) (citations omitted). Unjust enrichment, however, as an equitable doctrine, does not permit recovery where there is an adequate remedy at law. *See Curtis v. Altria Grp., Inc*., 792 N.W.2d 836, 852 (Minn. Ct. App. 2010) (citation omitted).

Tortious Interference — Generally in restrictive covenant matters, the defense will have to deal with a claim by a prior employer for tortious interference or, in rare cases, an employee who will claim an employer interfered by taking some sort of employment action. A tortious interference claim requires (1) the existence of a contract; (2) employer's knowledge of the contract; (3) employer's intentional procurement of its breach; (4) absence of justification on the employer's part; and (5) damages. *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994); *Bebo v. Delander*, 632 N.W.2d 732, 738 (Minn. App. 2001). Employee carries the burden of proving the employer caused the interference. *Electric Service Co. of Duluth, Inc. v. Lakehead Electric Co*., 189 N.W.2d 489 (Minn. 1971); *Snowden v. Sorenson*, 75 N.W.2d 795 (Minn. 1956). The defense should note that a party cannot interfere with his own contract, when an employee complains the employer interfered with its own employment relationship. *Nordling v. Northern States Power Co*., 478 N.W.2d 498, 505 (Minn. 1991).

To claim tortious interference with a prospective business relationship, the elements are: (1) the existence of a reasonable expectation of economic benefit belonging to plaintiff; (2) the defendant had knowledge of that expectation of the prospective relation; (3) defendant wrongfully and without justification induced a third person not to enter into the prospective relation or prevented plaintiff from acquiring or continuing the prospective relation; (4) that in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic benefit; and (5) plaintiff sustained damages as a result of this activity. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632 (Minn. 1982); *Harbor Broadcasting, Inc. v. Boundary Waters Broadcasting*, 636 N.W.2d 560, 569 (Minn. App. 2001).

Defamation — Defamation requires that someone "publish" a false statement that harms a person's reputation. *Steumpges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). In order for a statement to be defamatory, it should be specific and verifiable by reference to facts. *Anderson v. Kammeier*, 262 N.W.2d 366, 371 (Minn. 1977); *Lund v. Chicago & Northwestern Trans*., 467 N.W.2d 366, 369 (Minn. Ct. App. 1991). Statements are considered in their literary, social and public context as well. *Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995), *review denied, cert. denied* 116 S. Ct. 75 (1995). Under Minnesota law, defamation by implication occurs when a defendant "(1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, (such that) he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct." *Diesen v. Hessburg*, 455 N.W.2d 446, 450 (Minn. 1990). For example, in *Utecht v. Shopko Dep't Store*, the Minnesota Supreme Court held actionable a department store's placement of a notice at the cash register stating, "Shopper's Charge-Robert Utecht-Do Not Accept." S*hopko*, 324 N.W.2d 652, 653-54 (Minn. 1982). The Court explained that "(t)he circumstances in which the notice was seen by the public necessarily prompted speculation as to why the ("Shopper's Charge") card was not to be accepted. Loss or theft are possible explanations but poor credit is an at least equally likely alternative." *Id*. at 654. Minnesota allows a person to "self publish" the defamatory information when a person would be compelled to tell future hiring employers the reason for a termination from a prior employment. *Lewis*

3 The claim may also be called "quantum meruit." Quantum meruit is not an independent claim but a remedy which, in the absence of a contract, requires a showing of unjust enrichment. *See Stemmer v. Estate of Sarazin*, 362 N.W.2d 406, 408 (Minn. App. 1985) (determining that quantum meruit "is used only when failure to do so would result in unjust enrichment"); *see also* Restatement (Third) of Restitution & Unjust Enrichment § 31 cmt. e (2011) [recognizing that a claim for quantum meruit is either based in contract (seeking the enforcement of an implied term of an actual contract) or in unjust enrichment (seeking to recover the value of benefits conferred where there was no implied or express contract)].

v. Equitable Life Assurance Soc., 389 N.W.2d 876, 886 (Minn. 1986). Defamation by conduct alone, however, is not yet a claim in Minnesota. *Bolton v. Department of Human Resources*, 540 N.W.2d 523 (Minn. 1995).

Truth is a complete defense, and true statements, however disparaging, are not actionable. *Steumpges*, *supra*. Statements legitimately expressed in a business, employment or professional context may be insulated from suit by virtue of a "qualified privilege." A qualified privilege applies where the employer has "reasonable or probable grounds for believing in the validity of the statement, even though hindsight might show the statement to be false." *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990). To be privileged, the statement must be made upon a proper occasion, from a proper motive and there must be reasonable cause for making the statement. *Lewis*, 389 N.W.2d at 890-1. Statements documenting an employee's behavior in connection with job performance, communications made to an employee concerning the reasons for his or her discharge, or communications to other employees about the reasons for another employee's discharge are qualifiedly privileged. *Wirig, supra*; *Bauer v. State*, 511 N.W.2 447, 450 (Minn. 1994); *Harvet v. Unity Medical Center*, 428 N.W.2d 574, 579 (Minn. Ct. App. 1988); *Ewald v. Wal-Mart Stores, Inc*., 139 F.3d 619, 623 (8th Cir. 1998). The employer may lose the qualified privilege if the plaintiff can prove the statement was made with actual malice. *Lewis*, 389 N.W.2d at 890. When a communication is made in good faith, "(a)ctual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover." *Stuempges*, 297 N.W.2d at 256-257.

Some employments provide an immunity from suit for defamation claims. For example, public executive officers are absolutely immune from suit for defamatory statements made in the course of their duties. *See Buchanan v. Minnesota State Dept. Of Health*, 573 N.W.2d 733, 736 (Minn. Ct. App. 1998). Likewise, a person who must report conduct by statute or licensing board, like a nurse reporting abuse of a patient by another health worker, will be immune from suit by the person who is being reported. *See, for example*, Minn. Stat. § 626.557, Subd. 5.

The scope of a defamation claim is limited to the allegations contained in the plaintiff's complaint. *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 794 (Minn. Ct. App. 1998); *Benson v. Northwest Airlines, et al.*, 561 N.W.2d 530, 538 (Minn. Ct. App. 1997), *review denied*; *Thompson v. Campbell*, 845 F.Supp. 665, 680 (D. Minn. 1994). In addition, Minnesota law offers potential shields to employers in review of personnel files (Minn. Stat. § 181.962, Subd. 2) and job references (Minn. Stat. § 181.967).

Publication of Private Facts — In *Lake v. Wal-Mart Stores*, 582 N.W.2d 231 (Minn. 1998), Minnesota recognized the tort of publication of private facts, stating "(p)ublication of private facts is an invasion of privacy when one "gives publicity to a matter concerning the private life of another ... if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

STATUTORY CLAIMS

Drug Testing — Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA) statute, Minn. Stat. §§ 181.950-957, is one of the toughest in the nation on employers. DATWA both limits the ability of employers to subject their employees to drug tests and restricts how employers may use the results of such tests. When an employer fails to comply with DATWA's requirements, it faces strict liability. The statute requires a Minnesota compliant testing policy. *See* Minn. Stat. § 181.952. It requires notice of the policy prior to testing. Minn. Stat. § 181.953, Subd. 6. An employer must protect the chain of custody of the sample for a confirmatory retest, or permit the employee a confirmatory retest. Minn. Stat. § 181.953, Subds. 7, 9. An employer must provide notice of the confirmatory retest rights and the employee's right to explain the results. Minn. Stat. § 181.953, Subds. 6, 7, 9. An employer cannot terminate an employee following an initial screening test without offering a confirmatory retest. Minn. Stat. § 181.953, Subd. 10(a). An employer must offer an employee who fails a test the right to rehabilitation. Minn. Stat. § 181.953, Subd. 10(b)(1). An employer must also maintain the privacy rights of the employee with regard to the test results.

Minn. Stat. § 181.954, Subd. 2. Damages include back pay, front pay, emotional distress, attorney fees and punitive damages. *See* Minn. Stat. § 181.956, Subd. 2. One federal judge in Minnesota found liability as a matter of law against an employer and permitted a claim for punitive damages. *See Wehlage v. ING*, 2008 WL 4838718 (D. Minn. 2008).

Trade Secret — Minnesota's Trade Secret Act is found at Minn. Stat. § 325C.01, et seq. It protects actual or threatened misappropriation of trade secrets and provides remedies of injunctive relief as well as damages. Minn. Stat. §§ 325C.02, 325C.03. For a willful and malicious misappropriation, a court could award exemplary damages in an amount not to exceed two times any award of actual loss or unjust enrichment. Minn. Stat. § 325C.03, Subd. 2. Attorneys fees are available if the claim is made in bad faith or willful and malicious misappropriation exists. Minn. Stat. § 325C.04.

Minority Shareholder — Minn. Stat. § 302A.751 provides an opportunity for shareholders of closely held corporations to assert special employment rights. The statute provides, in Subdivision 3a:

> In determining whether to order equitable relief, dissolution, or a buy-out, the court shall take into consideration the duty which all shareholders in a closely held corporation owe one another to act in an honest, fair, and reasonable manner in the operation of the corporation and the reasonable expectations of all shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other. For purposes of this section, any written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between or among one or more shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements.

Minn. Stat. 302A.751, Subd. 3a.

Usually the "reasonable expectation" is continued employment. *See Gunderson v. Alliance of Computer Professionals, Inc.*, 628 N.W.2d 173, 181 (Minn. App. 2001); *Pedro v. Pedro*, 463 N.W.2d 285, 288-90 (Minn. App. 1990). With the precepts of conducting themselves in an "honest, fair, and reasonable manner," defendants will find it less likely to obtain summary judgment, especially when a court has broad equitable powers in a case such as this.

Wages — Under Minn. Stat. § 177.27, Subd. 8, an employee can bring an action in the District Court to enforce the provisions of the Minnesota Fair Labor Standards Act as to wages and overtime. Recovery can include a like amount as liquidated damages and attorney fees. *Id.*; Minn. Stat. § 177.27, Subd. 10.

Minn. Stat. § 181.13 provides the mechanism to secure payment of wages not timely paid after demand at termination. The employee can secure up to a 15-day penalty and attorney fees. Minn. Stat. §§ 181.14 and 181.145 provide similar remedies for employees who quit and commissioned salespersons.

Sales Representatives — Minn. Stat. § 325E.37 deals with the termination of sales representatives. The statute requires specific notice provisions, damages similar to Minn. Stat. § 181.145, and attorney fees. The representative has the option of court or arbitration.

Leave Laws — Minnesota has many leave laws allowing employees time off from work and presenting potential penalties for employers who are unfamiliar with the law. Even though no penalty may be stated for some violations, note that Minn. Stat. § 645.241 makes the violation a misdemeanor or a petty misdemeanor (if the statute violated was enacted or amended after September 1, 2014). Pursuant to Minn. Stat. § 181.944, violations of sections 181.172, paragraph (a) or (d), and 181.939 to 181.943 may result in a civil action to "recover any and all damages recoverable at law, together with costs and disbursements, including reasonable attorney's fees," as well as injunctive and other equitable relief.

- **Sick Leave** — Minn. Stat. § 181.9413. Employers with 21 or more employees must allow an employee to use personal sick leave benefits provided by the employer for absences due to an illness of or injury to the employee's child as well as an adult child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent for reasonable periods as necessary on the same terms the employee is able to use sick leave benefits for the employee's own illness or injury. An employee may also use this leave for safety leave, for such reasonable periods of time as may be necessary. Safety leave is leave for the purpose of providing or receiving assistance because of sexual assault, domestic abuse, or stalking. An employee returning from a leave is entitled to return to employment at the same rate of pay plus any automatic adjustments in the pay scale that occurred during leave. The employee returning from leave is entitled to retain all accrued pre-leave benefits of employment and seniority during leave. An employee returning from a leave is entitled to return to employment in the employee's former position.

- **Parental Leave** — Minn. Stat. § 181.941. Employers with 21 or more employees located at least at one worksite must provide twelve weeks of unpaid leave for an employee who is a natural or adoptive parent in conjunction with the birth or adoption of a child. An employee returning from a leave of absence longer than one month must notify a supervisor at least two weeks prior to return from leave. Employers must continue to make insurance coverage available to an employee while he/she is on leave but the employer is not required to pay the costs of the coverage while the employee is on leave. An employee returning from leave is entitled to return to employment in the employee's former position or in a position of comparable duties, number of hours, and pay.

- **Pregnancy Accommodation** — Minn. Stat. § 181.9414. Under this recent statute, an employer of 21 or more employees must provide reasonable accommodation for health conditions related to pregnancy or childbirth if an employee so requests, "with the advice of her licensed health care provider or certified doula," unless the employer demonstrates that the accommodation would impose an undue hardship on the operation of the employer's business. Advice of her licensed health care provider or certified doula is not required, nor may an employer claim undue hardship, for the following accommodations: (1) more frequent restroom, food, and water breaks; (2) seating; and (3) limits on lifting over 20 pounds. An employer shall not be required to create a new or additional position in order to accommodate an employee pursuant to this section, and shall not be required to discharge any employee, transfer any other employee with greater seniority, or promote any employee, nor may an employer require the pregnant employee to go on leave.

- **Breastfeeding Leave** — Minn. Stat. § 181.939. All employers must provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. An employer is not required to provide break time under this section if to do so would unduly disrupt the operations of the employer. The employer must make reasonable efforts to provide a room or other location, in close proximity to the work area, other than a toilet stall, where the employee can express her milk in privacy.

- **Adoptive Leave** — Minn. Stat. § 181.92. All employers who permit paternity or maternity time off to a biological father or mother shall, upon request, grant time off, with or without pay, to an adoptive father or mother. The minimum period of this time off shall be four weeks, or, if the employer has an established policy of time off for a biological parent which sets a period of time off of less than four weeks, that period of time shall be the minimum period for an adoptive parent.

- **Military Leave** — Minn. Stat. § 192.261. All employers must give employees who engage in active service in the military forces in time of emergency declared by the proper authority of the state a leave of absence without pay during such service, with right of reinstatement. Such

leave of absence without pay shall not extend beyond four years plus such additional time in each case as such employee may be required to serve pursuant to law. Upon reinstatement the employee shall have the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if that employee had actually been employed during the time of such leave.

- **School Conference and Activities Leave** — Minn. Stat. § 181.9412. All employers must provide leave of up to 16 hours during any 12-month period to attend school conferences or school-related activities related to the employee's child, provided the conferences or school-related activities cannot be scheduled during non-work hours. If the employee's child receives child care services as defined in Section 119B.011, Subdivision 7, or attends a prekindergarten regular or special education program, the employee may use the leave time provided in this section to attend a conference or activity related to the employee's child, or to observe and monitor the services or program, provided the conference, activity, or observation cannot be scheduled during non-work hours. Employees are entitled to a total of 16 unpaid hours during any 12-month period. An employee returning from a leave is entitled to return to employment at the same rate of pay plus any automatic adjustments in the pay scale that occurred during leave. The employee returning from leave is entitled to retain all accrued pre-leave benefits of employment and seniority during leave. A child could be as old as twenty years if still in secondary school.

- **Blood Donor Leave** — Minn. Stat. § 181.9458. All employers may grant paid leave from work to an employee to donate blood.

- **Bone Marrow Donor** — Minn. Stat. § 181.945. Employers with 20 or more employees at one work site must provide paid leaves of absence to an employee who seeks to undergo a medical procedure to donate bone marrow. The combined length of the leaves shall be determined by the employee, but may not exceed 40 work hours, unless agreed to by the employer. If there is a medical determination that the employee does not qualify as a bone marrow donor, the paid leave of absence granted to the employee prior to that medical determination is not forfeited.

- **Organ Donor Leave** — Minn. Stat. § 181.9456. Employers with 20 or more employees at one work site must provide paid leave of absence to an employee who seeks to undergo a medical procedure to donate an organ or partial organ. The combined length of leave shall be determined by employee, but may not exceed 40 work hours unless agreed to by employer. If there is a medical determination that the employee does not qualify as an organ donor, the paid leave of absence granted to the employee prior to that medical determination is not forfeited.

- **Military Family Leave** — Minn. Stat. § 192.325. All employers may not discharge from employment, take adverse employment action against, or otherwise hinder an employee from attending the following kinds of events relating to the military service of the employee's spouse, parent, or child and to which the employee is invited or otherwise called upon to attend by proper military authorities:

  (i) departure or return ceremonies for deploying or returning military personnel or units;

  (ii) family training or readiness events sponsored or conducted by the military; and

  (iii) events held as part of official military reintegration programs.

  The employer must provide a reasonable amount of nonpaid time off for the employee not to exceed two consecutive days or six days in a calendar year.

- **Leave for Immediate Family Members of Military Personnel Injured or Killed in Active Service** — Minn. Stat. § 181.947. All employers must provide an employee whose immediate family member, as a member of the United States armed forces, has

been injured or killed while engaged in active service up to 10 working days of unpaid leave. "Immediate family member" means person's parent, child, grandparents, siblings, or spouse.

- **Leave to Attend Military Ceremonies** — Minn. Stat. § 181.948. All employers, unless the leave would unduly disrupt the operations of the employer, shall grant a leave of absence without pay to an employee whose immediate family member, as a member of the United States armed forces, has been ordered into active service in support of a war or other national emergency. The employer may limit the amount of leave provided to the actual time necessary for the employee to attend a send-off or homecoming ceremony for the mobilized service member, not to exceed one day's duration in any calendar year.

- **Voting Leave** — Minn. Stat. § 204C.04**.** All employers must allow employees to be absent from work to vote for the time necessary to appear at the employee's polling place, cast a ballot, and return to work on the date of the election, without penalty or reduction from salary or wages.

- **Jury Duty Leave** — Minn. Stat. § 593.50. All employers may not discharge, threaten, or coerce employees because they receive or respond to a summons, serves as a juror, or attend court for prospective jury service.

- **Domestic Abuse Leave Act** — Minn. Stat. § 518B.01. All employers shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment, because an employee took reasonable time off from work to obtain or attempt to obtain an order of protection in a case of domestic abuse.

- **Crime Victims Leave** — Minn. Stat. § 609.748. All employers shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee who is the victim of harassment regarding the employee's compensation, terms, conditions, location, or privileges of employment, because the employee took reasonable time off from work to obtain or attempt to obtain relief as a result of being a victim of criminal harassment.

- **Crime Victim/Witness Leave** — Minn. Stat. § 611A.036. All employers must allow a victim or witness who is subpoenaed or requested by the prosecutor to attend court for the purpose of giving testimony reasonable time off from work to attend criminal proceedings related to the victim's case.

- **Election Judge Leave** — Minn. Stat. § 204B.195. All employers must allow an employee may be absent to serve as an election judge.

- **Time Off for Party Officers/Delegates** — Minn. Stat. § 202A.135. All employers must allow an employee to be absent from work to attend any meeting of the state central committee or executive committee of a major political party if the employee is a member of the committee, or may attend any convention of major political party delegates including meetings of official convention committees if the employee is a delegate or alternate delegate to that convention.

- **Leave for Civil Air Patrol** — Minn. Stat. § 181.946. Employers with 20 or more employees at one site, unless the leave would unduly disrupt the operations of the employer, shall grant a leave of absence without pay to an employee for time spent rendering service as a member of the civil air patrol on the request and under the authority of the state or any of its political subdivisions.

Workers' Compensation Wrongful Discharge/Retaliation — Section 176.82, Subd. 1 provides:

> Any person discharging or threatening to discharge an employee for seeking workers' compensation benefits or in any manner intentionally obstructing an employee seeking workers' compensation benefits is liable in a civil action for damages incurred by the employee including any diminution in workers' compensation

> benefits caused by a violation of this section including costs and reasonable attorney fees, and for punitive damages not to exceed three times the amount of any compensation benefit to which the employee is entitled. Damages awarded under this section shall not be offset by any workers' compensation benefits to which the employee is entitled.

Note that the statute imposes liability on individual persons, not only employers.

The obstruction and employment claims have different burdens of proof. The obstruction claim is "intended to cover those situations where the insurer's delay or denial of benefits goes beyond unreasonableness, neglect, or obstinance." *Bergeson v. U.S. Fidelity and Guar. Co.*, 414 N.W.2d 724, 727 (Minn. 1987). A section 176.82 violation occurs when "a person, such as an insurer, obstructs or hinders ... the receipt of benefits due the injured worker and does so in a manner that is outrageous and extreme, or, to put it another way, in a manner which is egregiously cruel or venal." *Id*. A plaintiff must prove a section 176.82 claim by clear and convincing evidence. *Id.* at 727. *See also Kaluza v. Home Ins. Co.*, 403 N.W.2d 230, 233—34 (Minn. 1987).

Courts apply the three-part *McDonnell-Douglas* analysis to the employment part of the claim. *See Snesrud v. Instant Web, Inc.*, 484 N.W.2d 423, 428 (Minn. Ct. App. 1992), *review denied* (Minn. June 17, 1992). A plaintiff may establish a prima facie case by showing the following elements "(1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983) (citation omitted). If the plaintiff establishes a prima facie case, the employer must then articulate a legitimate reason for the discharge. *See Snesrud*, 484 N.W.2d at 427. The burden then shifts back to the plaintiff to show, by a preponderance of the evidence, that the employer's articulated reason was pretextual and that the discharge was for impermissible reasons. *See Id*. at 427-28.

Nonwork Activity Retaliation — Minnesota statutes allows employees in other situations to engage in legal activities outside of the workplace without retaliation from their employer. *See* Minn. Stat. § 181. 938.

Whistleblower — Minn. Stat. §181.932, Subd. 1 provides:

> An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) the employee …in good faith reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer…"[4]

A report need not be "official or formal," and can constitute a "report" if they are "regular account[s] of" the allegedly illegal practices. *See Hayes v. Dapper*, 2008 Minn. App. Unpub. LEXIS 1097 at *6, 10-11 (Minn. Ct. App. September 23, 2008), *citing Janklow v. Minn. Bd. of Exam'rs for Nursing Home Adm'rs*, 536 N.W.2d 20, 23 (Minn. Ct. App. 1995) (giving two definitions of "report," including "[t]o make or present an often . . . regular account of").

Under the Minnesota Whistleblower Protection Act, remedies can include back pay, compensatory damages, and the expungement of any adverse records of an employee who was the subject of the alleged acts of misconduct, costs and disbursements, including reasonable attorney fees, and a penalty of up to $750.00 to the injured employee. Minn. Stat. § 181.935.

Minnesota also provides a state version of the federal False Claims Act (FCA) allowing an individual to pursue remedies for the state. *See* Minn. Stat. 15C.05. The federal law prohibits employment discrimination "because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [the FCA]." 31 U.S.C. § 3730(h).

4 Minnesota, at the time of the enactment of this statute, also recognized a common law whistleblower claim. *See Phipps v. Clark Oil and Refining Co.*, 408 N.W.2d 569 (Minn. 1987).

Veterans — Minnesota has an interesting statute, Minn. Stat. § 181.535, which prohibits any inquiry about veteran status in employment yet specifically removes the penalty for violation of the statute. However, Minn. Stat. § 192.34 does protect veterans from employment discharge and makes the penalty a gross misdemeanor.

Discrimination — The Minnesota Human Rights Act (MHRA), Minn. Stat. § 363A.08, Subd. 2, provides that it is unlawful for an employer to discriminate against an employee on several different protected classes: race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, or age.[5] Generally, claims under the MHRA are analyzed under the burden-shifting analysis articulated by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn.2001). For sex harassment, Minnesota adopted the *Faragher/Ellerth* liability standard. *Frieler v. Carlson Marketing Group*, 751 N.W.2d 558 (Minn. 2008).

Federal Judge Susan Nelson recently held that the strict liability standard under the federal Equal Pay Act applies equally to an equal pay claim under the MHRA. *Ewald v. Norway*, 2014 WL 7409565 *62 (D. Minn. 2014).[6]

There is an important nuance between Minnesota and federal law with the burden of proof for disability accommodation. Under the MHRA, a qualified disabled person is "a disabled person who, with reasonable accommodation, can perform the essential functions required of all applicants for the job in question." Minn. Stat. § 363A.03, Subd. 36. An employee claiming that his employer has failed to reasonably accommodate in violation of Minn. Stat. § 363A.08, Subd. 6, need only produce competent evidence that he had a disability, the employer knew of the disability, and the employer failed to make a reasonable accommodation. *Hoover*, 632 N.W.2d at 547. Furthermore, the MHRA, unlike federal law, specifically provides that the employer bears the burden of demonstrating that the employee was not a qualified disabled person. Minn. Stat. § 363A.03, Subd. 36; *see Hoover*, 632 N.W.2d at 547 n. 10 (recognizing burden on employer).

The MHRA prohibits employers and individuals from "intentionally engag[ing] in any reprisal against any person because that person . . . opposed a practice forbidden" by the MHRA or associated with a person who is disabled. Minn. Stat. § 363A.15. A prima facie case of reprisal requires "(1) statutorily protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Hoover*, 632 N.W.2d at 548. Reprisal includes, but is not limited to, "any form of intimidation, retaliation, or harassment." Minn. Stat. § 363A.15. Again the courts utilize the burden shifting analysis first employed by the United States Supreme Court in *McDonnell Douglas. See Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 556 (Minn. 1996). The complaining party sustains her burden "either directly by persuading the court that a [retaliatory] reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986) (internal citations and quotations omitted).

DEFENDING THE CLAIM

What follows are some observations and thoughts as a person who has primarily defended these claims for 25 years and occasionally prosecuted a few as well.

The Private Employer Client — Most employers who find themselves sued want the problem taken care of…*now*. The case is a distraction from business. This problem is compounded on whether or not they had advice in the first place, and whether they followed it. Sometimes bad advice has led to the lawsuit. For most attorneys, the first time they meet the client will be after the client has been sued, served with a charge of discrimination, or a substantial demand. The employer, especially one without employment litigation experience, will have many questions. Employers will question why business counsel may not be

5 Age discrimination is also prohibited by Minn. Stat. § 181.80.

6 Minnesota also has an equal pay for equal work law at Minn. Stat. § 181.66 et seq. An employee may go back one year and the fact the employee agreed to accept a lesser wage is no defense to the action. Minn. Stat. § 181.68.

allowed to handle the defense in insurance situations. I encourage counsel to visit the employer's site and understand their business. You can gain a significant amount of insight and understanding of the workplace by actually seeing and experiencing it.

Understanding the Expense — In my experience, more often than not, employers see human resources as inhibiting company profitability. The benefit of a good human resource department can't be measured economically, until an employer has experienced the expense of a lawsuit and then understands that the preventative measures suggested by human resources have a genuine purpose. Employment cases can be quite expensive and the employer and insurer should be informed of the expense issues with a thorough budget at the outset of the case. The budget prepared should encompass investigation, discovery, dispositive motions and trial and estimate costs of experts, ESI discovery, and related issues.

Explaining the Situation — The employer and insurer should be informed of the applicable laws, the need to have access to witnesses and IT personnel, the need to preserve documentation, electronic and otherwise, and the timeline for the case. A contact should be established with the employer to be the main person to shepherd the litigation. The employer should be introduced to the litigation team members to maintain alternate avenues of communication. Employee interviews should occur within the first month of retention and documents gathered in the first two weeks.

Managing Expectations — The employer should understand that the case will undergo an extensive period of discovery followed by a dispositive motion. If unsuccessful, trial could result. There will be several periods where settlement may be attempted. For insured clients, they should understand that although the retention has been exhausted, there will be interruptions to business as personnel are needed for discovery, motions or trial. The attorney should monitor fees and costs and update budgets where necessary, with explanations as to why costs increased. Costs may increase because of discovery motions, volumes of documents, experts, etc.

Discovery — ESI and Preservation — This has become the greatest area of expense and potential pitfalls for the client and attorney. As an attorney, at the first meeting you will need to emphasize the need to preserve information and immediately follow that up with a preservation letter. The employer will need to do a litigation hold and notify all record keepers to preserve information. Remember that information will include social media and the litigation hold will need to encompass smartphones, laptops, and other portable electronic devices. The penalties can be severe and the attorney can only be protected by being able to show "I told you so!"

Evaluating Risk and Minimizing It — Some may disagree, but I believe that most experienced counsel will know early on the potential value of a case. Wage loss and front pay can be calculated. The value of benefits are fixed. If your interviews disclose potential liabilities, you will learn of it. Unfortunately, Minnesota Rule of Civil Procedure 68 was amended several years ago to emasculate its ability for use in fee shifting cases. The corresponding federal rule still provides a means to use reasonable settlement offers to limit attorney fee exposure to your clients. Consider removal if appropriate, especially for that reason.

Future Relationship — For the attorney who wants to perform more day-to-day employment advice, the defense of a case presents a fine opportunity. In the course of your defense, you will observe needs for improvement to handbooks or other workplace policies, personnel failings, and training. You can also become a resource for them as issues arise and shepherd them through litigation avoidance in the future.

VIEW FROM THE BENCH:

HOW TO GET ALONG WITH THE JUDGE AND SERVE YOUR CLIENT

BY HON. KATHRYN D. MESSERICH (2001-02)

Introduction

Being a judge is frequently an exercise in extreme sensory overload — particularly in multi-county districts with master calendar systems. The following observations and suggestions are intended to assist civil litigators in having the best opportunity to help the judge focus on their particular case and to have their matter heard efficiently, without stepping in scheduling or procedural landmines. My hope is to impart information that I wish I had known when I was trying civil cases!

Know Your District

Minnesota has 289 District Court Judges who work in 10 separate Judicial Districts comprised of 87 counties. All but two of those districts are made up of more than one county. While the unified state court system has brought more uniformity to civil litigation, each county, district and judge has unique ways of conducting business. Each district has a different way of assigning and managing cases. This can affect all aspects of a civil case, including motion practice and trial. Do not assume that your complicated civil case will get a day certain trial if you simply file your complaint — more is required. Districts may have district-wide policies that may affect your case. Policies are posted on the district websites — don't assume that what you did in a particular district 20 years ago is still allowed. The public website www.mncourts.gov can provide a wealth of information about each district with links to district and county websites.

Know Your County

Similarly, each county within the district may have policies that affect your case. Know them. Each county also maintains a website with general information. These can be found by viewing the Minnesota Judicial Branch website or an individual district website. Know how your county schedules cases. Many counties utilize a master calendaring system that includes assigning judges to other counties within their district. Some counties have suburban courthouses where misdemeanors, family cases and the like are heard. Some counties schedule their judges for a year in advance with blocked assignments. Others deploy judicial resources on a daily basis. Each county has a Court Administrator who is assisted by supervisory and senior court staff. If you are not certain of a county's procedures, ask first before a making a mistake.

Know Your Judge

Judges come from many different backgrounds. Biographies can be found on the Minnesota Judicial Branch website. Other sources of information can be found through the Minnesota State Bar Association (MSBA) Civil Litigation Section. Many judges have posted individual preferences through the MSBA. If you have questions, call the Judge's judicial law clerk.

Be Proactive

Before filing your first pleading, assess whether you want a single judge assignment. Counties with civil blocks generally assign anything other than minor civil cases. But many counties do not. Rule 113.01 of the Minnesota General Rules of Practice for District Courts allows parties to request assignment of a single judge in any case that is deemed to be complex or where other reasons of efficiency or interests of justice dictate. Such a request is typically made to the Chief Judge of the District or his/her designee by letter.

Lawyers who believe that the case requires a single judge assignment should also so designate on the Civil Cover Sheet or bring a motion making the request. If you made the request and you do not receive an assignment, call the court administrator.

Rule 113 should also be considered within the context of Gen. R. Prac. Rule 146 governing complex cases. Many lawyers do not request complex case designation or a single judge assignment in our district and then find themselves dismayed on the day of trial to have their judge assigned to other trials, family cases and the like. In real life, in District Court, what is complex to a judge may not be complex to the attorney, who has handled similar cases over and over again. Realistically, if your case has multiple witnesses, particularly experts, many exhibits, many parties, it might very well be complex. While Rule 146.02(c) lists cases that are "provisionally" complex, Rule 146.02(d) allows parties to agree to complex designation in any case not enumerated in 146.02(c). In this Judge's experience, employment, professional liability and complex personal injury cases often require the kind of judicial supervision and management contemplated under Rule 146. Any case that needs a *Frye-Mack* hearing should be assigned to a single judge.

What are the advantages of single case assignment? A better-educated judge is a more efficient judge. As a former civil practitioner, I handled cases all over the state. Many of my cases, particularly motions, were heard on a "Special Term" cattle call. I would sit through bail hearings, family motions, order for protection hearings before my case was called. Remember that all of those other cases have to be decided, too. A judge who has already been assigned to your case will most likely had much more time to prepare than the judge who may have been assigned to your case at 4:30 p.m. the day before. The judge and his/her clerk on a single assignment case have more ability to schedule your case so it is the only one on the calendar.

A judge assignment may increase your chances of having a day certain trial setting. If you have witness scheduling issues and out-of-town experts, you don't want to make the case more expensive by having to cancel a witness because the trial is delayed. You may have a better chance of making sure, particularly in smaller counties, that jurors will be available to start hearing your case. If you have specific technology requests, need jury questionnaires or any other special trial requests, these can be dealt with in advance of the trial if you have a single judge assignment.

Communications with the Court

Most judges have at least one confidential staff member — a judicial law clerk, a court reporter. Some have scheduling clerks who may be assigned to a specific judge. It varies from county to county. If your case is not assigned to a judge, your first point of communication should be with court administration staff in the civil division. If your case is assigned to a judge, the judge's confidential staff is your first point of contact. Because of the prohibition against *ex parte* contact, the judge should not be called directly. When you leave a message with a law clerk or court reporter, leave a court file number.

If assigned to a judge, find out the preferred mode of communication. Some judges will communicate with counsel by email. Don't assume that all do. Some really, really hate email communications. Do not inadvertently include the judge on every case-related email.

Leave the judge out of your correspondence trail with opposing counsel. Email has made it easier for lawyers to pull judges into every dispute. Do not feel compelled to bring the judge in until you have an issue for the judge to decide and then follow the rules.

It should go without saying, always treat the judge's staff and any other court staff with professionalism and courtesy. Doing otherwise will ensure that the judge is informed and may not sit well with the judge. Remember, they have to deal with the same kind of unpredictable schedules as the judge and also often get pulled in many directions. Be patient when on the phone. It often takes time, even in the e-court world, for a file to appear on the computer screen and for the clerk to find the information you are requesting. Remember, the confidential staff goes with the judge. In multi-county districts, the judge you are trying to reach may be 200 miles away at another courthouse. Give staff a chance to call you back and if it is

an emergency, contact court administration. Often, a signing judge is available to deal with emergencies.

Talk to Your Opposing Counsel

It is always prudent to talk to your opponent, even if you don't like each other, before bringing disputes to the Court. The rules require it. Lawyers who work cooperatively on issues they can agree on, are much more likely to be viewed favorably by judges and juries. Narrow the issues whenever you can and always have a legal basis for your position. If opposing counsel refuses to talk to you, alert the judge but do so through a motion or conference call if that is the judge's preference. Document attempts at resolution.

Pro se Parties

People who chose to represent themselves in civil cases may pose some additional challenges requiring court intervention. They may also look to the opponent's lawyer for advice on how to proceed. The Minnesota Judicial branch website contains a great deal of information about self-help for pro se litigants. Often, a pro se litigant may have difficulty articulating a legal basis for a claim or following the rules. My only suggestion to lawyers opposing a pro se party is to document communications and not get distracted by the pro se status. If the party is faltering, don't demean or criticize the person in your arguments. Just tell the judge why the person is not entitled to relief. I have seen pro se parties do an excellent job of arguing legal issues and presenting evidence (and win).

Motion Practice

First consider why you are bringing a motion. If it is a discovery motion, have you tried to work out your disputes? If it is a Rule 12 motion, does the Complaint really fail to state a claim upon which relief can be granted? If it is a summary judgment, is the timing appropriate? Has discovery been completed? Are you really entitled to judgment as a matter of law?

If your case is not assigned to a specific judge, it will likely be heard on a rotating special term calendar. The judge will have an opportunity to review your pleadings ahead of time but may not be as well acquainted with the case as a judge who has been assigned to the case. The judge may not have as much time to hear the case. In my county, the Special Term Judge also typically conducts bail hearings immediately after special term.

When scheduling the motion, let the court clerk or law clerk know how much time you expect the motion to take. This will allow both the clerk and the judge to allocate accordingly. Be realistic about how much time you need. A judge who feels the pressure of another calendar looming may be distracted.

Draft your papers carefully. The ability to "cut and paste", while a potential time saver, can also be embarrassing. Make sure the venue is correct as well as the parties' names. It is also extremely important to have the correct court file number on the motion. Proofread everything.

Organize your exhibits and use direct cites to exhibit pages or deposition pages. With e-filing, exhibits can be extremely difficult to read. Put in no more than you need to resolve a disputed issue. Don't put every deposition, every contract or medical record into the record. The worst thing you can do is to file everything with the motion papers and expect that the judge is going to be able to wade through the record to locate some hidden point. Cite to the record in your memorandum and tell the judge exactly where it can be found in the exhibits. If contract language is at issue, quote the applicable provisions in your memorandum.

Your point will get lost and the fastest way to create a genuine issue of material fact is to fill the record with irrelevant minutiae. The same goes for case law. Don't cite every case just because you found a string cite somewhere. Don't cite stale case law if there has been a more recent statement of the law in an appellate decision. If you have a case directly on point, say so and bring the judge a copy.

Know the procedural rules that apply to your motion. The General Rules of Practice for District Courts set out time lines for dispositive and non-dispositive motions.

Motion hearings do matter. Be kind to the court reporter. Provide the reporter a business card so that he or she has the correct spelling of your name. If your argument involved technical terms or medical terms, a glossary of terms will help the reporter immensely. Judges and law clerks appreciate them too.

Summarize the procedural background and the underlying facts in your memorandum. If you are moving for summary judgment, outline the undisputed facts — if opposing, outline disputed, material facts.

Taking into account the time you have and the background of the judge, make sure you tell the judge what you want and why you are entitled to relief. It is really a matter of arguing why the facts of your case warrant a particular disposition. Belaboring the legal requirements for summary judgment and reading the Rule 56 language to the judge is far less important than explaining why, in your particular case, the record does not contain any genuine issues of material fact and why you are entitled to judgment as a matter of law.

Bring a copy of your motion and memorandum as well as exhibits. Court computers do fail periodically and the judge will have nothing to refer to. Pace your argument. The court reporter must be able to hear you and keep up with you.

Utilize motions to reconsider sparingly. A motion to reconsider is dictated by Rule 115.11 of the General Rules of Practice for District Courts. A motion to reconsider that simply reargues the case will not be viewed favorably. If you lost your motion and your order is appealable — appeal it. On the other hand, if the judge made a mistake that could be corrected by a motion to reconsider, pursue that route. But be clear on the basis for reconsideration. The comments to Rule 115.11 are helpful.

Judges have 90 days to rule on most civil motions. Most judges try to get their orders out quickly but, of course, it depends on what else is under advisement, what calendars the judge is assigned in the following weeks and whether there are cases that must be decided more quickly. Calling the judge's clerk will not get the motion done more quickly, with the caveat that calling after the 90-day period is appreciated.

Discovery Motions

The threat of a motion to compel is but one tool in civil litigation. These motions may be necessary to get what you need to prepare the case. Unfortunately, many motions to compel are brought without carefully thinking through the need for the discovery materials and whether the person seeking discovery is legally entitled to obtain the materials. Another vexing problem for judges is the litigant who "just says no" to any discovery request. Any refusal to produce discovery should be backed up with a legal objection that says more than, "they aren't entitled to that information."

Always supplement discovery responses. Many good lawyers automatically do so at least 60 days before trial. This is especially important with expert witness disclosures whose initial opinions might have changed between disclosure and trial. The remedies for nondisclosure can be harsh — exclusion at the worst. You may find yourself having to produce an expert at night during trial for a discovery deposition. In any case, avoiding surprises that could have been prevented by following the court rules is essential.

Privilege logs and protective orders should be considered early in the litigation. If your case requires a protective order, you should strongly consider requesting a single judge assignment. Alert the court any time confidential information is filed so that it can be classified appropriately on MNCIS.

Occasionally, lawyers are tempted to call a judge to get a ruling on a witness' refusal to answer a question at a deposition. While it may make good theater, it is not often easy to locate a judge for this purpose. If your case is blocked, you may try to reach the judge's clerk for advice on how to proceed. While it may be more economical to try to reach a judge by telephone in such circumstances, many judges will tell you to schedule a motion. Finish whatever you can with the deposition — and then make a motion to compel on the unanswered or instructed not to answer questions.

Pre-trial Settlement Conferences

Districts and judges vary on whether pre-trials are routinely held. In Dakota County, where I am chambered, civil pre-trials are only held upon request. Moreover, if the case is not assigned to a single judge, you may not have your trial judge hear the pre-trial. Some judges will try to settle cases at the pre-trial, others will simply inquire whether settlement possibilities have been exhausted. In any event, your client and/or a representative with authority to settle a case should attend the pre-trial.

Alternative Dispute Resolution (ADR) has changed the landscape somewhat, in that judges are less involved with settlement negotiations when a case has been through ADR. Some cases are exempted from ADR; some clients change their mind; unexpected changes can alter case assessment. If you wish to have the judge discuss settlement, let the judge know.

A pre-trial is the best time to argue motions *in limine*, discuss stipulations and streamline your case. Do as much as you can at the pre-trial so that jurors do not have to wait in the jury room while motions are argued.

Trial Practice

The Minnesota Civil Trial Book (Part H of the General Rules of Practice for District Courts) nicely sets out the procedures for civil practice and is worth reviewing before trial, even if you have tried hundreds of cases. Most judges, myself included, review it prior to a civil trial just to reorient to the civil world.

Before trial, there are a few things that will make your life easier no matter where you are trying the case and will make for a happy judge and a happy jury.

- Meet and confer with opposing counsel to review exhibits. Know whether your trial judge wishes to have exhibits pre-marked. Discuss whether you agree to the admission of an exhibit and if not, what the legal objection is, if the objection can be ascertained before trial.
- Providing the judge with a list of stipulated and disputed exhibits is a nice touch.
- Stipulate to foundation whenever you can. You can still maintain other objections to an exhibit even if you agree to foundation.
- Consider summaries for voluminous exhibits. Providing a summary to the court reporter and judicial law clerk will be greatly appreciated.
- Judges appreciate being given copies of exhibits.
- Always do a trial brief. The judge will appreciate getting a preview of the case along with legal issues that may arise. For example, providing the legal framework for the prima facie case is useful. Are there any special evidentiary issues that you anticipate? Having cases to support your position always helps.
- Notify the judge immediately if you are having problems with witness schedules or if there is some emergent situation in your case. Request/suggest a conference call with the court.
- Call the court immediately if your case settles.
- If possible, have your motions in limine heard before the trial date so that they can be decided before you have jurors waiting. It also helps you prepare.
- If you need to use a questionnaire, make sure you have conferred with your opponent and have alerted the judge well in advance of the trial. Bring your own copies of the final questionnaire. Some judges, in the interests of judicial economy, will have the jurors come in the Friday before trial to complete the questionnaire. This allows the attorneys and parties to study the answers and be more prepared to start questioning Monday morning.
- Judges have varying practices for voir dire. Find out what the judge usually does before you come for the first day of trial. Alert the judge if there are sensitive questions that the Court should ask. I always give jurors the option of being questioned outside of the presence of other jurors on sensitive issues.
- Use voir dire as an opportunity to make sure the jurors can hear you. Don't try your case or preview the evidence in voir dire.
- If you want voir dire recorded, ask. Some judges will require it; others do not. Don't assume it will be recorded.
- Try to agree on jury instructions in advance. Submit disputed instruction requests to the court with case law supporting the instruction.

- Don't squabble about things that don't matter. Don't fight about who gets to sit closest to the jury.
- If using technology for the trial, request an opportunity to set up early. If you are trying a case in a courtroom with built-in technology, see if you can come in the week before to learn how to use it. If you need a podium, let the court clerk know in advance. Most court administrators will arrange a time for you to review the courtroom.
- Consider calling the judge's law clerk to become informed of any special procedures that the judge prefers — clerks generally know how the judge conducts trials and what *not* to do. Judicial law clerks can provide a wealth of information.
- During trial, don't go rogue. The heat of a trial causes some lawyers to forget all of those rules of decorum. Always ask to approach the bench and the witness. Do not obstruct either the opposing counsel or the judge's view. Demonstrative exhibits should not be continuously displayed if you are not using them.
- Bench conferences should be minimized if possible — and remember, unless the judge has so indicated, those discussions are not on the record. If you have something to put on the record following a bench conference, do so after the jury has been released for a break or for the day.
- Don't feel compelled to always have the last word. If you have "just one more question," don't make it 15.
- Remember that evidentiary rulings are generally reviewed on an abuse of discretion standard. Objections are important, but there is an art to when and why to interpose an objection. Do you have to object every time you hear a leading question? Sometimes it simply doesn't matter and the jury will become annoyed with constant objections. Jurors will wonder what you are hiding. In post-trial conferences, jurors often wonder why a lawyer objected so often.
- Accommodate out-of-order witness schedules if you can. You may need accommodation in your case-in-chief.
- Live witnesses are far more interesting than witnesses presented by video. If you have to play depositions at trial, the worst time to show them is immediately after lunch. Tailor your recorded depositions accordingly. Don't belabor things that don't matter. Simply put — pick your battles.
- Try to get your testimony in during the court schedule. A few minutes late is not usually problematic, but to call a witness at 4:10 p.m. who finishes at 6:00 p.m. can create problems for the courthouse as far as staffing and security. Always give the judge a "heads up" about witness scheduling conflicts.
- Don't beat a dead horse. The evidence doesn't necessarily improve because you got a witness to say the same thing over and over. Streamline your case whenever possible.
- Don't try to be someone you are not. Tell your story, try your case your way.
- Keep your promises. If you told the jury in opening statement that you would do something, make sure you do it. While trials can be unpredictable, and witnesses can do things that are completely unexpected, you must be able to explain why you are still entitled to the verdict you are requesting. Don't ignore any negative evidence — deal with it.
- Go through the exhibits with the judge and clerks before they are sent into the jury room.
- Provide the Court with contact information for juror questions and the verdict. If you and your client choose to be present for the reading of the verdict, don't be more than 15 minutes away.
- Be professional and call your opponent if you lose. Hopefully they will do the same if you win.

I routinely talk to jurors after deliberations are completed to allow them to ask questions and to process the unique experience of being a juror. Remember, currently jurors receive $10 a day and 20 cents per mile for their service. We take away their phones and electronic devices and tell them they can't discuss the case with anyone. We pull them out of their daily routines and, in many cases, impose a degree of financial hardship on everyone who serves. Despite this, most jurors are awed by the experience of serving on a jury and report high satisfaction with the experience.

Jurors appreciate good lawyering. Some of their concerns and observations are particularly instructive for civil lawyers. They do not like condescending lawyers but at the same time, they want the lawyers to explain the importance of any piece of evidence that is admitted. Theatrics should be well placed to emphasize a point. Overly emotive presentations of the evidence may harm your case. Show righteous indignation only if righteous indignation is due.

Jurors like demonstrative exhibits. They bring a case to life. While there are many different high technology options for demonstrative exhibits, jurors even appreciate the low-tech versions — flip charts and easels.

Jurors try their best to follow the rules. Clear jury instructions are helpful — many wish that lawyers would explain in final argument what the instruction means for their case. Using the verdict form in closing argument is also helpful for the jurors to visualize and analyze what each party is requesting.

Finally, be considerate of jurors' time. Jurors hate delays. Everyone — judges, lawyers and parties — should make every effort to start cases promptly so that no one has to wait.

After Trial

Most judges are willing to talk to lawyers after the case is resolved to discuss the trial. Some judges will call the lawyers to get feedback on their own performance. Jurors may or may not be willing to talk to the lawyers after a trial. If you are trying to get information from a juror after the case, be respectful. I tell jurors that they may be called by lawyers and that it is their decision whether or not to talk about the case.

Post-trial motions should be brought in accordance with the rules. Similarly, taxation of costs should be brought in accordance with the rules and with supporting documentation.

Don't be offended if the judge inquires about settlement possibilities at post-trial motions. Many cases settle at this point. Yes, you may have won your case, but there is always the appeal...

Conclusion

Many judges, myself included, are thrilled to see good lawyering. Civil lawyers routinely are well prepared, professional and zealously represent their clients. Your work is greatly appreciated. Just know that the court system is often clogged with priority cases such as criminal and family law. The court system continually absorbs myriad new laws every legislative session. In the time I have been on the bench, the county courts have gone to state funding, the court system was hit hard by the great recession, and the entire court system has started the monumental task of going paperless. These changes may make the court system appear less accessible. Use the suggestions above to increase your access and to better serve your clients. And above all, enjoy your work!

GOVERNMENT DATA AND THE DEFENSE ATTORNEY:

UNDERSTANDING THE STATUTE, RULES AND LITIGATION IMPLICATIONS

BY PATRICIA Y. BEETY (2010-11)

Many MDLA members represent governmental entities in civil litigation. For these defense practitioners, dealing with government information or data issues often becomes a regular part of handling a case. Other MDLA members will confront data issues when a co-defendant in a case is a government entity, where their client is a government contractor, and/or where relevant evidence is in the possession of a state agency or local governmental body such as a city, county, or school district. This chapter's goal is to assist defense attorneys in all of the above situations to navigate the challenges of the Minnesota Government Data Practices Act or MGDPA. The MGDPA, Minn. Stat. Chapter 13, is the statute where the answers to our data questions purportedly lie. Often times, simply reading the statute will not make the answers any clearer and, in fact, may result in producing a pounding headache. Court decisions, as well as agency interpretations and rules, are likewise often complex and confusing in their practical application. Representing government clients in Minnesota's state and federal courts for over two decades has given me some unique experiences and perspectives. It is my hope that this chapter will answer common government data questions and also provide defense litigators with practical advice to successfully deal with government data issues in their cases.

OVERVIEW OF MGDPA

Purpose and Scope

The stated purpose of the MGDPA is to regulate the collection, creation, storage, maintenance, dissemination, and access to government data. Minn. Stat. §13.01, subd. 1. The *governments* covered by the MGDPA are state agencies, statewide systems (such as the University of Minnesota), and political subdivisions including cities, counties and school districts. *Id.* §13.01, subd. 3. The MGDPA has been around for over 35 years and has been frequently changed and amended. However, the Legislature's main goal in enacting this law remains as true today as it did in 1979. The MGDPA is an ambitious legislative attempt to balance the people's right to know what their government is doing, individuals' right to privacy in government data created and maintained about them, and the government's need to function responsibly and efficiently.

Data Classifications

The MGDPA regulates *government data* which is defined as "all data collected, created, received, maintained or disseminated" by a covered governmental entity "regardless of physical form, storage media or conditions of use." Minn. Stat. §13.01, subd. 2. This means the data regulated are paper documents, electronic files (including emails), as well as photographs, charts, maps, videotapes, audiotapes, and even hand-written notes and working documents or files. The Minnesota Supreme Court has held that even "mental impressions" or spoken comments by government officials can be government data if the mental impressions derived directly from other government data recorded in physical form. *Navarre v. S. Washington County Sch.*, 652 N.W.2d 9, 25 (Minn. 2002).

Every government datum has a classification in the statute. The MGDPA breaks out data on individuals from data not on individuals. Minn. Stat. §13.02. It then classifies all data as public, non-public, private or confidential. The statutory classification is important because it determines who has access to the specific data which, as will be discussed later, could be very important to know when attempting to gather otherwise discoverable data from a government entity. The first practice pointer for litigators is to remember that the majority of government is classified as public — and accessible to anyone, at any time. The MGDPA has at its core a presumption that government data are public and accessible. Anyone who requests to see public data can, and, as required by statute, the requester does not have to give a reason for wanting the data. In fact, the government entity is specifically prohibited from requiring that individuals identify themselves or explain or justify a request for access to public data unless otherwise authorized by law. *Id.* §13.05, subd. 12. Restrictions on accessibility are to be the exception.

Access to non-public data is a bit more complicated, especially when the data involve information on individuals. The classifications applying to data on individuals are *public, private and confidential.* The following chart sets out the framework for classification and access:

DATA ON INDIVIDUALS	DATA NOT ON INDIVIDUALS	DATA ON DECEDENTS	WHO HAS ACCESS
PUBLIC	PUBLIC	PUBLIC	ANYONE
NOT PUBLIC			
PRIVATE	NON-PUBLIC	PRIVATE	DATA SUBJECTS AND GOVERNMENT OFFICIALS WITH A NEED TO KNOW
CONFIDENTIAL	PROTECTED NON-PUBLIC	CONFIDENTIAL	ONLY GOVERNMENT OFFICIALS WITH A NEED TO KNOW

Many questions come up in the area of government data on individuals who are agents, employees or applicants of the government entity. For example, when a key witness or a named party is also a public employee, much of the information maintained on them by the government entity will be classified as private. First and foremost it is important to note that the statutory presumption of public access is reversed: personnel data are presumed private unless a specific statutory exception makes them public. Minn. Stat. §13.43. Personnel data are defined as data on individuals collected because the individual is or was an employee or applicant, or a person who volunteers services or acts as an independent contractor for a covered governmental agency. *Id.* §13.43, subd. 1. The statute lists the personnel data that are public including an employee's name, gross salary, job title, job description, bargaining unit, education and training background, contract fees, badge number, payroll time sheets, actual gross pension, value/nature of paid benefits, work location and phone number, and honors and awards received. *Id.* §13.43, subd. 2. Everything that is not specifically listed is considered private data. *Id.* §13.43, subd. 4.

Access to private data on individuals is limited to the data subject and those in the government whose official duties reasonably require access. Private data may also be released to third parties whom the data subject has given their informed consent for the disclosure. Minn. Stat. §13.05, subd. 4(d). For example, a city employee's performance evaluations are private data because they are not listed as public in §13.43. Therefore, the employee has a right to see her evaluations, as would her supervisors and others in the city whose jobs require access to this information, but the evaluations are not to be made available to others in the city's employ nor are they open for public inspection or releasable simply because a party in litigation serves a subpoena duces tecum. (This is discussed further in Section IIB). Confidential data, on the other hand, are only available to those in the government with a need to know and are *not* available to the subject of the data. Minn. Stat. §13.02, subd. 3.

One practice pointer is that government data can change classifications under the MGDPA. For example, information involving misconduct charges on a government employee is private but may become public should final discipline be imposed. The MG-

DPA classifies as public only the existence and status of complaints about employees; no details about the nature of the complaint are public. Minn. Stat. §13.43, subd. 2; *Navarre v. S. Washington County Sch.*, 652 N.W.2d 9 (Minn. 2002) (MGDPA authorizes only the disclosure of the existence and status of complaints against the employees, and nothing more, including the nature and type of the complaint). However, when there has been a final disposition of disciplinary action based on the complaint, then the data classifications change and not only the discipline itself becomes public but also the reasons for the discipline and *all* data documenting the basis for the action. *Id.* §13.43, subd. 2(5).

This changing of data classifications happens in other parts of the MGDPA. Therefore, it is important to consider statutory provisions as a whole. In addition, some data transform not because of a condition established in the statute but simply by the passage of time. Except for security information, data classified as *non-public* become public after 10 years; and private data on a deceased employee become public 10 years after the decedent's death and 30 years after the data were collected. Minn. Stat. §13.03, subd. 8; *Id.* §13.10. This is assuming, of course, that the data are still in existence. Nothing in the MGDPA prevents a government entity from enacting and properly registering a records retention policy that authorizes the destruction of old records deemed to have no continuing value. Minn. Stat. §138.17, subd. 1.

Finally, defense attorneys can find themselves dealing with issues involving government meetings and data classifications. It is important to appreciate how Minnesota's Open Meeting Law (Minn. Stat. Chapter 13D) intersects with the MGDPA, and how both statutes work in practice. The guiding principle to remember is this: if private or other not public data need to be discussed at an open meeting of a governing body (because no exception to the open meeting law provides for closure of the meeting), the information discussed at the open meeting retains its original data classification; i.e., private, or non-public. Minn. Stat. §13D.05, subd. 1(c); Minn. Stat §13.05, subd. 4(e). The official record/minutes of government meetings are always classified as public, however.

Government Responsibilities

Every government agency must designate a person to be the Responsible Authority (RA) to administer the statutory requirements of the MGDPA. This is the government officer/employee responsible for the collection, use and dissemination of any set of data. Minn. Stat. §13.02, subd. 16. The RA makes sure written procedures are established and that these procedures insure requests for government data are received and complied with in an appropriate and prompt manner.

The Governor, Secretary of State, Attorney General, State Auditor, and Legislative Auditor are the RAs for their offices. In state agencies, the RA is the commissioner, chief executive officer, or individual appointed by the agency. In counties, cities or school districts, the RA is the employee appointed by a city council or school board. In counties, however, a sheriff, county auditor, or county attorney is the RA for her/his office and the RA for a county social services office is the director of that office.

A second position designation required under the statute is that of Compliance Officer. This is the individual to whom questions about issues or problems in obtaining access to data may be directed. *Id.* §13.05, subd. 13. The Compliance Officer can also be the RA.

The government entity must publish and update written procedures for public access to data. It must also prepare a public document of data categories. Copies of these procedures are to be available to the public free of charge or a copy must be posted in a conspicuous place that is easily accessible to the public, such as city hall. Minn. Stat. §13.05, subd. 1. Written procedures must also be established that assure information on individuals are accurate, complete, and current for the purposes for which it was collected. *Id.* §13.05, subd. 5.

No fee can be charged a person who simply requests to "inspect" public data regardless of the time, effort and expense to the government entity of complying with the request. Minn. Stat. §13.03, subd. 3. Only if the person requests *copies* of the data can a fee be charged and only then can the government entity

charge for the actual costs of searching for, retrieving, compiling and copying the data. *Id.* §13.04, subd. 3. However, no fee can be charged for the costs incurred by the government entity in separating public data from non-public data. For example, if the data requested are maintained on forms that include both public and non-public data, the government entity can and should redact or otherwise separate out the non-public information from the public; but no matter how time consuming or expensive, it cannot charge for this work. Minn. Stat. §13.05, subd. 1. This is why government documents produced in discovery may have names, home addresses, dates of birth, or other non-public/private data redacted. (Production of unredacted documents is often governed by a Protective Order stipulated to by the parties, and approved by the Court. See Section IIB below for additional discussion).

GOVERNMENT DATA IN LITIGATION

Pre-suit Access to Government Data

When representing a government entity pre-suit, potential claimants and their attorneys often conduct claim related, fact-finding investigations by making requests for public data under the MGDPA. In addition, even when the government is not a party or potential party, litigants on both sides often want information relevant to their case which is being maintained by a government entity. For defense attorneys in the first situation, it is extremely important to understand how the MGDPA applies to the information being sought to properly protect your clients' interests. When seeking government information in the second situation, understanding the rules for access and data classification is equally important for case handling efficiency and, ultimately, better advocacy.

Government liability attorneys should not forget that there may be a temporary *confidential* classification of otherwise public information if it fits the definition of civil investigative data. The MGDPA specifically acknowledges that data collected as part of an investigation by a government entity in anticipation of litigation are protected from disclosure. Minn. Stat. §13.39, subd. 2. The definition is quite broad and states that a pending civil legal action sufficient to trigger this provision "includes *but is not limited to* judicial, administrative or arbitration proceedings" and "[w]hether a civil legal action is pending *shall be determined by the chief attorney acting for the government entity*." Minn. Stat. §13.39, subd. 1 (emphasis added).

While a civil investigation is considered active, a person may bring an action in district court to attempt to obtain government information being withheld under this provision. The MGDPA provides a balancing test for the court which first requires that the court review the data under consideration *in camera*. In considering release of any civil investigative data, the court must decide if the benefits to the person bringing the action outweigh the harm to the public, the government entity, or any person identified in the data. Minn. Stat. §13.39, subd. 2a. When a civil investigation becomes inactive, the data classification shifts back to public unless release of the data would jeopardize another pending civil action or where the data are classified as not public pursuant to other provisions of the MGDPA or "other law." *Id.* §13.39, subd. 3. But remember, nothing in Section 13.39 affects the status of communications protected under the attorney-client privilege. *See, Prior Lake American v. Mader*, 642 N.W.2d 729 (Minn. 2002).

In many cases, law enforcement data are very relevant to litigation involving non-government parties. For the defense attorney in this situation, the timing of a request for this type of information is as important as the scope and purpose of the information being sought. The definition of law enforcement data is very broad under the MGDPA. Section 13.82 covers all data created, collected, or maintained by entities which carry on a law enforcement function, including municipal police, county sheriff and fire departments, the Minnesota State Patrol and the Department of Public Safety. Data collected by other agencies that merely work with law enforcement, such as prosecutors or probation authorities, are not covered by the provisions of section 13.82. The following chart sets out the framework for classification of law enforcement data:

	DATA CLASSIFIED AS PUBLIC:	DATA CLASSIFIED AS PRIVATE OR NONPUBLIC:	DATA CLASSIFIED AS CONFIDENTIAL OR PROTECTED NONPUBLIC:
DATA PART OF INACTIVE INVESTIGATION OR NO CRIMINAL INVESTIGATION	ALL DATA NOT OTHERWISE CLASSIFIED AS NOT PUBLIC	• PROTECTED IDENTITIES (SUBD. 17) • CERTAIN ACTIVE AND INACTIVE CHILD ABUSE DATA (SUBD. 8 & 9) • CERTAIN VULNERABLE ADULT DATA (SUBD. 10 & 11) • 911 CALL AUDIO RECORDING (SUBD. 4)	REAL PROPERTY COMPLAINT DATA (§13.44)
DATA PART OF ACTIVE INVESTIGATION UNDER SUBDIVISION 7	• ARREST DATA (SUBD. 2) • REQUEST FOR SERVICE DATA (SUBD. 3) • RESPONSE OR INCIDENT DATA (SUBD. 6) • BOOKING PHOTOGRAPHS (SUBD. 26) • DATA PRESENTED IN COURT (SUBD. 7)	• CERTAIN ACTIVE AND INACTIVE CHILD ABUSE DATA (SUBD. 8 & 9) • CERTAIN VULNERABLE ADULT DATA (SUBD. 10 & 11)	ALL DATA NOT OTHERWISE SPECIFIED AS PUBLIC, PRIVATE, OR NONPUBLIC

*Section 13.82 classifies other data not listed in chart above.
(Chart courtesy of Minnesota Department of Administration Information Policy Analysis Division, www.ipad.state.mn.us)

As reflected above, some law enforcement data will always be public while some will have changing classifications. For example, data contained in an active criminal investigation by a law enforcement agency are classified as confidential. So, if you are the subject of the data in a criminal investigation, you have no right to see the information gathered on you. Minn. Stat. §13.82, subd. 7. However, most active criminal investigative data become public when the investigation becomes inactive.

A criminal investigation becomes inactive when any of the following occurs:

- A decision is made not to pursue case
- Time to bring a charge expires (i.e. statute of limitations reached)
- Appeal rights become exhausted, or a not guilty verdict reached

Of course, as is common in the MGDPA framework, there are exceptions; certain data retain a not public classification, and require redaction prior to public release, even when part of an inactive investigation including the following:

- Images clearly offensive to common sensibilities
- Data that would jeopardize another ongoing investigation
- Certain financial account or transaction information
- Protected identities including Undercover officers; Criminal sexual conduct victims; Informants if threat to personal safety; Adult witness/victim, upon request, unless no threat to safety; Mandated reporters; Juvenile victim, upon request, unless no threat to safety; Juvenile witness where subject matter justifies protection; Delinquent/alleged delinquent juvenile; 911 caller if agency believes would threaten personal safety or property; or reason for call is mental health emergency.

Discovery Requests, Subpoenas and Court Orders

The issues involving access to, and disclosure of, government data in discovery are probably the most common for civil litigators. When dealing with a government entity that is also a party to the litigation, the best practice is to conduct discovery pursuant to the rules of civil procedure for obtaining government data rather than through requests under the MGDPA. While the MGDPA does not specifically require that data be accessed in this way by a party in active

litigation, if you conduct your discovery by circumventing the attorney and going directly to the governmental entity pursuant to the MGDPA, be prepared for objections by the government defense attorney based on improper ex-parte contacts and violation of the rules of civil procedure. In short, respecting the governmental litigant's interests and relationship with legal counsel will help prevent unneeded delay and discovery disputes.

Another important point to remember: it is the responsibility of the party seeking the data to bring a motion to compel discovery. Under the framework of the MGDPA, discovery requests for government information that is classified as private on individuals requires the court to apply a balancing test. First, the court must decide if the data are discoverable pursuant to the rules of evidence or civil procedure. Minn. Stat. §13.03, subd. 6. Second, if the data are discoverable, the court must decide if the benefit to the party seeking access outweighs any harm to the confidentiality interests of the government or the person who provided the data, or to the privacy interest of an individual identified in the data. *Id*. The court's review of the data should be conducted *in camera*. Then, if the court determines that some or all of the data should be released, a protective order should be issued in order to assure the proper handling of the data by the parties.[1]

Of course, the government entity may release private data on individuals if authorized by the subject of the data. This requires the written permission of the data subject who may, or may not, have a position or stake in the litigation. For example, a party may seek discovery of prescription or optometry records maintained by the government employer of an employee involved in a motor vehicle accident and whose physical condition at the time of the accident is in question. While this information may be discoverable, it is also private personnel data under the MGDPA. The employee-driver may consent to release this data and thus save all parties the time and expense of a motion to compel. However, subject to any limitations prescribed in HIPAA, 45 CFR §164, a valid release of data on the employee must meet certain requirements. Pursuant to the MGDPA, any consent/authorization statement must be:

- in plain language;
- dated;
- specific in designating the person or agencies authorized to disclose the data;
- specific as to the nature of the information being disclosed;
- specific to the persons or agencies to whom the data is being disclosed;
- specific as to the purpose for which the information may be used by the parties;
- subject to a specific expiration, not to exceed one year.

Minn. Stat. §13.05, subd. 4(d)(1)-4(d)(7). Therefore, a party requesting private government data on individuals should be cognizant of these requirements and tailor authorization forms to meet the criteria listed above.

MGDPA issues also arise in cases where the government is not a party. Government entities may be served with subpoenas or court orders demanding that staff testify about or release government data related to the litigation. A subpoena is not a court order; a court order is a document signed by a judge mandating that the government entity do something. A subpoena, on the other hand, does not come from a judge and lacks the legal authority of a court order. *See State v. Colonna*, 371 N.W.2d 629 (Minn. Ct. App. 1985) (a subpoena is not the equivalent of a court order required to access private personnel data under Minnesota Statutes, section 13.43.) A government entity and its staff are generally protected when releasing or testifying about not public data pursuant to a court order. Minn. Stat. §13.08, subd. 5. This protection does not exist if the release or testimony is in response to a subpoena.

1 The practice of attorneys stipulating to release of private data on individuals pursuant to a protective order is becoming more and more common. It is important to note, however, that state and federal courts, as well as individual judges, have differing approaches and views of protective orders. In addition, in order to fully comply with the MGDPA, any protective order must be approved by a judge and the data production under such orders must be mindful of the privacy interests of those individuals whose data are the subject of the protective order.

If an attorney serves a subpoena on a government entity or official for the inspection or copies of not public data, the government's legal counsel will typically call and/or submit written objections to the requesting party's attorney pursuant to Minnesota Rules of Civil Procedure, Rule 45.03(b)(2). If an agreement regarding production of only the responsive *public* government data is not reached, the government must resist production. The consequence is that the requesting party is left with a useless subpoena, no access the desired information, and the prospect of taking additional steps to obtain a court order to compel production. Another approach sometimes taken in responding to a subpoena served on a government entity for either testimony or inspection/copies of not public data, is for the government to file a motion with the court to quash the subpoena. See Minnesota Rules of Civil Procedure, Rule 45.03(c) and Minnesota Rules 1205.0100, subpart 5. Either way, it is very important for the civil litigator to understand the limited power and consequences of a subpoena when dealing with government data to head off unnecessary disputes and confusion.

Government Data and Contractors

Government entities routinely contract with private parties and MDLA members routinely defend those contractors in litigation. It is important to remember that when a private party contracts with a government entity to perform any of its functions, the private party must comply with the MGDPA in carrying out duties related to the contract. Section 13.05, subdivision 11(a), provides:

> If a government entity enters into a contract with a private person to perform any of its functions, all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this chapter and *the private person must comply with those requirements as if it were the government entity.* (emphasis added)

The contract must also include a notice that requires the private contractor to administer any government data according to the provisions of the MGDPA. In 2014, the Minnesota Legislature modified this provision by stating that failure to include the notice in the contract does not invalidate the application of subdivision 11.

Therefore, if your client is a private contractor hired by a government entity, it is important to be aware that the contractor will need to step into the shoes of the government and follow the MGDPA in certain circumstances. *See WDSI, Inc. v. County of Steele,* 672 N.W.2d 617 (Minn. App. 2003). In *WDSI* the county contracted with a private contractor, KKE, to build a detention center. WDSI felt its ability to bid on the project was precluded by the county's pre-bid qualification requirements. When WDSI asked the county for the qualification requirements, and why KKE was awarded the contract, the county told WDSI to contact KKE for the information. KKE responded that its contract with the county did not turn the information requested into government data because they were a private company. When WDSI requested that the county order KKE to release the data related to the contract, the county refused.

In the lawsuit that followed, the KKE lost on its arguments that it had no obligations regarding the data requested. The court of appeals held that under the MGDPA when a political subdivision contracts with a private party to perform any of its government functions, the private party acts as the government and must comply with the requirements of the MGDPA. The private entity may even be held liable for violations of the statute. While this put burdens on the private contractor to know and follow the regimen of the MGDPA, a silver lining can be found because the *MGDPA* does not put these obligations on the private person if same data are also in the possession of the government entity. The MGDPA "does not create a duty on the part of the private person to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract. Minn. Stat. §13.05, subd. 11(b).

There are some other implications for private parties contracting with government entities. A private contractor is considered an individual "within"

the government entity for the purposes described in the contract. *See* Minnesota Rules 1205.0400 and 1205.0600. This will allow individual employees of the contractor to access private or confidential government data when the individual's work reasonably requires access. Thus, if a contractor's employees need access to private or confidential government data to do their work, they will be permitted to access this information which would ordinarily be off limits to the general public.

Bottom-line, all Minnesota defense attorneys should be aware of the legal obligations with respect to government data when representing a private contractor. If possible, plan ahead and set forth the obligations of both parties (private party and government entity) with respect to government data and incorporate them into a written agreement because without such an agreement, the private party may unwittingly be stepping into the shoes of the government and creating liability exposure under the MGDPA.

CONCLUSION

Dealing with government data is not always easy and, admittedly, can be very frustrating. Understanding the basic principles and framework of the MGDPA is essential for the success of a defense litigator in this state. Whether representing a governmental client or a private party, any MDLA member having the fundamental base of knowledge provided in this Chapter will have an advantage; and he or she should be able to adapt and react positively to MGDPA issues as they are arise.

WORKERS' COMPENSATION BAR AGAINST SUITS AGAINST AN EMPLOYER

BY MARK A. FREDRICKSON (2013-14)

Introduction

1913 was quite a year. The 16th amendment, allowing the federal income tax was ratified (1%) and the new President, Woodrow Wilson, created Federal Reserve Bank. Oregon passed the first minimum wage law. The US Department of Labor became its own entity. Stainless steel and the all purpose zipper were invented. The first coast to coast paved highway was opened and the first "sedan" went on sale. Ford opened its first moving assembly line and there were many nationwide and local strikes, general labor unrest and industrial and mining disasters. In Minnesota, the legislature passed the Minnesota Workers' Compensation Act (the "Act").

Like similar acts in most states, the Act formed as a result of a "grand compromise" between labor and industry. Prior to the act, an employee injured on the job typically had no safety net. If he could prove that the employer was negligent, he might have a shot at recovering in tort, but the employer had many common law defenses … the employee's claim was barred if he had any fault in causing the injury (the concept of comparative fault did not exist), or had assumed the risk of the injury, or if a co-employee's fault caused the injury. If he won, he got to recover the full amount of his damages, including pain and suffering, but in the meantime, he paid his own medical bills and had no source of income. Employers, while somewhat concerned with having to pay tort damages and deal with the effects of litigation on an ongoing business, were more concerned that they would soon be forced to provide significant benefits to all employees as a result of the growing strength of unionized labor and public outcry.

So was born the idea of a "no-fault" system to compensate employees injured on the job, but to limit that compensation to specifically delineated benefits, funded by insurance programs, in exchange for eliminating the employee's common law right to sue his employer for injuries. Also eliminated in this compromise were the employer's common law defenses. Essentially, this system still exists today, 102 years later.[1] However, over a hundred years, as the relationship between labor and capital has changed, opportunities to change the grand compromise and allow "employees" to sue their "employer" for work injuries have

1 Minn. Stat. Sec. 176.001, enacted in 1981, in part to reverse a reference to the workers' compensation act as a "remedial" law to be interpreted in favor of employees, specifically calls out this compromise as the basis for the act: "The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well." *Meintsma v. Lorman Maintenance of Way, Inc.*, 684 N.W.2d 434, 438 (Minn. 2004).

arisen and met with varying degrees of success. This article will discuss the various instances where the "workers' compensation bar" to common law claims against an employer have been challenged.

Minn. Stat. Section 176.031 is the codification of the compromise: "The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee, personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death."

There are, however, certain exceptions to this general rule in Minnesota, and there are other theories that would create exceptions which have not been adopted in Minnesota.[2]

Exceptions to the Workers' Compensation Bar

Employers Who Do Not Obtain Required Insurance or Self-Insurance

Employers who do not participate in the workers' compensation system by buying the mandatory insurance, or appropriately self-insuring against workers' compensation exposure, lose the benefits of the grand compromise. After setting out the bar, Minn. Stat. 176.031 continues:

> "If an employer other than the state or any municipal subdivision thereof fails to insure or self-insure liability for compensation to injured employees and their dependents, an injured employee, or legal representatives or, if death results from the injury, any dependent may elect to claim compensation under this chapter or to maintain an action in the courts for damages on account of such injury or death. In such action it is not necessary to plead or prove freedom from contributory negligence. The defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of employment, or that the injury was due to the contributory negligence of the employee, unless it appears that such negligence was willful on the part of the employee. The burden of proof to establish such willful negligence is upon the defendant."

There is not much modern case law construing 176.031's cause of action against uninsured employers, probably because the economic incentives are not present.

Typically, an employer without workers' compensation coverage has no significant assets and any liability coverage it has will have an exclusion for injuries sustained by employees. Also, the plaintiff still has to prove the fault of the employer. Presumably the employee would be entitled to additional common law damages, but while contributory negligence is not a bar, presumably comparative negligence principles would apply. See generally, *Anderson v. Hegna*, 212 Minn.147, 2. N.W.2d 820 (1942); *Andrews v. Bartholomew*, 242 Minn. 46, 64 N.W.2d 7 (1954) and *Klemetsen v. Stenberg Const. Co., Inc.* 424 N.W.2d 70 (Minn. 1988).

Rather, most employees end up making a claim against the employer and the Special Compensation Fund (a branch of the Department of Labor and Industry that provides workers' compensation coverage for uninsured employers). See MSA 176.183. The Special Compensation Fund is entitled to collect all benefits paid to the employee plus a 65% penalty from the employer, using the procedures for collecting unpaid taxes. It is best to be insured.

2 In order for the act to apply, the injured person needs to be an employee and the injury needs to arise out of and in the course of his/her employment. Minn. Stat. Sec. 176.021 (Every employer is liable for compensation according to the provisions of this chapter and is liable to pay compensation in every case of personal injury or death of an employee arising out of and in the course of employment without regard to the question of negligence.) Employee is a defined term (see MSA 176. 011 subd. 9 and 9a), as is employer, MSA176.011 subd. 10, and personal injury, MSA 176.011 subd. 16. "Arising out of and in the course of" can be a very complex analysis, and is the subject of a body of case law much too broad to include in this article. While this article will assume that case involves a covered employee's injury arising out of and in the course of his/her employment, unless otherwise discussed, that preliminary issue should be addressed first.

Employers and Co-Employees Who Commit Intentional Torts

THE ASSAULT EXCEPTION

Minn. Stat. Sec. 176.011, subd. 16 contains an exception for cases of certain intentional injuries by excluding them from the definition of personal injury:

> "Personal injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment."

This exception is known as the assault exception and "usually fall[s] into one of three categories: 1) those that are noncompensable under the Act because the assailant was motivated by personal animosity toward his victim, arising from circumstances wholly unconnected with the employment; (2) those that are compensable under the Act because the provocation or motivation for the assault arises solely out of the activity of the victim as an employee; and (3) those that are compensable under the Act because they are neither directed against the victim as an employee nor for reasons personal to the employee.'" *Meintsma*, 684 N.W.2d at 439, quoting *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830,834 (Minn. 1985). See *Foley v. Honeywell, Inc.*, 488 N.W. 2d 268 (Minn. 1992) and *Bear v. Honeywell, Inc.*, 468 N.W.2d 546 (Minn. 1991).

> In situations involving sexual assault or harassment, the Court of Appeals has ruled that there is at least a fact issue regarding the personal animosity issue. See *Stengel v. E. Side Beverage*, 690 N.W.2d 380 (Minn.Ct.App. 2004). Presumably, cases that do not actually involve personal injury are not covered by the workers compensation bar either. See *Kopet v. General Mills, Inc.*, 2005 WL 1021651 n. (Minn. App. 2005)(citing 344 N.W.2d 597, 604-05 (Minn.1984) and *Hollen v. USCO Distribution Servs., Inc.*, No. Civ. 02-1119, 2004 WL 234408, at *11 (D.Minn. Feb. 3, 2004).

Of course, once an assault is found to be personal, the employer faces liability for failure to properly supervise, negligent hiring, negligent security and other similar claims.

THE COMMON LAW EMPLOYER INTENTIONAL INJURY EXCEPTION TO THE EXCLUSIVE REMEDY PROVISION OF THE WCA.

In 1930, the court, in *Boek v. Wong Hing*, 180 Minn. 470, 440 N.W. 233 (1930), recognized an exception to the exclusive remedy provisions of the WCA when it allowed a tort claim to proceed against an employer who "willfully assaults and injures a workman" because "it would be a perversion of the purpose of the act to so hold." *Id*. at 471, 231 N.W. at 233-34. In addressing the employer intentional injury exception, the *Meintsma* court noted that "the employee must demonstrate that the employer harbored a conscious and deliberate intent to injury him or her…. [which] may not be inferred from mere negligence, though it be gross… [and is not triggered by the] employer's knowledge of a substantial certainty of injury to an employee." 684 N.W.2d at 440 (internal citations and quotations omitted). The employers' "knowledge and inaction" to prevent the assault is insufficient to meet the "conscious and deliberate intent to injure" test so as to take the claim outside of the exclusive remedy provision. *Id*. at 440.

THE STATUTORY EXCEPTION TO CO-EMPLOYEE TORT LIABILITY FOR INTENTIONAL INJURIES

Minn Stat. Sec. 176.061 Subd. 5 (e) [3]states: "A coemployee working for the same employer is not liable for a personal injury incurred by another employee unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee." We will address the gross negligence exception in the following section of the paper *Meintsma* addressed this exception as well. The issue in *Meintsma* was whether the statute applied if the co-employee intended to commit the act causing the injury, or whether the injured employee had to prove that the co-employee intended to cause the injury in order to avoid the workers' compensation bar and sue the co-employee in tort. *Meintsma* construing the language of the statute to be consistent with the

3 The numbering of the sections of Minn. Stat. Sec. 176.061 subd. 5 have changed. In earlier versions of the statute, this was Minn. Stat. Sec. 176.061 subd. 5 (c), not (e).

requirements of the common law intentional injury exception, found that the injured employee must prove that the defendant "consciously and deliberately intend[ed] to cause an injury, not just intend[ed] to do the act." 684 N.W. at 441. The *Meintsma* court determined that fact issues existed regarding whether the co-employees intended to inflict injury. It did not reach the question of whether the employer could be vicariously liable.

Co-Employees Who are Grossly Negligent and Breach a "Personal Duty" to the Injured Employee

As quoted above, Minn. Stat. Sec. 176.061 subd. 5(e) allows an injured employee to sue a co-employee who causes his injury as a result of gross negligence. However, the courts have put a significant gloss on this exception that makes recovering against an employer for injuries sustained at the hands of a grossly negligent co-employee in tort virtually impossible, and makes claims against even grossly negligent co-employees very difficult. This gloss is known as the "personal duty rule" and since its adoption in *Dawley v. Thisius*, 304 Minn. 453, 231 N.W.2d 555 (Minn. 1975), the Supreme Court has consistently resisted the temptation to find co-employee liability outside the context of intentional injury. [4] In *Dawley* the court applied the personal duty test to prevent an employee from suing the general manager of a plant for breaching his duty to provide for the overall safety of the plant and found that a co-employee will have no personal liability "because of his general administrative responsibility for some function of his employment without more." 304 Minn. at 456, 231 N.W.2d at 557.

Twenty years later, in *Wicken v. Morris*, 527 N.W.2d 95 (Minn. 1995) the defendant manager was accused of fraud in creating the conditions that resulted in the plaintiffs getting blown up. Again, however, the Supreme Court found that as the manager's fraud was not directed toward the employees, it too was merely an administrative activity required as an integral part of the manager's employment obligations. *Id*. at 99.

4 Actually, *Dawley* was decided before the 1979 amendments to the workers compensation statute added the gross negligence language to the statute.

The *Wicken* court added, "to hold otherwise, permitting co-employee liability when harm results however indirectly from the carrying out of administrative obligations incident to work responsibilities would eviscerate the fundamental purpose of the workers' compensation laws. *Id*.

Ten years after *Wicken*, following the tragic heat stroke death of Minnesota Viking Cory Stringer, the court again addressed the meaning of the personal duty rule, this time in the context of a suit against the trainers who ministered to Stringer on the day of his death. *Stringer v. Minnesota Vikings Football Club, LLC*., 705 N.W.2d 746 (2005). The plaintiff asserted that direct personal actions one employee takes with respect to another employee would satisfy the personal duty test. The respondents argued that a personal duty exists only where the co-employee departs from his employment responsibilities and voluntarily assumes additional duties that put another at risk. *Id*. at 757. Instead, the court adopted a two-part personal duty test: "the co-employee must have (1) taken direct action toward or have directed another to have taken direct action toward the injured employee, and (2) acted outside the course and scope of employment." *Id*. (citations omitted).

As the dissent in *Stringer* points out, there are no cases establishing the standard for gross negligence for co-employee liability under the workers' compensation act. Justice Hanson rejects the concept that to prove gross negligence under the compensation act, a plaintiff would have to prove the tougher standard of "want of even scant care" used in the context of criminal cases, and says that it should be described as "negligence of a high degree, great negligence, [or] more than ordinary negligence but less than wanton and willful conduct." *Id.* at 768. Under Justice Hanson's standard a fact issue on gross negligence would have existed. Neither the majority in *Stringer* nor *Wicken* reached the issue.

Employers Who Are Negligent and Owe Contribution to a Third Party Tortfeasor

Minn. Stat. Section 176.061, subd. 5 allows an employee whose injury arose out of and in the course of their employment to sue a negligent or otherwise at-fault

party, so long as the at-fault party is a third party to the employment relationship. The same section allows the employer to assert a subrogation or indemnification claim against the third party tortfeasor, and to recover the increased cost of worker's compensation coverage caused by the injury to the employee, thereby allowing the employer, in theory, to be made whole if the accident was wholly the fault of the third party. Prior to the Supreme Court's decision in *Lambertson v. Cincinnati Corp*., 257 N.W.2nd 679 (Minn. 1977), the common law rules of contribution and the workers' compensation bar worked to shield an at fault employer from claims that the employers fault contributed to the injury. *Lambertson* held that a third party tortfeasor was entitled to assert a claim of equitable contribution measured by the lessor of the employer's percentage of fault or the amount of workers' compensation benefits paid or payable. In this way, the employer, in theory, still never paid more than its workers' compensation liability, and the third party tortfeasor had an opportunity to mitigate its exposure. In practice, however, there were disputes regarding how workers' compensation payments aligned with common law tort damages, and the operation of the distribution formula at Minn. Stat. Sec. 176.061 resulted in the employer funding the employee's cost of recovery (attorneys fees and costs attributable to the subrogation amount) but still being potential liable to the third party tortfeasor for the full amount paid and payable. Additionally, an employer with significant fault would be forced to assume significant costs of defense and impositions on its employees and management with no potential recovery.

In 2000, the legislature made significant changes to the Minn. Stat. Sec. 176.061 which in large part have eliminated those issues. First, Subd. 5b was amended to clarify that the employers' subrogation rights included all benefits paid and payable "regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute." The remaining problems were solved by a new section, Minn. Stat. Sec. 176.11, which limited the tortfeasor's "Lambertson contribution" right to the amount recoverable by the employer under the 176.061, subd. 6 formula, and by giving an at fault employer the option to waive its right to subrogation in exchange for a dismissal of the third party tortfeasor's contribution claim. The statute then provides a mechanism for the damages assessed by the jury to be reduced by the amounts that are duplicative of those paid by workers' compensation.

An open question is how a contractual indemnification agreement between the at-fault employer and the third party tortfeasor would apply, especially where the employer's fault exceeds the amount of workers' compensation benefits paid, or where the employer has agreed to indemnify the third party tortfeasor for all damages arising out of the subject matter of the agreement. Nothing in the statute appears to prohibit such contractual indemnification agreements, and if they are otherwise enforceable, it seems that the third party tortfeasor should be entitled to recover under whichever theory provides it with the greatest recovery. The effect of a waive and walk election under 176.061 subd. 11 is also undecided in these circumstances.

Another open question under this scenario is the effect of the Minnesota's joint and several liability statute on an employee's claim against a third party tortfeasor. In *Staab v. Diocese of St. Cloud,* 853 N.W. 2d 713 (Minn. 2014), the Supreme Court held that a tortfeasor who was not more than 50% at fault was not jointly liable for the fault of a party who was not sued, but was placed on the verdict form. However, the plaintiff in *Staab* was not prevented from suing the other at fault party, her husband, by law as is the case where an employee is prevented from suing her employer by the workers' compensation bar.

The Minnesota Supreme Court has not addressed this issue under the new comparative fault statute or the 2000 revisions to Minn. Stat. Sec. 176.061 subd. 6. Under a prior version of the comparative fault act, the court, in *Hudson v. Snyder Auto Body*, 326 N.W.2d 149 (Minn. 1982), the court held that the procedural mechanism for payment of the various awards under *Lambertson*, as set out in *Johnson v. Raske Building Systems*, 276 N.W.2d 79 (Minn. 1979) applied and held "The comparative-fault statute does not affect the apportionment procedure set out in *Johnson."* 326 N.W. 2d at 157. Under the *Johnson* procedure, the at fault tortfeasor pays the total amount of the judgment

in favor of the plaintiff to the plaintiff (damages less plaintiff's fault), and then the employer pays the tortfeasor for the employer's *Lamberston* contribution liability and the employer recovers its subrogation claim from the employee.

However, in *Gaudreault v. Elite Line Services, LLC*, 2014 WL 2117211 (D. Minn. 2014), Judge Ericksen applied the reasoning in *Staab* and held that the comparative fault act applied to a special verdict form where the third party tortfeasor sought contribution from the employer, and the third party tortfeasor was less than 50% at fault. In other words, the court did not apply the *Johnson* method approved by *Hudson*. Rather, the court held that since *Johnson* was decided before Minn. Stat. Sec. 176.061 subd. 11 was enacted, and since the employer had waived and walked, the *Johnson* plan was not applicable. The Federal court did not directly address the language of *Hudson*. It did, however, refuse to follow *Decker v. Brunkow*, 557 N.W.2d 360 (Minn. App. 1996) which addressed this issue in light of the 4x15% joint liability rule then in effect and found that even where the third party tortfeasor's fault was only 5% and the employer's fault was 95%, the third party tortfeasor owed employee the full amount of its damages. The Federal court also failed to appreciate that while Minn. Stat. Sec. 176.061 subd. 11 codified the waive and walk procedure, *Lambertson* itself created the framework for that procedure, and it was used prior to the new statute. Finally, it should be noted that the court's discussion in *Gaudreault* was not a holding, but was an advisory opinion that the court itself recognized it did not have the power to make. It did so only as an accommodation to the parties.

Theories that Have not Been Adopted in Minnesota

Dual Capacity Doctrine

The "dual capacity" doctrine was advocated by many scholars in the 1970s and early 1980s. It proposed that:

> "[A]n employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer."

2A A. Larson, *The Law of Workmen's Compensation* § 72.80 (1976 & Cum. Supp. 1980), quoted in Note, *Workers' Compensation: The Dual-Capacity Doctrine*, 6 Wm. Mitchell L.Rev. 813, 814 (1980) *Kaess v. Armstrong Cork*, 403 N.W. 2d 643, 645 (Minn. 1987).

However, as the *Kaess* court noted, "Larson has abandoned the 'dual capacity' doctrine, explaining that it has been overextended and misapplied and that because of the many possible different relationships of an employer-landowner, product manufacturer, installer, modifier, doctor, insurer, etc., the 'dual capacity' doctrine would go far toward abolishing the exclusive remedy principle." 2A A. Larson, *The Law of Workmen's Compensation* § 72.81, at 14-230 (1983). To date, although no published Minnesota cases have adopted the Dual Capacity doctrine, neither has the Supreme Court flat out held that the Dual Capacity doctrine does not apply in Minnesota. *Id.* ("Thus even if the "dual capacity" doctrine were to be recognized in Minnesota, it would not in this case permit a suit against MacArthur"), *see* also, *Terveer v. Norling Bros. Silo Co.*, 365 N.W.2d 279 (Minn. App 1985), and *Egeland v. State*, 408 N.W. 2d 848 (Minn. 1987).[5] Perhaps a creative plaintiff's lawyer

5 "With respect to the "dual capacity" doctrine, Judge Egeland was injured in an accident involving another state employee; in cases involving government employees, whether local, state, or federal, the "dual capacity" doctrine has been rejected by virtually every court which has addressed the issue. *See* 2A A. Larson, *The Law of Workmen's Compensation*, § 72.85(b) (d), at 14-255 14-258 (1986 & Cum.Supp.). For example, in rejecting the doctrine in a case involving an attempted suit against the state by an injured state employee, the Alaska Supreme Court stated:

> 'Whatever frail vitality the dual capacity doctrine has in other jurisdictions, we do not think that it warrants adoption here. To do so might undermine extensively the policy sought to be achieved by the workmen's compensation act. There are endlessly imaginable situations in which an employer might owe duties to the general public, or to non-employees, the breach of which would be asserted to avoid the exclusive liability...

can find a path through the existing case law, but as *Kaess* and *Egelund* indicate, the path would be very narrow and hard to navigate.

Dual Persona Doctrine

As the Court in *Kaess* pointed out, Professor Larson has refined the Dual Capacity doctrine to the doctrine known as the "Dual Persona" doctrine. This doctrine provides:

"An employer may become a third person, vulnerable to tort suit by an employee, if and only if he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." 2A A. Larson, *supra*, § 72.81, at 14-229." *Kaess*, 403 N.W. 2d at 645.

However, even this narrow route around the workers' compensation bar has met with hostility from Minnesota's courts. In *Kaess*, the court found that the dual persona test was not met where the plaintiff worked for one division of his employer installing asbestos containing products and was injured by asbestos containing products manufactured by a different division of the same employer. In *Egeland*, the court found that the plaintiff, a county district court judge employed by the state of Minnesota could not sue the Minnesota Department of Transportation because they are not separate legal entities. *See* also *Ytuarte v. Gruner +Jahr Printing and Publishing Co.*, 935 F.2d 971 (8th Cir. 1991) (employer, as division of owner of building that collapsed, was not separate and distinct for purposes of Dual Persona doctrine).

> provision of our statute. It would be an enormous, and perhaps illusory, task to draw a principled line of distinction between those ... situations in which the employee could sue and those in which he could not. The exclusive liability provision would, in any event, lose much of its effectiveness, and the workmen's compensation system as a whole might be destabilized. For these reasons, and because of the persuasiveness of case law from other jurisdictions rejecting it, we reject the dual capacity doctrine as the law of this state.'"
>
> *Id*. at 851, quoting *State v. Purdy*, 601 P.2d 258, 260 (Alaska 1979) (footnote omitted).

Non-Employers who Are Beneficiaries of the Workers' Compensation Bar

Common Enterprise

Minn. Stat. Sec. 176.061 subd. 1 and 4 work together to bar an employee of one participant in a common enterprise from suing the other participant in the common enterprise for negligence. The question is, when does a common enterprise exist? In *McCourtie v. US Steel Corp*, 253 N. W. 2d 501, 93 N.W.2d 552 (1958) the Minnesota Supreme Court "explained that a common enterprise exists if all of the following three factors are met:

1. The employers must be engaged on the same project;
2. The employees must be *working together* (common activity); and
3. In such fashion that they are subject to the same or similar hazards."

McCourtie, 253 Minn. at 506, 93 N.W.2d at 556; *Kaiser v. Northern States Power Co.*, 353 N.W.2d 899, 906 (Minn. 1984). *O'Malley v. Ulland Bros.*, 549 N.W.2d 889 (Minn. 1995). The *O'Malley* court held that whether or not the employers were part of a common enterprise was a question of law for the court, and determined that in this case, the employers were in a common enterprise, and therefore dismissed the employee's claim. The *O'Malley* court indicated that its opinion was informed by the 1983 statutory change in 176.001 requiring the WCA be applied in an even handed way, not as before 1983, in favor of recovery as a remedial statute.

The dissent in *O'Malley* argued that whether the common enterprise test was met was a mixed question of fact and law, and noted with disdain that this was the first case in 50 years to find a common enterprise in a contested case, and predicted the resurgence of the common enterprise doctrine and its resurrection from near death. Since *O'Malley*, however, the common enterprise exception to third party liability continues

to be a difficult defense for the third party tortfeasor to succeed on. *See Sorenson v. Visser*, 558 N.W.2d 773 (Minn. App 1997), *Carstens v. Mayers, Inc.*, 574 N.W.2d 733 (Minn. App. 1998), *LeDoux v. M.A. Mortenson Co.*, 835 N.W.2d 20, 22 (Minn. App. 2013. *But See*, *Teska v. Potlach Corp.*, 184 F.Supp. 2d 913 (D. Minn. 2002).

The rule exists for the protection of employers who have joined forces and in effect have put their forces in a common pool. *LeDoux*, 835 N.W. 2d at 22. In order to prevail, the tortfeasor must put together significant evidence showing that all three elements of the *McCourtie* test have been met. In spite of the result in *O'Malley*, this remains a tough row to hoe.

There is one additional element of the common enterprise defense … both the employer and the tortfeasor seeking to use the defense must be insured or self-insured for workers' compensation under the Minnesota Act.

Borrowed/Loaned Servants

Employers of all kinds use temporary agencies to staff their operations. Typically, the plaintiff is an employee of the temporary agency (general employer) who is seconded to another employer to actually perform work (special employer). Under Minnesota's Workers' Compensation Act, both the general employer and the special employer are liable for workers' compensation benefits if a three part test is met. *Danek v. Meldrum Manufacturing & Engineering Co.*, 252 N.W.2d 255 (Minn.1977). The test is:

> "When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:
>
> a. the employee has made a contract of hire, express or implied, with the special employer;
> b. the work being done is essentially that of the special employer; and
> c. the special employer has the right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation." *Id*. at 258.

The general employer and the special employer are allowed to "arrange for a different distribution of payment of the compensation for which they are liable." Minn. Stat. Sec. 176.071.

Usually, the labor broker/general employer pays the workers' compensation benefits. It is not unusual therefore, for the plaintiff to assert a claim against the special employer. Under the *Danek* analysis, the first element includes an inquiry regarding whether the employee consented to an employment relationship with the special employer. In the labor broker context, consent is inferred. Consent may also be implied, for example in a temp to hire scenario. *Dukes v. Northern Metal Fab., Inc.*, 2015 WL XXX (D. Minn) Case No. 13-cv-03647 (SRN/FLN).

Conclusion

Minnesota has, despite numerous challenges, fairly rigorously upheld the elements of the Grand Compromise. The bar against tort claims by an employee against his employer continues to have the support of the courts. Understanding the relationship between the plaintiff, his employer and the alleged third party tortfeasor in the context of purposes of the Workers' Compensation Act will make navigating this often confusing legal landscape easier for defense lawyers involved in these cases.[6]

6 There is an entire jurisprudence surrounding claims and settlements in cases involving true third party tortfeasors. That discussion is outside of the scope of this article, but the author is happy to discuss it with you.

STAAB V. DIOCESE OF ST. CLOUD CHANGED THE LANDSCAPE OF JOINT AND SEVERAL LIABILITY IN MINNESOTA

BY DYAN J. EBERT (2014-15)

In 2003, the Minnesota Legislature chose to drastically modify Minnesota's joint and several liability law. Prior to 2003, any person could be held liable for 100% of a jury's verdict unless certain specified conditions were met. After the 2003 amendments, the joint and several liability statute provides (in relevant part):

> **Subd. 1.** When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> 1. a person whose fault is greater than 50%
>
> […]
>
> **Subd. 2.** Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Minn. Stat. § 604.02 subd. 1, 2. (2003).

The impact of the 2003 amendments was borne out by a premises liability case that was tried to a Stearns County jury in Spring 2009. My partner, Mike Lafountaine, represented the Diocese of St. Cloud in a lawsuit that was started by Alice Staab after she was injured when her husband Richard Staab pushed her wheelchair off a step on premises of the Holy Cross Parish. Ms. Staab sued the Diocese of St. Cloud; she did not sue her husband. The Diocese did not bring a third party claim against Mr. Staab. At trial, both the Diocese and Richard Staab were included on the jury verdict form as potentially at fault parties. The jury found both the Diocese and Richard Staab negligent and a cause of Respondent's injuries and attributed 50% fault to the Diocese and 50% fault to Richard Staab.

The amount of the jury verdict that the Diocese was obligated to pay was the subject of two separate appeals that both made their way to the Minnesota Supreme Court. Laura Moehrle and I represented the Diocese in both appeals, first to the Minnesota Court of Appeals and then to the Supreme Court. In the first appeal, *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 74

(Minn. 2012) (referred to as *Staab 2012*), the Minnesota Supreme Court addressed the proper interpretation and application of subdivision 1 of the statute. After consideration of the language used, the legislative history and intent, and other authorities, the Court recognized the Legislature's intention to reduce the scope of joint liability, to ensure that minimally at fault defendants did not pay damages in disproportion to their fault. *Staab 2012*, 813 N.W.2d at 78. The Court held that, because the Diocese was severally liable pursuant to the statute, it was only required to pay its fair share (50%) of Ms. Staab's damages. *Staab 2012*, 813 N.W.2d at 80.

The second *Staab* decision (referred to as *Staab 2014)* was focused on the fundamental difference between the concepts of several liability and joint liability. Following the Supreme Court's Order remanding the case to the District Court to enter judgment consistent with the decision, Ms. Staab filed a Motion for Reallocation, alleging the amount of the jury award attributable to Richard Staab was uncollectable and requesting an Order from the District Court reallocating the remaining 50% of the jury's award to the Diocese pursuant to subdivision 2 of the statute. After considering the language of the statute, as well as the legislative history, the Minnesota Supreme Court found that there was no basis to allow the reallocation provisions of subdivision 2 of the statute to be applied to a severally liable defendant. The Court concluded that the Diocese's exposure was limited to 50% of the damages awarded by the jury.

Following the *Staab v. Diocese of St. Cloud* decisions, there have been several articles written and numerous continuing legal education seminars presented on joint and several liability and the impact the decisions of the Supreme Court have on case evaluation and civil litigation. As such, it would be futile for me to try and come up with some novel way to approach the subject. Instead, I thought it best to simply defer to two articles from that were published in *Minnesota Defense* on the topic. The first article, *Liability and the Sole Defendant: Applying Minnesota Section 604.02 after Staab v. Diocese of St. Cloud,* was published in the Summer 2012 Edition and was written by my partner, Laura Moehrle, and Matt Johnson, formerly of Johnson & Condon, P.A. and currently with Erickson, Zierke, Kuderer, & Madsen, P.A. This article analyzes the joint and several liability statute following the 2003 amendments and the impact that *Staab 2012* had on the question of what damages a sole defendant owes to an innocent plaintiff when that sole defendant is 50% or less at fault. This article also includes some guidance on how the *Staab 2012* decision may impact other claims, including construction claims and employer liability (*Lambertson*) claims.

The second article was co-authored by me and Ms. Moehrle and was published in the Fall 2014 edition. This article, *Reallocation and the Severally Liable Defendant: Applying Minnesota Statute Section 604.02 After Staab v. Diocese of St. Cloud*, addresses the question of whether a person who is severally liable can be forced to pay more than their fair share of a verdict. Additionally, this article provides some guidance on when subdivision 2 relating to reallocation may be implicated.

Mark Fredrickson and Lauren D'Cruz of Lind, Jensen, Sullivan & Peterson, P.A. have also authored an article addressing what impact the *Staab* decisions have on the issue of apportioning fault between a negligent tortfeasor and an intentional tortfeasor. It is anticipated that this article will be published in the Summer 2015 edition of *Minnesota Defense*.

MICHAEL J. FORD: A LASTING LEGACY AS AN ATTORNEY, MENTOR, AND FRIEND

BY CALLY KJELLBERG-NELSON

Mike Ford was the greatest mentor I've ever had, period. While always humble, he was the most intelligent man I have known and with his gentle nature, he commanded respect. Mike's passing was a loss to me, but I recognize I only got to know him for a few years, while many others in my firm and in the profession got to know him for 30+ years and I can only imagine the loss they feel.

In my brief time with Mike Ford, I became his "right hand woman" — there wasn't a case that came in that he didn't put me on with him. We had a great working relationship, one borne out of respect and admiration for not only the way he handled his cases, but how he treated others.

Tuesdays With Morrie is a book by Mitch Albom in which Albom writes of his time with his dying sociology professor, Morrie Schwartz, and the life lessons he learned from their time together. It is only fitting for me to quote from this book when reflecting on Mike Ford:

> Death ends a life, not a relationship. All the love you created is still there. All the memories are still there. You live on — in the hearts of everyone you have touched and nurtured while you were here.

This could not be truer when considering the life of Mike Ford.

Mike was a prolific writer. Whether it was through published articles or lengthy emails to firm members regarding the latest legal issues, Mike always had a thoughtful message to convey to others about a variety of topics.

When I started clerking at Quinlivan & Hughes, P.A. in 2008, Mike handed me the article "An Associate's First Client" and set an appointment for us to discuss later that week. At the time, I knew Mike was a "big deal" because he was the President of the Minnesota State Bar Association, so I decided it would be wise of me to follow his advice in the article. Whether you are a new law clerk, a new associate, or a seasoned lawyer, the recommendations Mike had regarding what clients want and need provide a valuable lesson.

When I started as an associate attorney in January 2010, Mike Ford brought me another article to review — this time about time entries — "Billing Your Clients: Seven Deadly Sins." If there was one thing I did not like about the practice of law, it was the tedious task of entering time. Mike gave me the article and once again, he set up a meeting to discuss it. At the time I admittedly thought this was a bit much; are time entries really all that important? Can't I just

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do my research projects, write motions, and write whatever I want to record that time? In "Billing Your Clients: Seven Deadly Sins", Mike explains the precise reasons why time entries are so important below. Mike's appreciation for what clients need and want allowed him to summarize the "sins" of billing.

Mike described the profession of law as a three-legged stool. The three legs consist of the profession of law, the practice of law, and the business of law. In an interview with Bench & Bar in 2008, Mike explained his analogy as follows:

> The profession of law is all the things we think about when we attend meetings of the organized bar — work for the passage of legislation that's helpful to society, representing the indigent — all of the good things about being an attorney.
>
> Then there's the practice of law, which is developing your skills, going to continuing legal education, drafting documents, becoming a better lawyer. And everybody recognizes the value of that.
>
> I think, over the years, the organized bar has been reluctant to ascribe much importance to that third leg, which I call the business of law. That's the dirty, grubby business of billing clients, collecting from those clients, paying your staff, paying for computer resources and paper, and in essence turning sufficient profit so that you can make a living.

Mike's concern was that if attorneys were so concerned about the business of law, they would "skimp on the profession and practice of law." To Mike, writing about the nitty-gritty of billing clients was an important topic because it addressed the business of law. The less time attorneys spent worrying about the financial aspects of the business of law, the more time attorneys would have for professional organizations, such as MDLA.

Mike served as MDLA President from 1992 to 1993. His contributions to the association were immeasurable. Whether he was serving on committees, publishing articles, or coming up with new ideas to increase membership, Mike left a lasting impression on how to serve an organization. Maybe one of Mike's most lasting legacies to the association was his strong encouragement for all attorneys to become involved in professional associations. At Quinlivan & Hughes, Mike specifically encouraged the attorneys to join MDLA. As noted in the article "Super Lawyers and the Bar Association", Mike's involvement in MDLA, of course, involved a personal story, but for those who do not have a personal story, let the article serve as your reminder about why you became involved in MDLA.

Mike Ford notoriously would end his emails within the firm with the saying, "The beat goes on." Yes, the beat does go on. Mike's beat goes on through his family, the colleagues he influenced, his war stories (military[1], football[2], and legal) still being told, and his countless writings. Much like the stories Mike heard about Richard Quinlivan being passed down over the years, we should all take time to tell a story about Mike Ford because in that way, his death does not end his contribution to the profession. While the folowing articles are just a few of Mike's publications, they are a testament to his impact on the profession and MDLA.

1 3rd Platoon, Alpha Company, 3rd Battalion, 325th Airborne Infantry Regiment, 82nd Airborne Division.
2 St. John's University-Collegeville, MN Football Team

AN ASSOCIATE'S FIRST CLIENT

BY MICHAEL J. FORD (1992-93)

An Associate's first client is, most likely, another attorney.

When a law firm takes on a new Associate, it assumes a responsibility for the training, supervision, and integration of that Associate into the practice of law. A newly minted law school graduate requires a considerable amount of experience in the practical aspects of the law before being foisted on to a client.

Therefore, the savvy recent Associate hire will quickly realize that in order to progress in his chosen profession he, or she, must gain the trust and confidence of the more senior attorneys in the firm.

One way to do that is to approach each new assignment with the view that there are really two "clients". The ultimate client, of course, is the client of the firm.

However, equally important to the Associate should be the lawyer "client" who refers the matter to the Associate for handling. Whether it is a simple discovery motion or residential real estate closing, the Associate should handle the matter in a fashion as will increase the confidence of the assigning attorney.

How to do that?

Well, representing lawyers is not much more mysterious than representing clients. The first thing that all clients like is responsiveness. The most brilliant attorney in the world, with the best work product, who never meets time deadlines, takes himself out of the race before it even starts. So, first and foremost, a new Associate needs to timely respond to the demands of attorneys seeking the Associate's services.

Following closely on the heels of responsiveness is accuracy. An extremely responsive attorney who, unfortunately, turns out slipshod work product may get high marks for timeliness, but in the final analysis will see little repeat business.

The third leg of the basic work product is completeness. Accurate work product which is produced in a timely manner but which does not address the entire issue directed to the Associate is frustrating and time consuming for the attorney/client. Having to fill in the gaps of what should have been done in the first place can prove expensive for the firm, the ultimate client, or both.

So far we have reviewed the basic work product that is adequate. However, how can the Associate go above and beyond the call of duty? In other words, how can the Associate convince the attorney/client as the Associate may some day wish to impress a client of the firm, that he or she is an attorney to whom the client wishes to return?

In addition to carrying out the specific assignment, the Associate who wishes to go above and beyond the call of duty needs to understand the place that assignment fills in the overall representation of the actual client. For example, a discovery motion that seeks to compel the disclosure of documents may be a precursor for a motion to dismiss. Under those circumstances, an Associate might wish to understand the legal bases for such a motion and, to the extent that the document request does not get all of the documents needed to support such a motion, point that out to the assigning attorney. Conversely, within this example, if the ultimate motion to dismiss does not need some, or all, of the sought after documents, that might also be pointed out to the assigning attorney.

A number of other hints for impressing senior attorneys follow.

- Clients are constantly expecting attorneys to do things quicker, better, and more economically. This can only be accomplished by the Associate who understands and utilizes the firm's work product databases (Brief Bank and Forms Directory).
- In these days of litigation budgets and overall cost constraint, the savvy Associate will pin down the assigning attorney as to how much that attorney is willing to "pay" for the assignment measured in terms of billable hours.
- Upon completion of an assignment, the astute Associate will review with the assigning attorney the amount of time actually employed, along with the actual activity description given to that time in the Associate's timesheets, so as to avoid awkward surprises at the time of billing. Nothing is more grating to a billing attorney than to come upon cryptic descriptions by an Associate ("legal research," "review documents"), which must either be further explained, or written off.

Conclusion

Difficult as it may be to realize at times, senior attorneys who assign projects to junior associate attorneys are people, too. More often than not, these senior attorneys assign projects not on the basis of training for the junior associate or to give the junior associate experience but, rather, because the projects are problems which the senior attorney does not want to deal with. Most often, the senior attorney has the ability to deal with the problem but does not have the time. Sometimes, regrettably, the senior attorney may be unsure of the most appropriate way to resolve the problem — and secretly hopes that the Associate will be able to come up with a solution.

Regardless of the reason for the assignment, the Associate who is going to get ahead in the profession will approach the matter as if the attorney making the assignment was the client. Be responsive, be accurate, be complete, and use your imagination to come up with more than you've been requested.

If that seems like a tall order — welcome to the profession of law.

BILLING YOUR CLIENTS: SEVEN DEADLY SINS

BY MICHAEL J. FORD (1992-93)

Every law firm writes off time. Some timekeepers, usually associates and paralegals, are concerned to find their time written off by billing attorneys. In a perfect world, billing attorneys would counsel attorneys and paralegals whose time they have to write off.

However, since we all don't live in a perfect world all of the time, let me share with you some observations about why your time might get written off on occasion by a billing attorney.

I base these observations on my review of prebilling reports, in which I have noticed a number of recurring issues. Timekeepers may wish to address these to improve the chances that their time records will survive the billing process, and that their time will get billed to, and paid by, a client.

Sin 1 — Abbreviations in Bills

Avoid the use of abbreviations in your billing reports. Instead of noting "conf MS re MSJ" try spelling it out: "Confer law firm paralegal Maggie Smith regarding documents to be assembled in support of our motion to dismiss the complaint."

To avoid sin one, first remember that a bill is a form of communication with the client. It is like a letter, or a legal brief.

None of us would use abbreviations in a letter or a legal document. Abbreviations cheapen the communication, in the eyes of both the one doing the abbreviating and the one reading it.

As far as it contributes to the fiscal health of the law firm and the productivity of the timekeeper, a billing communication is one of the most important communications in the firm.

Try to avoid abbreviations.

Sin 2 — Indecipherable Entries

Describe the activity that you want to get paid for in such a way as to make it understandable to a non-lawyer, the client.

To avoid sin two, look at your notes from the client's perspective. Consider the example above: "conf MS re MSJ." No client will know "MS" is Maggie Smith without meeting her, and most clients won't know what an MSJ is.

Few know what a "motion" is, and many don't appreciate the significance of the terms "summary judgment" or "Rule 56 motion," much less acronyms that may substitute for these terms.

Why not interpret the legalese for the client so they can understand what you are talking about, as in "motion to dismiss the complaint"?

From *Bench & Bar of Minnesota,* Vol. 63, No. 9 | October 2006

Sin 3 — Unpersuasive Billing

In order for the client to pay the bill, they need to come away from reviewing the bill with the firm conviction that the activity described was both necessary to the engagement and likely to bring the engagement to a successful conclusion.

To avoid sin three, use specific, descriptive language. For example, does "Draft documents forwarding change of beneficiary and IRA forms to various providers" make you feel that the activity is worth $58.50 worth of paralegal time?

How about "Prepare correspondence forwarding change of beneficiary and related IRA forms to Bremer Bank, U.S. Bank, Wells Fargo Bank and PrimeVest."? It is both more descriptive and tells a more compelling story that is more likely to be paid for by the client.

Sin 4 — Ignoring the Internal Client

Except for attorneys in solo practice or in very small firms, few attorneys have full control over the billing of their time. Typically there's a "billing attorney" who reviews time records and approves billings. Overlooking that attorney's needs can be costly.

To avoid sin four, consider creating an "internal bill" to the "internal client" who has to pay, or account, for your time.

Billing attorneys review prebills at odd hours, often in the evening and on weekends, and may not have access to a computer or email when they are reviewing prebills. As a result, if they run across a puzzling time sheet entry, their inclination is to write it off, or down, without taking the time to hunt up the timekeeper whose time is being reduced.

If you have just finished a discrete project, , a motion for summary judgment or preparation of trust documents, consider preparing a time report using your law firm's practice management software. If your firm does not have practice management software, prepare your report using your word processing program.

Send that "internal bill" to the billing attorney, both as an email attachment and in hard copy (for those billing attorneys who don't read electronic communications all that well).

Ask in the email whether there are any time charges that need more explanation. Stop by the billing attorney's office several days after the "internal bill" has been delivered and solicit a verbal response to your email if a written one has not already been received.

In other words, act like a lawyer who is interested in getting paid for his or her time.

For associates, who all should hope to be billing attorneys some day, these will be excellent habits to develop in anticipation of the day when you are billing external clients.

Sin 5 — Hiding Unbilled Time

There are some tasks that simply must be done but which aren't obviously both necessary to the engagement and likely to bring the engagement to a successful conclusion. For example, you may work for clients who refuse to pay for office conferences among counsel (a short-sighted position as such conferences, if properly planned and executed, can actually make the engagement more efficient).

If you must write off such activity, do it in front of the client rather than behind the scenes.

To avoid sin 5, when entering time to document the file but without any intention to charge the client, use a "NO CHARGE" preface, "NO CHARGE — confer law firm attorney Fred Smith regarding steps needed to finalize the trust documents."

Such a notation not only documents what effort you have put forth but also provides the client with a visual reminder of the fact that at least some of the effort was on a "no charge" basis.

Sin 6 — Unclear Ground Rules

Billing and supervising attorneys often prefer to have time entered in certain ways and carry certain assumptions about what time is billable and what must be written off. Work to get those expectations and assumptions on the table at the time a project is assigned; a lot of productive time can otherwise be wasted rewriting time reports at the time of the prebill.

Better to get it right the first time than have to extensively review and revise a bill at the time the bill is being produced for presentation to the client.

Sin 7 — Misjudging Costs

Attorneys and staff working on a project risk losing control over why their time is written off if they don't anticipate and stay on top of the costs of a project as it unfolds.

One of the key reasons for write offs is a failure on the part of the assigning or billing attorney to recognize or appreciate the scope of the project assigned. Just as an external client may have unrealistic expectations of the cost of a legal effort, so also the "internal client" may misjudge the true cost of a project if not kept informed by those working on it directly.

Both for their own sake and for that of the firm, project attorneys and paralegals have an obligation to educate their internal client — the billing attorney who assigned the project — of the true cost of the project.

To avoid sin seven, at the outset of the assignment gently, but firmly, insist on a target budget for the project. If the assigning attorney doesn't give you that budget, suggest a preliminary one yourself ("might I suggest a time budget of 40 hours for this summary judgment project?"). Be prepared to negotiate that budget at the outset if you get internal client resistance.

Then, as the project unfolds, continue to educate the billing attorney with any revised estimates that you arrive at ("as this project has unfolded I have had to review many more documents than we originally discussed and, as a result, my original estimate of 40 hours looks like it will turn out to be 50 to 55 hours").

After the project is completed, "bill" the billing attorney with a time sheet report and send that in both electronic and hard copy formats as outlined above.

Wait several days after billing the assigning attorney and then call or stop by and ask if the timesheet descriptions, and overall charge, are acceptable.

Following this procedure should inoculate your time for this project from substantial, or any, revision at the time the file is billed.

Conclusion

The foregoing "Seven Deadly Sins When Billing a Client" can lead to a substantial loss of the economic value of a law firm's work. In addition to the loss of revenue, there can be corresponding dissatisfaction on the part of clients who get indecipherable bills that they naturally, and rightly, resist paying.

Tell the client what you will do for them. Do it. And then accurately bill for it. Try it! You and your clients will like it.

SUPER LAWYERS AND THE BAR ASSOCIATION

BY MICHAEL J. FORD (1992-93)

Within not-all-that-distant memory, I took the occasion of writing a message to the younger attorneys in my firm about the benefits of being active in the organized bar. In this instance it was the annual meeting of the Seventh District Bar Association, which encompasses Saint Cloud, where my firm practices.

My message follows.

Shortly after joining this firm I took some depositions with an excellent trial attorney, who was effusive in his praise of Richard Quinlivan as one of the best trial attorneys in the state, if not *the* best.

I asked this attorney how many cases *he* had tried to a verdict with Dick Quinlivan and he replied that although he had had cases with Richard, taken depositions, argued motions, and the like, he had never tried a case to a verdict with Dick.

My suspicion at the time, and it has been borne out by almost 30 years of observation, is that this attorney was willing to anoint Richard Quinlivan as a "super lawyer" (we didn't have those designations in those days) based upon his observation of Richard during depositions and motion practice, *coupled with Richard Quinlivan's work in the organized bar.*

Dick Quinlivan was not only an accomplished trial attorney, much more accomplished than I am or ever will be, but he was a committed member of the profession. He and Dick Mahoney and a number of other attorneys *formed* the Minnesota Defense Lawyers Association in 1962, when Dick was in his early 40s.

Dick was active in the American Bar Association (ABA). In fact, he and his father dissolved their law firm and formed another one because Dick's father's partner at the time tried to make it difficult for Dick to attend the annual ABA meeting in New York.

Six months after I joined this firm, Richard called me into his office and directed me to present myself the following day to "the Hughes twins" and ride with them to the Seventh District annual meeting in Wadena (Dick went separately). I dutifully did so and rode up with Kevin and Keith Hughes, who regaled me during the trip with their analyses of the foibles of the lawyers and the judges in the Seventh District, as Dick knew they would. You see, my attendance at that meeting was part of the socialization effort that Richard undertook with me.

This year Steve Schwegman and I were, again, named Super Lawyers. I can't speak for Steve because for my money he is a super lawyer.

I can speak for myself when I say that there are most certainly lawyers in this law firm and in this state who

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Editor's Note: The following bio was reproduced from the original article. Michael J. Ford is president of the Minnesota State Bar Association. A shareholder in the law firm of Quinlivan & Hughes, PA, St. Cloud, Minnesota, he is a graduate of St. John's University and received his JD from the William Mitchell College of Law. He concentrates his practice in the areas of civil litigation, insurance coverage, employment and government liability, and land use and general casualty law.

are much more "super" than me when it comes to trying cases who have *not* been anointed as super lawyers.

They, and you, are not likely to get that sort of recognition without being active in the organized bar.

In this area, that means the Stearns/Benton Bar, the Seventh District Bar, the Minnesota State Bar and, for the insurance defense attorneys in the crowd, the Minnesota Defense Lawyers Association.

However, much more important than being recognized as a super lawyer, now is the time for you to take your place in the struggle to make and keep this profession what it is and can be.

Dick Quinlivan assumed a leadership role in the Minnesota State Bar Association not because he needed the recognition. He agreed to serve because throughout his career, he showed up.

He showed up at local, state, and national bar meetings. He contributed. Now it's your turn.

BRIDGING THE GAP: CONSTRUCTION LAW IN MINNESOTA

BY LISA R. GRIEBEL (2012-13) AND MICHAEL S. ROWLEY

Minnesota has seen 20 years of explosive growth in the number of construction claims and lawsuits. Concurrently, the law surrounding construction claims also developed, sometimes for better or for worse, depending on which party you represented. While claims declined during and after the Great Recession, as more cranes appear on the skyline, we can expect construction claims and the law to continue developing. With the economy returning, now is an appropriate time to review the important legal issues in construction law.

I. A Review of Construction Defect Litigation

A. Potentially Responsible Parties

Depending on the type of damage and claims, numerous parties may be involved in construction cases:

1. General Contractors
2. Subcontractors
3. Construction Managers
4. Architects, Designers, and Engineers
5. Building Material Manufacturers and Suppliers
6. Building Officials and Inspectors
7. Homeowners Associations
8. Management Companies
9. Owners/Past Owners of Property
10. Real Estate Agents

There are certainly others that may be involved depending on the facts of the case.

B. Experts

In virtually all cases, retention of an expert to investigate the cause and scope of any construction defects is necessary. Experts will also be required to determine the scope of any repairs. Finally, repair estimates will have to be obtained and disclosed. In Minnesota, a person is qualified as an expert by knowledge, skill, experience, training or education in a particular field. Minn. R. Evid. 702.

C. Possible Claims

1. NEGLIGENCE

Negligent construction claims apply the traditional tort elements of duty of care, breach of the duty, causation, and damages. In general, a contractor "owes his contractee a duty to use due care in the performance of his undertaking and that his duty is nondelegable." *Brasch v. Wesolowsky*, 272 Minn. 112, 117, 138 N.W.2d 619, 623 (1965). This means that the contractor must respond to a plaintiff for "unworkmanlike performance within the scope of his undertaking, notwithstanding the fact that someone else may have actually performed the work." *Id.* This nondelegable duty similarly extends from the subcontractor to the general contractor, and any breach forms the basis of indemnity claims. *Id.* Minnesota does not recognize "negligent breach of contract," however, both breach of contract and negligence theories may be asserted. *Arden Hills North Homes Assoc. v. Pemtom, Inc.*, 475 N.W.2d 495, 500 (Minn. App. 1991), *modified & affirmed* (Minn. July 19, 1993) (noting that it makes no difference whether the duty of care is imposed by law or by the contract).

Negligent construction claims encompass the usual problems of poor construction practice, failure to follow codes or industry practice, failure to follow instructions, etc. Prosecuting and defending these claims will require expert opinions.

2. PROFESSIONAL LIABILITY

Another claim based on negligence could be against the architect or engineer for negligent design. Design can include the planning and execution of the drawings, drafting of the specifications, and site inspections. In order to assert such claims, expert testimony will be necessary to establish the standard of care and describe how the architect or engineer's work failed to meet that standard.

Claims against these types of professionals are governed by Minnesota Statute Section 544.42. In any "action," the party making such claims must do two things to prevent the claims from automatic dismissal:

a) Within 90 days of service of the summons and complaint, serve an affidavit from the party's attorney that states:
   (1) the facts of the case have been reviewed by the attorney with a qualified expert who's opinions could be admissible at trial; and
   (2) that in the opinion of the expert, the architect or engineer deviated from the applicable standard of care and thereby caused injury to the plaintiff.
b) Within 180 days of commencement of discovery under Rule 26.04(a) of the Minnesota Rules of Civil Procedure, the attorney must serve an affidavit that includes the following:
   (1) disclose the identity of expert attorney expects to call as an expert;
   (2) the substance of the facts and opinions to which the expert is expected to testify; and
   (3) a summary of the grounds for each opinion.

Minn. Stat. § 544.42, Subd. 3 and 4. An "action" includes an original claim, cross-claim, counterclaim or third-party claim. Minn. Stat. § 544.42, Subd. 1(2). The penalty for noncompliance with the above requirements is mandatory dismissal of the claims against the architect or engineer. Minn. Stat. § 544.42, Subd. 6.

3. BREACH OF CONTRACT

The owner and general contractor or prime contractors will have a contract for the construction of the home or building. The contract will usually state that the builder agrees to build in a workmanlike manner and according to the plans and specifications. Some contracts may say the builder agrees to build according to the local building codes. Failure to meet these contract terms is the basis for breach of contract.

Contract claims may also include indemnification claims depending on the language in the contract. These clauses must be closely scrutinized to determine if they apply only during the building phase or survive beyond completion of the project.

4. BREACH OF MINNESOTA STATUTE CHAPTER 327A WARRANTIES

Under Minnesota law, whenever a residential builder constructs a building to sell, or for improvements that involve major structural changes or additions, it warrants that the building is free from certain defects. Minn. Stat. § 327A.01 and Minn. Stat. § 327A.02. Minnesota statutes set forth a one-year warranty for defects caused by faulty workmanship and materials due to failure to follow building standards and a two year warranty for defects caused by faulty installation of electrical, plumbing and HVAC systems due to noncompliance with building standards. Finally, there is a ten-year warranty against major construction defects due to noncompliance with building standards. Minn. Stat. § 327A.02, Subd. 1 & 3. A major construction defect is defined as "actual damage to the load-bearing portion of the dwelling or home improvement, including damage due to subsidence, expansion or lateral movement of the soil." Minn. Stat. § 327A.01, Subd. 5.

The "Warranty Date" is the "date from and after which the statutory warranties . . . shall be effective" as of the earliest date of the following: (a) initial occupancy; or (b) owner takes legal or equitable title. Minn. Stat. § 327A.01, Subd. 8. To perfect a claim under the statutory warranties, the owner must give the builder written notice within six months after the owner discovers or should have discovered the defect, unless the owner can establish that the builder had actual notice of the loss or damage. Minn. Stat. § 327A.03 (a).

The statute includes a dispute resolution process for warranty claims, as follows:

a) Owner must allow for inspection;
b) Inspection must occur within 30 days of notice to builder;
c) Builder must make an offer to repair within 15 days of inspection;
d) If the owner agrees to the offer, the builder must make the repairs;
e) If the owner and builder cannot agree to the scope of the repair, the parties may apply in writing to the commissioner of labor and industry for a list of neutrals;
f) Within 10 days of receiving a list of neutrals, the parties shall select a neutral;
g) Parties shall submit information and documentation of the dispute to the neutral;
h) Parties shall conduct a conference with the neutral;
i) Neutral shall submit nonbinding, written determination regarding recommendations on scope and amount of repairs necessary.

Minn. Stat. § 327A.01, Subd. 4 and Minn. Stat. § 327A.051.

If the builder refuses to inspect or make an offer, or refuses to engage in the dispute resolution process, or continues to dispute the determination of the neutral, the owner may commence litigation within 60 days of any refusal. Minn. Stat. § 327A.02, Subd. 6. The statute of limitations and repose for such claims is tolled from the date of notice to the builder until the latest of completion of the dispute resolution process or 180 days. Minn. Stat. § 327A.01, Subd. 4.

5. NEGLIGENCE PER SE

Negligence per se is often a claim in construction defect cases. Plaintiff will argue that failure to construct the structure according to the building codes adopted by statute is per se evidence of negligence. Violations of statutes can result in negligence per se. *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 558 (Minn. 1977). However, negligence per se only arises when "the persons harmed by [the] violation [of a statute] are within the intended protection of the statute" and … "the harm suffered is of the type the [statute] was intended to prevent." *Noack v. Colson Construction, Inc.*, 2009 WL 305114, at *7 (Minn. App. Feb. 10, 2009) (No. A08-0148) [quoting *Alderman's Inc. v. Shanks*, 536 N.W.2d 4, 8 (Minn. 1995) (citing *Pac. Indem.*, 260 N.W.2d at 558-59)].

The Minnesota Building Code is established by the administrative rules pursuant to the authority of Minn. Stat. §16B.61. Chapter 1300 of the Minnesota Rules of Administrative Code concerns the building code. Rule 1300.0030 sets forth the purpose and application of the building code. It states, in part:

The purpose of the code is not to create, establish, or designate a particular class or group of persons who will or should be especially protected or benefited by the terms of the code.

Minn. R. 1300.0030. Thus, it does not appear that violation of the building Code should subject a contractor to negligence per se.

6. BREACH OF EXPRESS AND IMPLIED WARRANTIES

Sometimes, construction contracts or purchase agreements may have express warranties regarding quality of construction. Close examination of these clauses is important. Rarely, express warranties may have limitation of damages clauses that set forth the amount of damages if there is a breach.

The implied warranties of merchantability and fitness for a particular purpose have also been alleged. A warranty that a good is merchantable is implied in any contract for sale if the seller is a merchant in goods of the kind. Minn. Stat. § 336.2-314(1). The claim will allege builders are merchants in buildings, and therefore impliedly warrant to provide a building that is free from defects. *See Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 53-54 (Minn. 1982) (holding buyer of manufactured home could bring claim of breach of warranty of merchantability against builder of such homes).

A warranty that a good is fit for its particular purpose is implied in any construction contract when:

(1) the contractor holds himself out, expressly or by implication, as competent to undertake the contract;

and the owner (2) has no particular expertise in the kind of work contemplated; (3) furnishes no plans, design, specifications, details, or blueprints; and (4) tacitly or specifically indicates his reliance on the experience and skill of the contractor, after making known to him the specific purposes for which the building is intended.

Robertson Lumber Co. v. Stephen Farmers Co-Op Elevator Co., 143 N.W.2d 622, 626 (Minn. 1966).

In the past, privity between a buyer and seller of a good has been a requirement to a breach of warranty claim. Minnesota, however, abrogated its privity requirement in sales contracts. *Church of the Nativity of Our Lord v. Watpro, Inc.*, 474 N.W.2d 605, 609 (Minn. 1991) (noting abrogation). Moreover, privity is not a requirement in statutory warranty claims under Minn. Stat. § 327A.02 because those warranties survive passage of title. Minn. Stat. § 327A.02, subd. 2.

If the contractor or subcontractors claim there are problems with plans or specifications that resulted in the defects, the contractor may argue the owner breached its implied warranty of accuracy. An owner impliedly warrants that the plans and specifications are accurate. *See U.S. v. Spearin*, 248 U.S. 132 (1918). The contractor must show that (1) the contract documents contain representations which are materially different than those actually encountered, (2) the contractor relied on the representations, and (3) the actual conditions affected the performance of the work. *Alley Constr. Co., Inc. v. State*, 219 N.W.2d 922, 925 n.1 (Minn. 1974).

7. PRODUCTS LIABILITY BY MANUFACTURERS AND SUPPLIERS

Owners of property may have claims against the manufacturer of a product or material that has failed, resulting in damage. Window manufacturers are a common target for these claims. HVAC equipment manufacturers can also be targets in multi-unit residential and commercial settings.

In product defect claims, the following general elements must be found:

a) the product must have been in a defective condition unreasonably dangerous for its intended use;
b) the defect must have existed when the product left the defendant's control; and
c) the defect must have been the proximate cause of the injury.

Bilotta v. Kelley Co., 346 N.W.2d 616, 623, n.3 (Minn. 1984).

In manufacturing defect claims, the manufacturer has a duty to use reasonable care in the manufacture of a product to protect people and property from an unreasonable risk of harm. A product is unreasonably dangerous if the person could not have anticipated the danger created by the product using the ordinary knowledge in the community. Restatement, Second, Torts, § 402A, comment i (1965). Proving manufacturing defects in products used in construction may be difficult because the products are handled by installers. A common defense is that the product was altered after it left the control of the manufacturer.

In design defect claims, the manufacturer has a duty to use reasonable care to design a product that is not unreasonably dangerous when the product is used as intended or as the manufacturer could have reasonably anticipated. The ultimate issue is whether the design choices resulted in a product that was unreasonably dangerous to the user or their property. *Bilotta*, 346 N.W.2d at 622. Factors to be considered include the dangerousness of the product, the likelihood of harm from use, the cost and ease of precautions, and the manufacturer's ability to eliminate the harm. *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987) (applying similar factors).

Product liability litigation is complex, and therefore retaining the appropriate experts is critical. Generally, property owners will name only the general contractor in a lawsuit, forcing the general to make the decision to bring a third-party action against any product manufacturer.

8. CONSUMER PROTECTION/DECEPTIVE TRADE PRACTICE

In Minnesota, most fraud claims are usually brought under Minnesota's Consumer Protection Act and

Deceptive Trade Practices Act (DTPA). These claims are brought under Minn. Stat. §§ 325D.44 and 325F.69 for false and misleading representations made by the builder or its subcontractors, regarding the quality of the materials, construction methods, or contractors doing the work. Plaintiff owners claim they relied on the representations to enter into the contract with the builder. Plaintiffs claim that because their house or building has suffered damage caused by building code violations, they are entitled to damages, including costs, disbursements and attorneys' fees.

Plaintiffs typically allege that builders violate the DTPA by representing that "goods and services are of a particular standard, quality, or grade, or that goods are of a particular style of model" when they are in fact something worse. Minn. Stat. § 325.44, subd. 7. The owner's reliance on the false or misleading statements is an element in all fraud and misrepresentation claims. The reliance must have been reasonable based on the knowledge of the parties and the relationship. Plaintiffs try to prove reliance through the builder's written representations in the construction contract or promotional literature. Plaintiffs also claim they reasonably relied on a builder's statements about its quality when deciding whether to choose the builder.

Minnesota's Uniform Deceptive Trade Practices Act provides that "[a] person likely to be damaged by a deceptive trade practice of another may be granted an injunction." Minn. Stat. § 325D.45, subd. 1. Injunctive relief is the "sole statutory remedy for deceptive trade practices." *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 476 (Minn. App. 1999). Minnesota's Prevention of Consumer Fraud Act provides that "[t]he attorney general or county attorney may institute a civil action … for an injunction prohibiting any violation. … Minn. Stat. § 325F.70, subd. 1. Considering the building owner usually does not seek injunctive relief, and is not the attorney general or county attorney, money damages are not warranted.

D. Potential Damages

ECONOMIC LOSS/PROPERTY DAMAGE
Repair/Replacement/Remediation/ Decontamination.

These damages are relatively self-explanatory. Obtaining estimates from experienced repair companies is necessary. The repair company should work closely with consulting experts to ensure the scope of work is appropriate.

Often the extent of the damage, and therefore the scope of the repairs cannot be known until areas of the building are revealed during investigation or during actual repairs. There may also be costs for bringing the structure into compliance with current building codes.

Diminution in Value
Minnesota law allows a plaintiff to choose either repair cost or diminution in value, whichever is less, as the remedy for property damage. In some circumstances, plaintiff may be able to recover a smaller percentage of diminution of value if the repair cannot completely remedy the problem. While an owner is qualified to testify concerning the value of the property, diminution in value claims usually require a real estate expert.

Stigma
Stigma is a theory of damages plaintiffs argue results from owning a building that had to undergo repairs because of construction defects, e.g. stucco or mold. Plaintiffs argue that disclosure of the problems and repairs results in some kind of mark or sign that detracts from the value of the home. Stigma damages have been alleged in other jurisdictions, usually in "sick building," asbestos, and environmental contamination cases.

Stigma damages may result from something that physically affects the use of the property that creates a fear in a buyer that subsequently diminishes the value of the property beyond normal diminution. Proving stigma damages would require a real estate consultant to conduct market research into the sale prices of buildings with similar construction defects and repairs. This category of damages is very rare.

Temporary Living Expenses
Owners claim this damage is caused by having to move out of the home during repairs/remediation. Owners also claim they must move out of the home because of the health effects of mold.

Investigation/Testing Expense
Owners claim they are entitled to collect for their costs of investigating and testing for mold. Costs to prosecute a lawsuit have generally not been considered a damage. If the owner prevails at trial, then investigation expense may be recoverable as a taxable cost.

Expert Costs
Similarly, expert costs have sometimes been awarded as taxable costs to the party prevailing at trial. Many times, however, courts have decided that each party in the litigation bears their own expert costs.

Medical Costs
Injured parties may attempt to recover the past and future medical costs they can prove are required because of a personal injury caused by a defective condition. These types of damages were typically asserted in cases involving mold. Given the difficulty of proving causation, these damage calculations are difficult to support. Moreover, if the defect is repaired, then residual symptoms should go away.

Attorney Fees
Minnesota follows the American rule that each side bears the burden of attorneys' fees. As will be discussed in a later section, however, attorneys' fees may be recoverable through defense and/or indemnification clauses in contracts.

E. Waivers of Subrogation

Another contract provision that may affect a party's ability to proceed is called a "waiver of subrogation." Subrogation is when the insurer of a party pays on a claim and then seeks to recover its payments from a potentially at fault party. In many instances, it is the owner's property insurer that seeks to recover payments it made for repairs that resulted from damage caused by construction defect. A waiver of subrogation in a construction contract means the parties agree that such recovery actions are barred. For example, Paragraph 11.3.7 of the A201 – 2009 General Conditions to the Contract contains a mutual waiver of all rights for damages to the extent covered by insurance obtained under Paragraph 11.3. The waiver in Paragraph 11.3.7 applies to claims that arise during the project, while many jurisdictions have concluded that Paragraph 11.3.5 waives subrogation rights for damage that occurs on non-work property or occurs after the project is completed. *See Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490 (Minn. 1998). When confronted by a claim from an insurance company that is related to a construction project, review of the contracts for subrogation waivers is a first priority.

II. Condominium/Townhome Defect Cases

While many of the issues discussed above apply equally to condominium and townhome cases, there are many unique considerations to understand.

A. Parties

1. DEVELOPER/DECLARANT

a) Developer Forms Common Interest Community (CIC).
   (1) Minn. Stat. Chp. 515B.
   (2) More commonly known as an association.
   (3) Forms the CIC by filing a Declaration.
   (4) Once formed, the developer is called the Declarant.
b) Period of Declarant Control — Minn. Stat. § 515B.3-103.
   (1) Begins on date association created.
   (2) Ends upon the earlier of three events:
      (a) Three (3) years from the first unit sale; or
      (b) Voluntary surrender; or
      (c) Sale of 75% of units.
c) Powers & Duties — During Declarant Control.
   (1) May appoint and remove officers and directors of the association.
   (2) Owes fiduciary duties to unit owners.
   (3) Must maintain separate bank accounts for the association.
   (4) Must pay expenses of association.
d) Common Elements vs. Limited Common Elements.

(1) Common Elements — Generally all portions of the CIC except the units themselves.
  (a) Usually areas in buildings and grounds that are shared by all unit owners.
  (b) Can include hallways, social rooms, mechanical rooms, parking lots or garages.
(2) Limited Common Elements — parts of the building that are used or affect one or more units, but less than all units:
  (a) Can be pipes, fixtures, walls, etc. that affect one or a few units
  (b) Includes stoops, patios, decks, balconies and even windows and doors that serve one unit.

2. HOMEOWNERS ASSOCIATION (HOA)

a) Formed by Developer Upon Creation of CIC.
b) Unit Owners are members of the Association.
c) Governed by Board of Directors.
  (1) Usually first board is controlled by Declarant/Developer — stocked with own people.
  (2) Hires Management Company.
  (3) Unit Owners Take Over Board When Period of Declarant Control Ends.
d) Responsibilities.
  (1) Manage common and limited common elements.
  (2) Finances – operating budget, repairs, dues, assessments.
  (3) Hiring/terminating service providers – trash, plow, maintenance.

3. MANAGEMENT COMPANY

a) Hired by HOA Board to Manage HOA Affairs.
  (1) Initially hired by Developer and/or Declarant Controlled Board.
  (2) Many times change when period of Declarant control ends.
b) Responsibilities.
  (1) Manage day to day operations of facilities;
  (2) Hires maintenance and service providers;
  (3) Budgets, accounting, insurance;
  (4) Meetings — planning, notice, agenda, notes, minutes;
  (5) Communications with unit owners.

4. ARCHITECTS/CONTRACTORS/SUBCONTRACTORS — FULFILL THE SAME ROLES AS DISCUSSED ABOVE

B. Claims

NEGLIGENCE/BREACH OF CONTRACT

In general, the same types of claims brought in single family home claims are also asserted in condominium and townhome cases. These can include negligence and breach of contract for damage to common elements. The Developer's promotional literature, or sale closing documents, may include statements concerning quality of materials and workmanship that may form the basis of these claims. While the HOA does not have a contract with the Developer or contractors, the HOA typically claims rights as a third-party beneficiary to any obligations between a unit owner and the Developer.

BREACH OF MINN. STAT. CHP. 327A WARRANTIES

Breach of the new home/home improvement warranties claims apply to condominium and townhome buildings. The HOA typically asserts this claim on behalf of all unit owners for damages to common elements.

BREACH OF THE MINNESOTA COMMON INTEREST OWNERSHIP ACT (MCIOA)

Minnesota Statute Chapter 515B governs the formation and rules for common interest communities like condominiums and townhomes. The statute contains a number of warranties that apply to the Developer/Declarant.

a) Breach of Minn. Stat. § 515B.4-112 Express Warranties.
  (1) Promises Declarant makes to unit buyer through a model unit, or by description, plans, specifications creates express warranty that the CIC shall conform to the model or description.
  (2) Buyer must reasonably rely on descriptions or model.
b) Breach of Minn. Stat. §515B.4-113 Implied Warranties.
  (1) Unit and common elements are suitable for use.
  (2) Any improvements, including original construction, will be:

(a) "free from defective materials;" and
(b) "constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner."

(3) These warranties do not abrogate the warranties in Minn. Stat. Chp. 327A or affect any other cause of action under statute or common law.

c) Failure to Fund Repair/Replacement Reserve Account — Minn. Stat. § 515B.3-114.
(1) Annual Budget to Provide for Cumulative Adequate Reserve Funds to Replace Parts of Building.
(a) Reserve study should be done.
(b) Apply to Declarant or to HOA?
(c) May not apply equally to common elements vs. limited common elements.
(d) Not Apply to Commercial Property.

d) Failure to Pay Monthly Assessments — Minn. Stat. § 515B.3-115.
(1) Declarant pays all expenses of HOA if no assessment levied.
(2) If assessment levied, each unit owner (including Declarant) pays their share:
(3) EXCEPTION: Declarant may choose to pay 25% of assessments until a unit is substantially completed;
(4) BUT — Declarant then must make up any operating deficit incurred by the HOA during Declarant control.

e) Breach of Fiduciary Duty.
(1) Declarant controlled Board made bad decisions — usually based on financial claims.
(2) HOA is basically suing itself.
(3) Business Judgment Rule - Presumption that directors have fulfilled their fiduciary duty by acting on an informed basis, in good faith, and in the honest belief that any action taken was in the best interest of the company. In re Xcel Energy, Inc., 222 F.R.D. 603 (D. Minn. 2004).
(4) Declarant supposed to be named as Additional Insured on HOA policy.
(a) Minn. Stat. § 515B.3-113(a)(2).
(b) Tender to HOA insurer.

C. Damages

The types of damages are mostly similar to single-family residential cases. The cost of repair is the most common. Sometimes the cost of temporary relocation can be mitigated if there are open units in the building.

Damages related to deficient reserve account/assessment claims require an expert opinion to conduct useful life studies on the building components. These studies will help determine whether adequate reserves were handed over by the Developer and maintained by the HOA. The useful life may be significantly affected by the level of maintenance and service to the building.

D. Attorney Fees

Attorneys' fees for breach of the obligations in Minn. Stat. Chp. 515B be awarded against the Declarant. Minn. Stat. § 515B.4-116 (a). Punitive damages may be awarded for a "willful failure to comply." *Id.*

E. Defenses

1) Statute of Limitations/Repose.
a) Negligence/Breach of Contract.
(1) Limitations - Two Years From Discovery of the Injury — Minn. Stat. § 541.051, Subd. 1.
(2) Repose - Ten Years from Substantial Completion — Minn. Stat. § 541.051, Subd. 1.
b) Breach of 327A Warranties.
(1) Limitations — Two Years From Discovery of Breach — Minn. Stat. § 541.051, Subd. 4. Breach = Contractor Not Agreeing to Repair.
(2) Repose — Twelve Years From Effective Warranty Date — Minn. Stat. § 541.051, Subd. 4, means the earlier of sale or possession.
(3) Written Notice of Claim Within Six Months of Discovery of Injury required unless can prove contractor had actual notice of loss or damage — Minn. Stat. § 327A.03(a).
c) Breach of 515B Warranties.
(1) Six Years After Cause of Action Accrues — Minn. Stat. § 515B.4-115(b).
(a) For Unit — Accrue means sale or possession, whichever is earlier.
(b) For Common Elements — Accrue means latest of
(i) time common interest completed;
(ii) time of first unit sale; or
(iii) termination of declarant control.

(2) Reduction in Statute of Limitations — Minn. Stat. § 515B.4-115(b).
- must be on an "instrument separate" from than the purchase agreement and signed by purchaser — look for in closing documents.

d) Other 515B Claims — Financial/Breach of Fiduciary Duty.
- Tolled for Claims Against Declarant Until Period of Declarant Control Terminates — Minn. Stat. § 515B.3-111(b).

e) Contribution Claims.
- Two Years from earlier of start of lawsuit or settlement/verdict. Minn. Stat. § 541.051, Subd. 1(c).

III. Statute of Limitation/Repose in Construction Claims

One main defense to construction claims is that the claim is barred by the statute of limitations or repose. Minnesota's statute of limitations and repose for construction defect cases is as follows:

> Subd. 1. Limitation; service or construction of real property; improvements. (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

Minn. Stat. § 541.051, Subd. 1(a).

A. Purpose

The Minnesota Legislature created the limitations period to protect architects, designers and contractors who had completed work, turned it over to the owner long ago, and no longer had an interest or control over the property. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988). The relatively short statute of limitations was upheld as reasonable because the "lapse of time between completion of an improvement and initiation of a suit often results in the unavailability of witnesses, memory loss and a lack of adequate records." *Id.* The Court also recognized the problem of applying state-of-the-art standards to work and design of improvements that occurred years earlier. *Id.*

B. Application

IMPROVEMENT TO REAL PROPERTY

An improvement is "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 63, 226 N.W.2d 603, 607 (1975). Demolition or repairs are not an improvement. *Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396, 400 (Minn. App. 1997).

"DEFECTIVE AND UNSAFE CONDITION"

The courts have interpreted this requirement broadly. A condition that is "hazardous to human health or whether the defect simply renders the property insecure and vulnerable to invasion" satisfies this language. *Griebel v. Anderson Corp.*, 489 N.W.2d 521, 523 (Minn. 1992) (holding patio door unsafe when it failed to keep out the elements).

"CAUSE OF ACTION ACCRUES"

The statute defines when a cause of action accrues:

> (c) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury.

Minn. Stat. § 541.051, Subd. 1(c).

DISCOVERY OF INJURY

The statute of limitations starts when a party discovers or, in the exercise of reasonable diligence, should have discovered, the injury from the defective or unsafe condition. *Greenbrier Village Condominium Two Ass'n, Inc. v. Keller Investment, Inc.*, 409 N.W.2d 519, 524 (Minn. App. 1987). It is the party's knowledge of the injury, not the knowledge of the source or cause of the defect, that triggers the statute. *Dakota County v. BWBR*, 645 N.W.2d 487, 492 (Minn. App. 2002). Also, it is not necessary that the final damage be known for the statute to run. *Greenbrier*, 409 N.W.2d at 524; *Continental Grain Co. v. Fegles Constr. Co.*, 480 F.2d 793, 797 (8th Cir. 1973) (holding statute begins to run when "some damage occurs which would entitle the victim to maintain a cause of action").

LATE ACCRUING ACTION

Late accruing actions in the ninth or tenth year after substantial completion get special treatment. Section 541.051 allows two more years after that discovery of injury to commence an action, but in no event allows a claim more than 12 years after substantial completion.

Notwithstanding the provisions of subdivision 1, paragraph (a), in the case of a cause of action described in subdivision 1, paragraph (a), which accrues during the ninth or tenth year after substantial completion of the construction, an action to recover damages may be brought within two years after the date on which the cause of action accrued, but in no event may such an action be brought more than 12 years after substantial completion of the construction. Nothing in this subdivision shall limit the time for bringing an action for contribution or indemnity.

Minn. Stat. § 541.051, Subd. 2.

C. Contribution and Indemnity Claims

Claims for contribution and indemnity, which are typically asserted amongst the contractor parties, have their own statute of limitations and repose.

(b) Notwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a), provided that in no event may an action for contribution or indemnity be brought more than 14 years after substantial completion of the construction.

Minn. Stat. § 541.051, Subd. 1(b). The statute of limitations for contribution and indemnity claims accrues "upon the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition." Minn. Stat. § 541.051, Subd. 1(c).

D. Limitations Not Apply To Certain Actions

The limitations period in Section 541.051 does not apply to "actions for damages resulting from negligence in the maintenance, operation, or inspection of the real property improvement against the owner or other person in possession." Minn. Stat. § 541.051, Subd. 1(d).

Moreover, the limitations period does not apply to "the manufacturer or supplier of any equipment or machinery installed upon real property." Minn. Stat. § 541.051, Subd. 1(e).

E. Statutory/Express Warranty Claims

Statutory and express warranty claims have their own statute of limitations and repose:

Subd. 4. Applicability. For the purposes of actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, such actions shall be brought within two years of the discovery of the breach. In the case of an action under section 327A.05, which accrues during the ninth or tenth year after the warranty date, as defined in section 327A.01, subdivision 8, an action may be brought within two years of the discovery of the breach, but in no event may an action under section 327A.05 be brought more than 12 years after the effective warranty date. An action for contribution or indemnity arising out of actions

described in this subdivision may be brought no later than two years after the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the breach, provided that in no event may an action for contribution or indemnity arising out of an action described in section 327A.05 be brought more than 14 years after the effective warranty date.

Minn. Stat. § 541.051, Subd. 4. Thus, the statute of limitations for warranty claims is two years from the discovery of the breach of the warranty. A "breach" is when the builder refuses or is unable to ensure that the structure is free from major construction defects. *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 678 (Minn. 2004). Minn. Stat. § 327A.01, Subd. 8 defines the "warranty date" as the earliest of (1) first occupancy of the home, or (2) date on which legal or equitable title is taken. Thus, the repose period ends at 12 years from the warranty date. Claims for contribution and indemnity must be brought no later than 14 years after the warranty date.

IV. Spoliation of Evidence

Construction defect cases highlight the struggle between a plaintiff's duty to mitigate damages and the potential to spoliate the evidence. Plaintiffs must balance the need for timely repairs and remediation with identifying the necessary parties, placing them on notice, and preserving the structure for inspections.

Spoliation is the destruction of evidence. The spoliation of evidence may result in a sanction if the loss of evidence is prejudicial. Some courts have indicated spoliation is "an obstruction of justice." *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990). Some courts have been willing to dismiss a case as a sanction for spoliation. *See*, e.g., *Hoffman v. Ford Motor Co*., 587 N.W.2d 66, 71 (Minn. App. 1998) (granting summary judgment based on exclusion of evidence that was the basis of plaintiff's expert witness).

Minnesota does not recognize an independent tort of spoliation. In analyzing the defense of spoliation, it is the court that decides the sanction. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118-19 (Minn. 1995). When one party gains an evidentiary advantage because of its failure to preserve evidence, a sanction for spoliation is appropriate. *Id.* Willful or inadvertent spoliation does not matter. Sanctions may be imposed if a non-party causes the spoliation, and even if there is no violation of a court order or bad faith. *Himes v. Woodings-Verona Tool Works, Inc.*, 565N.W.2d 469, 471 (Minn. App. 1997), *review denied* (Minn. Aug. 26, 1997) (imposing sanction when tool inadvertently lost by non-party). If the evidence has been destroyed, and therefore unavailable for a meaningful examination by the other parties, then it is possible the court may impose a sanction for spoliation.

As for sanctions, "an unfavorable inference to be drawn from the failure to produce evidence in the possession and under the control of a party to litigation." *Kmetz v. Johnson*, 261 Minn. 395, 401, 113 N.W.2d 96, 100 (1962); *see also CIVJIG* 12.35 Failure to Produce Evidence — Inference (4th ed.). When the evidence lost or damaged is so critical that it forms the only support for an expert's opinions on fault or causation, summary judgment may be an unavoidable consequence of the exclusion of such evidence.

The only sanction imposed for the spoliation of the evidence was the exclusion of testimony and other evidence derived from the expert's inspection and investigation of the remains of the motor home. The summary judgment of dismissal was not itself a sanction, but only the inevitable consequence of the plaintiffs' failure, without evidence of the physical condition of the product itself, to raise genuine issues of material fact with regard to their claim of design defect liability.

Patton, 538 N.W.2d at 118.

Spoliation penalties are reviewed under an abuse of discretion standard. *Id.* The appellate court will examine the prejudice to the spoliating party by examining "the nature of the item lost in the context of the claims asserted and the potential remediation of the prejudice." *Id.* Photos, notes, and diagrams of the spoliating party's expert may not be enough to remedy the loss

of a critical piece of evidence. *See*, e.g., *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998) (rejecting claims that expert would be prejudiced by "sketchy, relatively speculative secondhand evidence").

A spoliation defense will depend on a variety of factors, including notice by the property owner, to whom it was made, how often, and how detailed the notice was. This spoliation notice must reasonably provide notice and the facts of the breach or claim. *Hoffman*, 587 N.W.2d at 70-71. As defense counsel who may be prosecuting contribution and indemnity claims on a third-party basis, appropriate notice must be given to the third parties. Defense counsel should insist that notice be sent to all parties by plaintiff's counsel. If not, then plaintiff's counsel must give defense counsel adequate time to issue separate notice.

V. Contractual Indemnity

Construction defect cases are complex, expensive and time-consuming, so defendants look to any other party that may have caused the alleged damage to help bear some of the burden. Claims for contribution and/or indemnity are two ways defendants try to recover or offset damages. Indemnity is usually when one party (the "indemnitee") tries to shift liability to the other party (the "indemnitor"). The indemnitor usually agrees to "hold harmless" the indemnitee for costs and expenses arising out of the underlying allegations. Broad indemnity purports to cover all claims, including those arising from the indemnitee's own negligence. A more comparative approach tries to make the indemnitor responsible only for damages caused by the indemnitor. Many times, broad and comparative indemnity will be addressed in written contracts.

A. Fundamental Principles

Most of the fundamental principles of indemnity in Minnesota were enunciated in the seminal case of *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 372, 104 N.W.2d 843 (1960). The following are excerpts from the case:

The principles governing contribution and indemnity are similar both in origin and in character. In modern law these principles comprise the subject that is treated under the general title of restitution. The principles of restitution are derived from the old common-law actions of general assumpsit and those which we now call quasi-contract and from the equitable principles of unjust enrichment. The basis of the right to restitution is the belief that men should restore what comes to them by mistake or at another's expense, and that it is unfair to retain a benefit or advantage which should belong to another. This statement is, however, merely a generalization of the more specific principles underlying the subject. Like most such generalizations, this is too vague to be of much assistance in the determination of specific cases. Although both contribution and indemnity rest upon this common concept, they are significantly different in specific application.

Hendrickson, 258 Minn. at 370, 104 N.W.2d at 846 (citations omitted), *overruled on other grounds, Tolbert v. Gerber Ind., Inc.*, 255 N.W.2d 362 (Minn. 1977).

Contribution is the remedy securing the right of one who has discharged more than his fair share of a common liability or burden to recover from another who is also liable the proportionate share which the other should pay or bear. Contribution rests upon principles of equity. Indemnity is the remedy securing the right of a person to recover reimbursement from another for the discharge of a liability which, as between himself and the other, should have been discharged by the other. Indemnity is generally said to rest upon contract, either express or implied. However, there are numerous exceptions and situations in which a contract is implied by law, and contract, therefore, seems to furnish too narrow a basis. In the modern view, principles of equity furnish a more satisfactory basis for indemnity.

Hendrickson, 258 Minn. at 370-71, 104 N.W.2d at 846-47 (citations omitted).

Contribution and indemnity are variant remedies used when required by judicial ideas of fairness to secure restitution. Although similar in nature and origin and having a common basis in equitable principles, they differ in the kind and measure of relief provided. Contribution requires the parties to share the

liability or burden, whereas indemnity requires one party to reimburse the other entirely. Differing thus in their effect, these remedies are properly applicable in different situations. Contribution is appropriate where there is a common liability among the parties, whereas indemnity is appropriate where one party has a primary or greater liability or duty which justly requires him to bear the whole of the burden as between the parties.

Id. at 371, 104 N.W.2d at 847 (citations omitted). Thus, "[w]hen one tortfeasor has paid or is about to pay more than his equitable share of damages to an injured party, he has an interest in obtaining indemnity or contribution from his fellow tortfeasors." *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 124, 257 N.W.2d 679, 686 (1977).

The *Hendrickson* court listed five situations in which a joint tortfeasor could recover indemnity:

1. Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged.
2. Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.
3. Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.
4. Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.
5. Where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.

Hendrickson, 258 Minn. at 372, 104 N.W.2d at 848 (citations omitted) (holding Rule 4 basis of indemnity is no longer allowed in Minnesota, but that contribution based on relative fault would be allowed in similar situations).

In eliminating Rule 4 as a basis for indemnity, the court in *Tolbert v. Gerber Ind., Inc.* noted that this form of indemnity really involves an equitable sharing of liability, not the complete shifting of liability from one party without fault to another with fault as was historically the basis of an indemnity claim. The court also noted that analyzing whether fellow tortfeasors had "passive" versus "active" and "primary" versus "secondary" negligence was impractical in Rule 4 situations. *Tolbert*, 255 N.W.2d at 367. So, the court abolished Rule 4 indemnity. Instead, *Tolbert* held that indemnity in Rule 4 situations would be handled by Minnesota's comparative negligence statute, Minn. Stat. § 604.02. Thus, partial indemnity is achieved by "limiting the reallocation of the loss between joint tortfeasors to contribution based on relative fault." *Id.* In other words, indemnity under Rule 4 situations has become an action for contribution.

In terms of construction defect cases, it would appear that Rule 4 indemnity situations occur often. Many times a general contractor seeks indemnity from its subcontractors, materials suppliers, and even material manufacturers. If the general contractor can have liability for failing to prevent the subcontractors' poor work or for using inferior materials supplied or manufactured by a joint tortfeasor, then there would appear to be a basis for indemnity under Rule 4. Because Rule 4 has been replaced with the allocation of joint liability in Minn. Stat. § 604.02, what was historically an indemnity claim is really one for contribution. Thus, contribution claims will likely be the broadest avenue of liability sharing in construction defect and mold cases.

B. Contractual Indemnity vs. Equitable Indemnity

While both appear viable ways to shift liability, contractual indemnity is not as fraught with unanswered legal questions. Contractual indemnity gives a liable party a basis for transferring liability to another party, but the contractual language must be carefully stated. And in construction cases, a recent statutory amendment makes indemnity for one's own negligence unenforceable.

CONTRACTUAL INDEMNITY

Minnesota has a general prohibition against certain types of indemnification agreements in construction contracts.

An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegatees; or (2) an owner, a responsible party, or a governmental entity agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws.

Minn. Stat. § 337.02. Thus, any requirement of a subcontractor to indemnify a general contractor for the general contractor's own fault is void and unenforceable.

Old Indemnity Statute

Despite the prohibition, and prior to 2013, there was an exception that essentially allowed indemnity for the negligence of others in construction contracts if the promisor "agree[ed] to provide specific insurance coverage for the benefit of others." Minn. Stat. § 337.05, subd. 1 (2012). A long line of appellate decisions interpreted Minn. Stat. § 337.05 to allow a party to indemnify another for the other parties' negligence. The leading case was *Holmes v. Watson-Forsberg Co.*, which held that the following language from the 1985 AGC standard subcontract was enforceable:

> To obtain, maintain and pay for such insurance as may be required by the General Contract, the rider attached hereto, or by law, and to furnish the Contractor satisfactory evidence that it has complied with this paragraph; and to obtain and furnish to the Contractor an undertaking by the insurance company issuing each such policy that such policy will not be cancelled except after fifteen (15) days notice to the Contractor of its intention to so do.

The Subcontractor agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of it, resulting from or in any manner connected with, the execution of the work provided for in this Subcontract or occurring or resulting from the use by the Subcontractor, his agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Subcontractor or third parties, and the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor, his agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be, liable and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph and the Subcontractor further agrees to obtain, maintain and pay for such general liability insurance coverage and endorsements as will insure the provisions of this paragraph.

Holmes v. Watson-Forsberg Co., 488 N.W.2d 473, 474-75 (Minn. 1992). One of the threshold questions in the *Holmes* line of cases analyzing contractual indemnity was whether the claimed defects and/or damage arose out of the subcontractor's work. Minnesota courts interpreted the "arising out of" language broadly, requiring only a temporal, geographical or causal relationship. *Anstine v. Lake Darling Ranch*, 233 N.W.2d 723, 727 (Minn. 1975). Typically, if the general contractor could show that the subcontractor's scope of work included the area in which Plaintiff's claimed damage occurred, that was enough for the courts.

Under the *Holmes* indemnity scheme, therefore, the party, typically a subcontractor, did not agree to indemnity, but instead agreed to obtain insurance for the other parties' liability. Under Minn. Stat. § 337.05, indemnification was only available if the party failed to obtain the agreed upon insurance:

Indemnification for breach of agreement. If:

(1) a promisor agrees to provide specific types and limits of insurance; and
(2) a claim arises within the scope of the specified insurance; and
(3) the promisor did not obtain and keep in force the specified insurance;

then, as to that claim and regardless of section 337.02, the promisee shall have indemnification from the promisor to the same extent as the specified insurance.

Minn. Stat. § 337.05, Subd. 2. Parties, typically general contractor, seeking to enforce the insurance requirements under the *Holmes*/pre-2013 Minn. Stat. Chp. 337 scheme, have done so through motions for summary judgment, seeking an order that the indemnification/insurance provisions are valid and enforceable.

New Indemnity Statute

In 2013, the continuing enforcement of contractual indemnity/agreements to insure for another parties' negligence in construction contracts resulted in an amendment to Minn. Stat. § 337.05 that finally made such agreements void and enforceable:

Agreements valid. (a) Except as otherwise provided in paragraph (b), sections 337.01 to 337.05 do not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others.

(1) *A provision that requires a party to provide insurance coverage to one or more other parties, including third parties, for the negligence or intentional acts or omissions of any of those* other parties, including third parties, is against public policy and is void and unenforceable.
(2) Paragraph (b) does not affect the validity of a provision that requires a party to provide or obtain workers' compensation insurance, construction performance or payment bonds, or project-specific insurance, including, without limitation, builder's risk policies or owner or contractor-controlled insurance programs or policies.

Paragraph (b) does not affect the validity of a provision that requires the promisor to provide or obtain insurance coverage for the promisee's vicarious liability, or liability imposed by warranty, arising out of the acts or omissions of the promisor.

Paragraph (b) does not apply to building and construction contracts for work within 50 feet of public or private railroads, or railroads regulated by the Federal Railroad Administration.

Minn. Stat. § 337.05, subd. 1 (emphasis added). The new prohibition, however, only applies to contracts entered into on or after August 1, 2013, therefore, all prior contracts with indemnification/agreements to insure may be enforceable if they have language similar to *Holmes v. Watson-Forsberg Co.* line of cases. Parties can expect tenders and motions for summary judgment to continue for these cases.

Indemnity Agreements for Design Professionals

Similar to the prohibition in contracts for construction, any contractual indemnity provision in a professional services contract is void and unenforceable to the extent it requires a design professional to defend and indemnify anyone against loss or damage resulting from anyone other than the design professional:

(1) A provision contained in, or executed in connection with, a design professional services contract is void and unenforceable to the extent it attempts to require an indemnitor to indemnify, to hold harmless, or to defend an indemnitee from or against liability for loss or damage resulting from the negligence or fault of anyone other than the indemnitor or others for whom the indemnitor is legally liable.
(2) For purposes of this section, "design professional services contract" means a contract under which some portion of the work or services is to be performed or supervised by a person licensed under section 326.02, and is furnished in connection with any actual or proposed maintenance of or improvement to real property, highways, roads, or bridges.
(3) This section does not apply to the extent that the obligation to indemnify, to hold harmless, or to defend an indemnitee is able to be covered by insurance.
(4) This section does not apply to agreements referred to in section 337.03 or 337.04.
(5) A provision contained in, or executed in connection with, a design professional services contract for any actual or proposed maintenance of, or improvement to, real property, highways, roads, or bridges located in Minnesota that makes the

contract subject to the laws of another state or requires that any litigation, arbitration, or other dispute resolution process on the contract occur in another state is void and unenforceable.

(6) This section supersedes any other inconsistent provision of law.

Minn. Stat. §604.21. This prohibition became effective August 1, 2014, and applies to contracts entered on or after that date.

EQUITABLE INDEMNITY

Equitable indemnity is based on common law principles. Under Minn. R. Civ. P. 14.01, a joint tortfeasor does not have to wait until it has made the actual payment to bring an indemnity claim, but may institute a third-party action in conjunction with the original claim. *Grothe v. Shaffer*, 305 Minn. 17, 25, 232 N.W.2d 227, 232 (1975). When such a third-party action is brought, the indemnity claim is contingent on the outcome of the original action. *Id.*, 232 N.W.2d at 233.

A right of indemnity arises when a party seeking indemnity has incurred liability due to a breach of a duty owed to it by the one sought to be charged, and such a duty may arise by reason of a contractual obligation. *Altermatt v. Arlan's Dep't Stores*, 284 Minn. 537, 538, 169 N.W.2d 231, 232 (1969). "Indemnity usually requires that one party reimburse another entirely for its liability." *Zontelli & Sons, Inc. v. City of Nashwauk*, 373 N.W.2d 744, 755 (Minn. 1985). Indemnity is "an equitable doctrine that does not lend itself to hard-and-fast rules, and its application depends upon the particular facts of each case." *Id.*

In examining indemnity under the four remaining Rules in *Hendrickson*, the court must determine if the negligence of the indemnitee was "passive" or "secondary" as opposed to the "active" or "primary" negligence of the indemnitor. In doing so, the court must examine "the relative culpability of the conduct of the wrongdoers." *Hillman v. Ellingson*, 298 Minn. 346, 350, 215 N.W.2d 810, 813 (1974). As to primary or secondary negligence, "a party may be granted indemnity even though he has engaged in active wrongdoing if his misconduct is clearly secondary when compared with the misconduct of the party from whom indemnity is sought." *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 358, 216 N.W.2d 859, 862 (1974). The rationale for this analysis is:

> (T)he difference between primary and secondary liability, as used in determining the right of indemnity, is based, not on a difference in degrees of negligence or on any doctrine of comparative negligence, but on the difference in the character or kind of wrongs which caused the injury and in the nature of the legal obligation owed by each wrongdoer to the injured person.

Keefer v. Al Johnson Const. Co., 292 Minn. 91, 101, 193 N.W.2d 305, 311 (1971). Thus, the court will examine the connections between the various parties and the damages to determine whether indemnity is allowed.

C. Is Finding of Fault Required?

In equitable indemnity cases, a finding that the indemnitor is at fault is required. *See*, e.g., *Zontelli*, 373 N.W.2d at 755 (engineering firm breached contract); *Tolbert*, 255 N.W.2d at 368 (indemnitor found negligent by jury); *Keefer*, 292 Minn. at 100, 193 N.W.2d at 310-11 (indemnitor subcontractor found negligent). The fault of the indemnitee and indemnitor, however, do not have to be based on the same theories of liability. *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). Thus, the indemnitee could be negligent while the indemnitor's liability is based on contract or warranty.

In contractual indemnity cases, fault is not necessary as the liability shifting occurs through the operation of contractual language.

VI. Insurance and Additional Insured Considerations

Understanding the types of insurance obtained by a contractor is critical to determining whether there will be coverage for plaintiff's claims, and any contractual indemnity or additional insured obligations.

A. Actual Injury vs. Continuous Trigger

One of the most important coverage issues is when did the defect or damage occur? Did it occur back when the original allegedly bad work was done? If

the claim involves water intrusion, did it occur at the first rainstorm? Did the damage occur at the first instance of water intrusion, or did it continually occur at each rainfall over many years until discovery? These are important questions for coverage analysis that, unfortunately, have not been conclusively decided in Minnesota.

To start the analysis, Minnesota follows the "actual injury" or "injury in fact" rule, therefore, an "occurrence" takes place when the claimant was actually damaged as opposed to the time the wrongful act was committed. Minnesota has rejected the gradual injury or "manifestation" rule that says the occurrence takes place when the damage is discovered. *Singsaas v. Diederich*, 307 Minn. 153, 159, 238 N.W.2d 878, 882 (Minn. 1976).

When injuries have occurred over an extended period of time in environmental contamination cases, Minnesota courts have determined that all policies on the risk during this time were triggered. Thus, there was a "pro-rata" allocation amongst the policies based on time on the risk. *Northern States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 662, 663-64 (Minn. 1994); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305 (Minn. 1995).

In 2003, the Minnesota Supreme Court reaffirmed the "actual injury" or "injury in fact" rule. *In re Silicone Implant Ins. Coverage Litigation*, 667 N.W.2d 405, 421 (Minn. 2003). Under the rule, only those policies in effect when the bodily injury or property damage occurred are triggered. The insured has the burden to show that some damage occurred during the policy period. In cases that involve multiple insurers or multiple potential causes of damage, the court established a method to evaluate whether allocation of damages from a continuing injury triggers multiple policies or only the policy on the risk at the time of the "injury in fact." *Id.*

In the *Silicone Implant* decision, several of 3M's insurers sought to identify which policies were triggered as a result of 3M's silicone breast implant litigation. The policies were in effect from 1977 to 1985 and covered injuries that occurred during those policy periods. The district court had made factual findings involving expert medical testimony about when injury was likely to have occurred. The district court held that leaked silicone was in contact with the body from the moment of implantation until a protective capsule is formed. "Thus, bodily injury within the purview of the trigger language occurs at or about the time of implant." *Id.* at 414.

The Supreme Court affirmed the district court's factual finding that there was a continuing injury that started at implantation. The Court concluded that implantation was a "discrete and identifiable event" that was the insurance trigger or "occurrence" under a policy. The Court concluded that when there is a continuing injury that "arises from discrete and identifiable events, then the actual-injury trigger theory allows those policies on the risk at the point of initial contamination to pay for all property damage that follows." *Id.* (quoting *Domtar*, 563 N.W.2d at 730). Thus, the Court held that only those insurers on the risk at the time of implantation were liable under their policies for 3M's damages arising from that implantation.

In so holding, the Court rejected the analysis that the continuing injury was like the continuous trigger allocation environmental cases, holding that continuous trigger "allocation is meant to be the exception and not the rule because '[i]t is only in those difficult cases' that allocation is appropriate." *Id.*, 667 N.W.2d 405, 421 (Minn. 2003) [quoting *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 733 (Minn. 1997)]. In other words, allocation should only occur when the triggering injury does not arise from a discrete and identifiable event. The Court went on to note that "continuous injury" does not equal "continuous trigger." "A trigger is a legal event that activates the insured's policy, while a continuous injury is a factual finding. …" *Id.* at 414. If a court can identify the discrete and identifiable event that caused the continuous injury, then pro-rata allocation is not appropriate.

What does the supreme court's decision mean for construction defect claims? Unfortunately, it is not clear. A number of subsequent cases have tried to answer the question.

WOODDALE BUILDERS, INC. V. MARYLAND CAS. CO.

In the *Wooddale Builders* case, Wooddale Builders

sought declaratory relief on its policies with various insurance companies during the time when Wooddale Builders constructed homes that were the subject of construction defect lawsuits involving allegations of water intrusion and mold. *Woodale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 288 (Minn. 2006). The case has a strange procedural posture in that Wooddale Builders and its insurers agreed that the damage to the homes constructed by Wooddale Builders did not result from a discrete and identifiable event, and therefore agreed that allocation based on pro-rata time on the risk was appropriate. *Id.* at 289.

The issue on appeal was whether the end date for allocation was the date of repair or the date of notice of the claim. *Id.* at 291. The parties had decided that damage for allocation purposes started as of the closing date for the sale of each home. *Id.* at 290. The Court held that the end date for allocation was the date of notice of the claim. *Id.* at 292. The Court reasoned that once notice was given, any subsequent damage was "expected" by the insured, and therefore excluded by each subsequent policy's exclusion for expected or intended damage. *Id.* The court then went on to explain an elaborate method to determine which insurers had what pro-rata time on the risk share, and how an insured's lack of insurance or periods of self-insurance affect such time on the risk allocation. *Id.* at 294-301.

Based on the parties' stipulations, the *Wooddale Builders* decision does not stand for the proposition that pro-rata time on the risk allocation is to be applied to all construction defect, water intrusion, and mold cases. In fact, the Court commented in a footnote that pro-rata time on the risk allocation may not be appropriate:

Arguably, the damage to the homes is traceable to a discrete and identifiable event, such as installation of the windows, installation of the flashing, or the application of the building paper.

Id. at 291, fn. 6.

While the Supreme Court did not decide that issue, other cases have. *See* e.g., *Westfield Ins. Co. v. Weis Builders, Inc.*, 2004 WL 1630871, *3 (D.Minn. July 1, 2004) (discrete event was faulty installation of waterproofing and drainage systems); *Kootenia Home, Inc. v. Federated Mut. Ins. Co.*, 2006 WL 224162, *4 (Minn. App., Jan. 31, 2006) (discrete event was improper installation of stucco); *Parr v. Gonzalez*, 669 N.W.2d 401, 406-07 (Minn. App. 2003) (discrete event was damage to vent cap).

DONNELLY BROS. CONSTR. CO., INC. V. STATE AUTO PROP. & CAS. INS. CO.

In *Donnelly Bros.*, homeowners alleged improper stucco work caused water intrusion and resulting damage. During the period in question, Donnelly Bros. had been insured by five different insurers. State Auto denied coverage, arguing that all the water intrusion occurred prior to its policy date of July 16, 2004. The court of appeals was only asked to determine whether State Auto had a duty to defend. The duty to indemnify was not an issue on appeal. *Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651, 652 (Minn. App. 2009).

The court of appeals started by analyzing when each policy was triggered. The court followed the general rule that a policy is triggered when damage occurs while the policy is in force. The court determined that while the damage to the homes was "continuous and ongoing," some of the damage occurred after July 16, 2004, triggering State Auto's duty to defend. *Id.* at 657.

State Auto attempted to rebut that analysis by arguing that the improper application of stucco was the discrete and identifiable event, precluding any damage occurring in its policy period. The court of appeals disagreed, noting that there were no facts in the record to support the conclusion that it was the installation of stucco alone that caused the water intrusion. The court noted there could be many causes of water intrusion, including improper installation of windows, lack of caulking and flashing, design defects, roof defects, and improper maintenance. *Id.* at 657-58. The court concluded there was a genuine issue of material fact about what was the discrete and identifiable event. The court noted that allocation based on time on the risk may be appropriate if the timing of the triggering event proved impossible to determine. *Id.* at 658, n.1. By only addressing State Auto's duty

to defend, the court of appeals specifically did not address whether the discrete and identifiable event was "the initial water intrusion that leads to damages (such as rot or mildew) or the onset of that damage (the rot or mildew)." *Id.* at 657.

TONY EIDEN CO. V. STATE AUTO PROP. & CAS. INS. CO.

The second State Auto case was issued the same day as *Donnelly Bros.* and again dealt with trigger and allocation. The case arose out of homeowners who claimed water intrusion damage caused by construction defect in a home built by Tony Eiden Co. in 1994. During the period in question, Tony Eiden Co. was insured by four different insurers. Again, State Auto denied coverage, arguing the defective construction had been completed before State Auto's coverage began on October 15, 2002. *Tony Eiden Co. v. State Auto Prop. & Cas. Ins. Co.*, No. A07-222, 2009 WL 233883, *1 (Minn. App. Jan. 26, 2009).

A two day trial was conducted by the district court in the declaratory judgment action. The district court found that the damage to the home had been going on for an extensive period of time prior to discovery on October 13, 2002. The district court found that the rotting process began within the first year or two following construction and continued through at least October 13, 2002. The district court also found that the property damage continued until November 15, 2003, but also found that "no appreciable new damage to the home could be identified as occurring after October 13, 2002. The district court concluded that because Tony Eiden Co.'s defective work occurred before State Auto insured Tony Eiden Co, State Auto had no duty to defend. *Id.* at *3.

The court of appeals applied the injury in fact rules to the facts. The court determined that State Auto's policy was triggered because the district court found that property damage was continuous and ongoing into State Auto's policy period. *Id.* at *4. The court of appeals then went on to analyze whether there was a discrete and identifiable event or whether pro rata time on the risk allocation was appropriate. *Id.*

The court of appeals stated that trying to determine a discrete and identifiable event should not "focus on the timing of the insured's conduct, but rather, on the timing of the consequences of the insured's conduct." *Id.* The court of appeals held that because the district court found it impossible to determine exactly when property damage began to occur, there was no single discrete and identifiable event. *Id.*

The court of appeals, however, held that the district court's findings supported a conclusion that "the continuous injury to the Bacigs' house arose from a series of discrete and identifiable events." *Id.* The court of appeals supported it decision by citing to the *Wooddale Builders* and *In re Silicone* cases as supporting the notion that a series of discrete and identifiable events is favored under the law. *Id.* at *5. The court of appeals concluded that all the discrete and identifiable events occurred before State Auto's policy, and therefore State Auto had no duty to defend or indemnify Tony Eiden Co.

The court of appeals' reasoning in the *Tony Eiden* case begs one main question; what constitutes a series of discrete and identifiable events as opposed to one event? Is it faulty construction or events of water intrusion? Is each act of faulty construction or each rainstorm a discrete and identifiable event? What is clear, however, is that the issue of what triggers coverage under a policy remains primarily a fact issue.

SAND COS., INC. V. GORHAM HOUSING PARTNERS III, LLP

In *Sand Cos.*, Gorham Housing Partners hired Sand Cos. to build an apartment building in 2001. On December 13, 2003, a garage sprinkler pipe froze and burst. The pipe was repaired. On January 20, 2004, sprinkler pipes in a first floor atrium broke, but did not cause any other damage. The pipes were repaired. On January 22, 2004, a sprinkler pipe in a third-floor apartment broke, damaging the apartment. Sand Cos. hired a sprinkler expert who concluded that modifications were necessary to meet code. Sand Cos. proceeded to repair the whole sprinkler system in the building and pursue its subcontractor who originally installed the system, Superior Fire. *Sand Cos., Inc. v. Gorham Housing Partners III, LLP*, No. A10-113, 2010 WL 5154378, *1 (Minn. App. Dec. 21, 2010).

Superior Fire had a general liability policy with

International Insurance Company of Hanover, Ltd. that was issued on January 6, 2004. Sand Cos. claimed it was an additional insured on the Hanover policy. Sand Cos. claimed it was required to bring the sprinkler system up to code. Hanover argued that any repairs were caused by the December 2003 break, and any subsequent breaks were not occurrences under its policy. *Id.* at *3.

The Hanover policy had a typical definition of "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at *3. The policy did not contain a definition of "accident," so the court of appeals cited to the well-known definition: "'an unexpected, unforeseen, or undersigned happening or consequence from either a known or unknown cause.'" *Id.* (quoting *Hauenstein v. St. Paul-Mercury Indem. Co.*, 242 Minn. 354, 358-59, 65 N.W.2d 122, 126 (1954). The court of appeals upheld the district court decision that the January 2004 pipe breaks were occurrences under the Hanover policy because there was a finding that no one knew the pipe breaks would continue until after the January 2004 breaks, indicating the breaks were unforeseen and unexpected. *Id.* at *3.

The court of appeals then addressed whether Hanover's policy covered damages resulting from multiple occurrences. The court of appeals cited the *Wooddale Builders*' decision for the proposition that "there is no reason for the insured's coverage, or the insurers' obligations, to be diminished simply because the damages arise from a series of events rather than a single discrete occurrence." *Id.* at *4 (quoting *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 292 (Minn. 2006). The court of appeals concluded that as long as one of the pipe breaks occurred in January after Hanover's policy was in effect, Hanover was liable for the subsequent repairs. *Id.* Thus, the court of appeals seemed to decide that any event that can be tied to damages can result in coverage.

In conclusion, whether defects or damage are an occurrence when they may have occurred over many policy periods remains a fact question in every case. The practical effect is the contractor and its counsel should tender defense and indemnity to all insurers from the time the work was completed until the claim was made. The insurance companies will work out whether they share defense and indemnity equally, pro rata, or some other method.

B. Coverage for Contractual Indemnity

Typically, construction related damage is discovered after construction is complete. If damage occurs while the work is ongoing, there is usually a "builders' risk" policy that covers repair costs incurred by the contractors. Damage that occurs following completion of the project arguably would trigger the completed-operations coverage under a contractor's Commercial General Liability (CGL) policy. *See O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99 (Minn. App. 1996), *abrogated on other grounds by Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002). Construction contracts, therefore, will require the contractors to obtain completed-operations coverage in the CGL policies for some specified length of time following project completion, e.g. two years or until the statute of repose expires.

In terms of the contractual indemnity/agreement to procure insurance obligation, the key question is whether the CGL policy will cover the obligation. Indemnification agreements will usually be analyzed under the Contractual Liability (exclusion b) exclusion in the insured's CGL policy. The exclusion reads:

b. Contractual Liability
"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
(1) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
(2) That the insured would have in the absence of the contract or agreement.

An "insured contract" is defined as:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire or explosion to premises while rented to you or temporarily occupies by you with permission of the owner is not an "insured contract";
b. A sidetrack agreement;
c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
d. An obligation, as required by ordinance to indemnify a municipality, except in connection with work for a municipality;
e. An elevator maintenance agreement;
f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
   (a) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or
   (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
   (c) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection or engineering services.

In other words, while contractually assumed liability (i.e. indemnity) would normally be excluded from coverage, the exception to the exclusion, coupled with paragraph "f" of "insured contract" would appear to include the indemnification agreements in many construction contracts. More recently, however, ISO issued an endorsement (CG 24 26 04 13) that changes the definition of "insured contract" to limit it to situations in which the insured's "assumption of tort liability [of another] is permitted by law." Given Minnesota's anti-indemnity statute, this means there is typically no coverage for contractual indemnity for the insured subcontractor.

C. Additional Insured Endorsements

Considering the typical lack of coverage for the indemnity obligation, a second avenue for shifting the risk of loss is to require the downstream party to name the upstream party as an "additional insured" or "AI" on its policy. The insurance requirement in most commercial construction contracts will typically require the subcontractor to name the Owner and construction manager/general contractor/architect as "additional insureds" on a primary, noncontributory basis. Many times the insurance requirement will identify the ISO insurance form to be used. [E.g.: form CG 2010 (CGL) in conjunction with ISO form CG 2037 (AI) (10-01 edition)]. The contract will usually state how long the insurance must be kept in force, such as "at least two years from the date of acceptance of the project."

In such policies, the endorsement may list the names of the parties considered additional insureds in a schedule, or may just include language like the following:

1. SECTION II — WHO IS AN INSURED is amended to include:
   2.e. The person or organization shown in the Schedule but only with respect to liability arising out of your ongoing operations performed for that insured, HEREINAFTER REFERRED TO AS ADDITIONAL INSURED.

SCHEDULE

Any person or organization for whom you are required in a written contract, oral agreement or oral contract where there is a certificate of insurance showing that person or organization as an ADDITIONAL INSURED under this policy.

2. SECTION IV — COMMERCIAL GENERAL LIABILITY CONDITIONS is amended to include:
   11. Automatic Additional Insured — Contractor ProvisionThe written contract, or agreement or oral contract must be currently in effect or become effective during the term of this policy. It also must be executed prior to the "occurrence" or offense of "bodily injury", "property damage", "personal injury", or "advertising injury".

3. SECTION III — LIMITS OF INSURANCE is amended to include:
   7. The limits applicable to the ADDITIONAL INSURED are those specified in the written contact, oral agreement, or contract or in the Declarations of this policy, whichever are less.

This general language frees the insured from repeatedly asking the insurance agent for endorsement changes. The general endorsement also allows the insurance company to charge a greater premium to cover the increased exposure.Another example of such AI endorsement language may include:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. SECTION II — WHO IS AN INSURED is amended to include:
   2.e. The person or organization shown in the Schedule but only with respect to liability arising out of your ongoing operations performed for that insured, HEREINAFTER REFERRED TO AS ADDITIONAL INSURED.

This endorsement only applies to ongoing operations, and therefore would not provide AI coverage for claims that occur after completion of the project. *See KBL Cable Services of the Southwest, Inc. v. Liberty Mut. Fire Ins. Co.*, 2004 WL 2660709 (Minn. App., Nov. 23, 2004).

As discussed, all standard ISO AI endorsement forms provided for ongoing operations coverage (e.g. CG 2010 1093, CG 2010 0704 and CG 2010 0413), however, the track record of forms providing completed operations coverage has been far more spotty. For instance, the original form CG 2010 1185 provided broad form completed operations coverage to an insured for liability "arising out of your work for that insured." On the other hand, completed operations was eliminated entirely in form CG 2010 1093. In 2001, form CG 2037 1001 was created to reinstate completed operations coverage. The two recent forms, CG 2037 0704 and CG 2037 0413, include coverage for completed operations, but limit coverage for damage "caused, in whole or in part, by 'your work' at the location designated and described in the schedule" and for the limits required by the contract. Both in terms of writing contracts and determining whether the contractor has fulfilled its contractual requirements regarding AI, it is very important to know what the endorsement forms provide.

In terms of practice, when a claim is made against a general contractor, for example, the general will usually tender the claim to both the subcontractor who is an insured under the policy, or to the subcontractor's insurer directly for the AI coverage. The subcontractor insurer must determine whether it has a duty to defend and indemnify the general based on the facts of the claim.

VII. Dispute Resolution in Construction Claims

Resolving construction claims is everyone's priority. These cases are expensive, time-intensive, and emotionally draining for plaintiffs and defendants. The methods of resolution vary, and what may work in one, may not in another. Counsel should evaluate the case and proceed with one or more methods to resolve the case.

A. Negotiation

Negotiation is always good, but can be complicated by the numerous issues, especially obtaining repair estimates, whether all parties will participate, and whether there are contractual indemnity or additional insurance demands. Successful negotiation requires the presence of all parties who may be willing to compromise. If a general contractor is not willing to negotiate without its subcontractors, then negotiations will

have to wait until the subs are notified and involved. Most of the time, negotiation cannot occur until after the parties complete a thorough examination of the building. Negotiations are also helped by an early and conservative repair estimate. Usually, plaintiffs will incur large fees and costs through litigation, and therefore a willingness to compromise early can often settle a case. The key to negotiation is to keep an open mind and not get bogged down in the accusations.

B. Mediation

Mediation has been the preferred method of resolving construction defect and mold claims. Mediation is non-binding and informal. The mediator attempts to assist the parties to reach a mutually satisfactory agreement. With exceptionally few cases proceeding to trial in the past twenty years, mediation has truly shown its value. Experienced counsel, and insurance companies, know that construction cases are expensive, and therefore mediation is a cost-effective method for resolving the cases.

Whether mediation occurs early or closer to trial, all the following must be accomplished beforehand to ensure a reasonable chance of success. All parties must be notified and agreeable to mediation. The parties must have the opportunity to have an expert inspect the property. The parties' insurers must be ready and willing to mediate, which may be difficult if contractors have multiple insurers dating from the time of original construction. Expert reports, even preliminary ones, can help to frame the issues and assess liability. Consideration should be given to the expert attending the mediation to provide analysis of the scope of the problem and the scope of repair. Repair estimates must be circulated beforehand to help the parties understand the scope of damages. Finally, a mediator experienced in construction cases should be retained.

Multiple mediation sessions may be necessary in complex multi-unit residential and commercial cases. Complications can include defense and indemnity obligation issues that must be sorted out between the various levels of parties. Indeed, oftentimes subcontractors are faced with two demands — one from the general contractor for defense costs, and one from the plaintiff for repair costs.

Given the various parties involved and their usual desire for confidentiality, a "blind" method is most effective. This method results in the parties focusing on the merits of the case and not on comparing contributions between parties.

C. Arbitration

Arbitration is generally viewed as a less expensive alternative to trial, but in practice many last just as long with just as many fixed costs. Arbitration has several advantages that should be considered. First, arbitrators usually have expertise in the area of dispute. Arbitration usually takes less time to get to the decision made because discovery can be shortened or eliminated. In construction defect cases, however, lengthy discovery may be unavoidable given the complexity of the issues.

Arbitration has some disadvantages that should be seriously considered. Arbitration can be unpredictable. Arbitrators are not required to follow state law. The limited appellate review of arbitration decisions provides little insulation against a bad decision. Often, there is a perception that arbitrators compromise to come to a decision. In construction defect cases involving many parties, it may not be possible to reach agreement with all parties to join, leaving out potential sources of contribution, and requiring separate court actions to seek recovery from non-joined parties.

Arbitration usually occurs in property disputes between homeowners when the arbitration clause in a purchase agreement is invoked. Less often are actions between single family owners and builders. One common reason is that the original owners no longer own the home, and therefore the enforceability of an arbitration clause in the construction contract signed with the original owner but not the current one is most likely unenforceable. Arbitration is much more common in commercial construction because the contracts between the owner and contractors require arbitration as the dispute resolution process. Even in these commercial settings, however, arbitration often does not occur because one party or the other can opt out. Considering the costs and limitations of arbitrations administered by professional organizations such as the American Arbitration Association, more parties are agreeing to binding private arbitration in which the parties have more control over the process.

BEST PRACTICES FOR OUTSIDE DEFENSE LAWYERS: A VIEW FROM INSIDE

BY KAY E. TUVESON (2008-09)

What do new lawyers (and not-so-new lawyers) need to know about keeping in-house counsel happy and the litigation files coming in the door? Here are my suggested best-practice tips for outside lawyers.

1. ***Unique, but similar***. Like snowflakes, no two in-house lawyers are alike. But they are all snowflakes. Each in-house counsel is unique in the detail, but we share common themes. Like all clients, each in-house counsel will have different preferences, demands, and ways of doing things. It is your responsibility to learn, to understand, and to pay attention to the specific requirements of the in-house counsel. It is not an easy task being a lawyer's lawyer.

2. ***Marketing to In-House Counsel***. To woo, or not to woo, that is the question. But the more important question to ask is — can you woo?

   First, in-house counsel do not like being hustled. Second, it is important to know your audience and then put together your marketing strategy. Third, know the rules.

   Some in-house counsel like lots of wooing attention and others detest it. Be extremely careful to learn what are acceptable marketing activities — some in-house counsel marketing may be forbidden by corporate ethics codes and policies. Don't put your in-house counsel into an ethical dilemma; understand their corporate code of ethics. For example, can you take me out to the ballgame? Nope, as this is a violation of my corporation's code of ethics regarding vendors (yes, outside lawyers are considered "vendors"). Can you send me gifts on the holidays? Another no. Not all corporations have the same policies, so learn what you can and can't do.

   Generally, in-house counsel hire people they know based on prior/existing relationships. Cold-calling in-house counsel rarely works. Most of us toss unsolicited brochures or marketing materials into the recycling bin unread.

   So how do you get in-house counsel's attention? I notice who writes articles, who presents, and who participates in bar and community activities. Make yourself known.

   We look at your websites and we read them. Your law firm's website is a vital marketing tool, so make sure your biography demonstrates your specialized expertise and that the firm's website contains content (articles, blogs, videos, legal updates). Your website is not an online brochure but, rather, a platform to publish your knowledge to in-house counsel. A big no-no for many corporations is to list them as a client on a website without prior permission.

   If you think business is developed over drinks and dinner, you are dead wrong. My best marketing advice: make us (in-house counsel) look good. Share your knowledge and insights: Do a bit of

research on an important topic and send us your analysis; forward pertinent articles with a brief re-cap; or email us significant case law developments. Even better yet, send us the information in way that, with a little cut-and-paste, we can use it internally to show our business clients and law department colleagues how smart we are. Don't worry about sending too many newsletters or articles — we will let you know if this happens.

3. ***The Business.*** ALWAYS know who you are representing. If you represent a corporation, develop more than a superficial understanding about the organization. Knowledge of the industry you are representing forms the foundation of the in-house counsel relationship. In-house counsel want to collaborate with attorneys who know and understand their business. We can't look to an outside lawyer as a trusted advisor if they don't get who we are and what we do. We are impressed by the outside attorney who has a deep knowledge about our company or industry.

   Not only should you understand the industry and specific business that you represent, but it is important that the outside attorney understands the company's core values, culture, mission, and vision. It is important that you understand the brand personality of those companies whom you represent.

   I want to work with outside lawyers who understand the business I am in. As I see it, the better you know my business, the better your legal advice. A good outside attorney does not look at the single case on their desk — they consider the client's entire big picture. You take into consideration the potential for negative publicity, disruption to the organization, or impact on other cases. The more you understand the company's structure and business, the more likely it is that you and your firm will be identified to assist with specific projects above and beyond the usual defense of a disputed matter.

   And for goodness sake, on your written communications (particularly the engagement letter), spell the corporation's name correctly. There is no space between "Health" and "Partners" and don't forget the "Inc." If you can't get the name right, you are looking for business in the wrong place.

4. ***The Key Players.*** It is important that outside lawyers understand key company organizational players and who is who in the company's law department. It is always wise to consider positional authority.

   It is a good practice to spell my name right, but it is a *really* smart practice to spell my boss's name correctly and know her full title. Remember, you are the corporation's outside lawyer — you are not the lawyer for a particular in-house counsel. Be prepared and know the entire key cast of characters.

5. ***Expectations.*** Outside lawyers must understand their client's expectations. If you don't know what your in-house attorney's expectations are … **ask me**. As in-house counsel, I am your client contact. You can't meet our expectations if you don't know what they are. When you don't meet the expectations of in-house counsel, repeat business is nonexistent and you become a nonfactor.

   I expect you to know my business and understand who we are, as this translates into better legal advice. As I see it, the more you know about my company, the better you will represent us.

6. ***The Relationship***. The relationship between in-house and outside lawyers must be collaborative, efficient, effective, and cost-conscious. As we like to say at HealthPartners, you are my partner.

   The in-house counsel is your strategic partner. As your partner, we **must** be kept informed and involved in all critical case decisions. In-house counsel cannot partner effectively with outside defense attorneys if we don't know what's going on. Maintaining communication and being available will help sustain your in-house counsel relationships.

- Do you know when the in-house counsel wants a case update?
- Do you know their case development process?
- Do you know the company's settlement philosophies?

- Do you have any understanding as to your client's reputational risk tolerance?
- Do you know what meetings the in-house counsel "likes" to attend and those they "must" attend?
- What about depositions? Does the in-house counsel prep for and attend depositions, and how and when do they want the depositions summarized?
- Do you know what role the in-house counsel plays throughout the litigation – from acceptance of legal process to settlement authority?

If you don't have a clue as to how to answer these basic questions, you will fail as a strategic partner and your relationship with in-house counsel will also fail. As the relationship fails, so does the chance of new files coming your way.

7. ***Communications and Availability***. If you don't communicate with in-house counsel, you will have extra time on your hands to do fun things like mowing your lawn. To start, here are some communication pointers.

- Keep in-house counsel informed regularly, not occasionally.
- Your in-house counsel is a part of the litigation team, and you must communicate with all team members in a respectful tone.
- We need to know the answer, the risk, and the cost.
- Be responsive and timely in your communications.
- Surprise! When it comes to litigation, we do not like surprises.
- If you make a mistake, don't hide from in-house counsel or ignore the subject. Hit the issue square on and with full transparency. Explain and apologize, and propose a positive next step.
- Outside lawyers must communicate as honestly and as realistically as possible, given the facts and law as they know it. In-house counsel expect complete candor and need to understand the good, the bad, and the ugly. Negative assessments should be delivered sooner rather than later.
- Make your case recommendations known. Explain the case strategy options, risks of each defense option, and recommendations for best-laid plans.
- Be prepared to be questioned by in-house counsel. Don't give us the answer you think we want to hear; give us the answer you think is best. Do not be afraid to push back and challenge the in-house counsel. Give us the foundation of information to re-think our decisions or case directions. It is your duty to give the best advice possible for the company, and that duty runs to the company, not to me.
- Don't wimp out and tell us the case has a 50/50 chance of winning. Take a position and change it if warranted as the case develops. Making a prediction about the likelihood of success or failure is difficult, but we are paying you for your expertise and experience to make those predictions.
- Know what actions or case developments your in-house counsel wants reported and when. If you don't know, I suggest that you work a little harder to understand your in-house counsel expectations.
- Do you copy your in-house counsel on letters to adverse counsel, or blind copy them? Do they care? Do you know if they care?
- Copy in-house counsel on all communications with others in their organization.
- Understand the preferences of in-house counsel regarding correspondence (email or snail-mail) and the formality of the correspondence. If you don't understand how to best communicate with in-house counsel, you can't do a good job for them. I like email communications. My litigation files are in an electronic format, and emails are easier to file electronically. I expect communications to be clear and creative. I prefer brevity and the use of bullet points. A concise email takes less of my time, gets me up to speed faster, and that nugget of crucial information from the outside lawyer is not buried in poetic prose of the attached "dear counsel" letter — I don't need to spend money on a precisely formatted letter. However, when legal analysis of a key area of law is undertaken, that probably requires a written memo that contains both a short, succinct answer and a reasoned, lengthy answer.
- Don't give me a PDF memo, for obvious reasons.
- Why send a long memo when a short-answer email will suffice? Unneeded memos fall in the over-lawyering category. Think: what did the in-house counsel ask for — a quick, thoughtful response or a law review article? Sometimes in-house counsel wants a "just good enough" response and not an A+ response.

- Emails: the subject line of an email has a functional purpose that should be utilized.
- Give your in-house counsel sufficient turn-around time and a clearly defined deadline to review documents. Important deadline reminders are greatly appreciated.
- In-house counsel is fully integrated into the daily operations of the company, we are busy lawyers, and we are pressed with a multitude of urgent issues hitting us from all directions. As a result, your case may not get the priority you feel it needs. Think before you act, but act when it is warranted to push the in-house counsel to action.
- Negotiate work deadlines. Examples: "I can have that to you next Friday. Does that work?" Or, ask the in-house counsel, "When do you need this?" Can't meet a deadline? Notify your in-house counsel, acknowledge, and establish a new deadline.
- Fatal Errors: Late-returned calls and emails. In-house counsel understand that outside lawyers serve many clients, are in trial, or are not always available to be immediately responsive. Because you are not always available, it is important for the in-house counsel to have relationships with the associates working on the file. For me, a quick email, text or call stating something like: "I got your message; in trial, I will get back to you next Tuesday. Does that work for you? If not, I will have another member of the firm connect with you."
- What are the ground rules to contact the business clients or targets of the litigation directly? Outside lawyers should never go around the in-house counsel and go directly to the corporation's employees without clear permission from in-house counsel.
- Don't just send us copies of deposition transcripts, expert reports, discovery requests, orders, and the like without explaining the significance of the document. We don't like extra documents; we like important documents and an explanation as to why they are important.
- In-house counsel wants to see a level of commitment from outside lawyers that ensures they will be available when the situation warrants it. Does your in-house counsel know how to contact you outside of traditional work hours should the occasion arise to warrant a call? Most in-house counsel expect their outside lawyers to be available when a matter is urgent.

8. ***Costs & Budgets***. In-house counsel are under tremendous pressure to keep costs down, so it is important that you take your litigation budgets seriously. Outside lawyers must contain them, manage them, adhere to them, and own them.

   If we ask you to create a budget, create a realistic budget and stick to it. We base our cost reserves, in part, on your budgets. Revise budgets as necessary and explain why. In-house counsel must defend their quarterly budgets, and if the external legal budget consistently goes off-target, your in-house counsel will fail, and you will ultimately fail. If something is anticipated to be a budget buster, be proactive and explain in advance. Be prepared to write off any excess when you violate an agreed-upon budget. You will make it up in the long run with a continuing working partnership (more business).

   A big outside-lawyer mistake is not paying attention to instructions and running off on a tangent, causing the budget to burst — surprises are not a good thing. Do not perform unnecessary or unanticipated work without approval.

   We ask that you be upfront about trial costs. If you can't tell us how much it will cost to go to trial, you don't know your business, and that makes us leery.

   Follow specific corporate billing guidelines. If you can't follow billing and budgetary guidelines, your relationship with in-house counsel will be strained and perhaps destined to go down the drain.

   Be creative, think outside of the box, and suggest alternative fee arrangements.

   And yes, rates matter.

9. ***Performing the Work***. Let us know who you are. Introduce your in-house counsel to relevant lawyers and paralegals working on their files.

   We want attorneys to work to the best of their abilities. We expect new lawyers to be utilized to save money. Services should be performed by the person with the lowest billing rate qualified to do the job. A balance must be struck between the

efficiency a more experienced lawyer brings to a given task and the advantages of having the task performed by a junior lawyer (lower rate and to obtain experience) or a paralegal. Whoever does the work must be efficient and not require additional hours because of a lack of experience.

Seeing an associate's name on an invoice when we didn't know he or she would be working on the file is really annoying for most in-house counsel. Depending on the company's billing guidelines, there is also a chance you may not get paid for that undisclosed associate's work.

And how many attorneys does it take to work on the file? If we see too many attorneys billing on a single matter, we will ponder: Is the file being over-lawyered? Is work being duplicated? Is this efficient? And how much money am I spending to keep all of these outside lawyers up to speed on the file?

10. ***Technology.*** It is simple; keep up with it. In-house attorneys understand and use technology. Most of us will not tolerate the technologically deficient outside lawyers.

11. ***Qualities of an Outside Lawyer.*** Here's a starting list, in no particular order, of what in-house counsel like to see in their outside lawyers.

- Ethical
  - Eyes open — ethical behavior.
  - Don't push boundaries.
  - We don't like scandals.
- Smart
  - Understand the law and what remedies are available.
  - You simply don't know the law — you know how to apply it the specific situation.
  - You partner with in-house counsel, but you are the expert.
  - Stay current on the law and best practices.
  - You "get" eDiscovery.
  - You understand my industry.
- Experienced
  - We need to know your legal and trial background.
  - Outside lawyers are retained for their expertise and past experiences in handling particular subject matters.
- Practical and Sensible
  - Practical advice is often preferred over academic advice.
  - Common-sense alternatives help in-house counsel weigh the risks and benefits.
  - You get the work done efficiently without extra bells and whistles.
- Reputation
  - The individual lawyer and firm reputations are both important, but to differing degrees.
  - Play and work well with others.
  - We expect outside lawyers to be litigators and leaders.

12. ***The In-house Counsel.***

- We are real lawyers.
- We practice law.
- We specialize in knowing our company.
- We understand the big picture — to advise on law and strategy.
- We are answerable to a boss.
- We need to know when to escalate an issue "up."
- We are expected to bring value to the company, minimize spending, and account to upper management.
- We wear many hats.
- We have business responsibilities.
- We are creative.
- Our business clients expect us to know the law cold — now.
- Teamwork.
- We can't and don't wimp out when we give risk assessments to our business partners.
- We take ownership of our claim outcomes.
- We don't keep timesheets or have billable quotas, therefore we focus on outcomes.
- We work long hours, and weekends too.
- Every day we prioritize conflicting time demands.
- There is a great deal of pressure to do more with less.
- Our legal departments are a "cost center" and not a "profit center."
- There's no average day.

PEMBERTON'S BEST NEGOTIATION TIPS

FOR LITIGATION SETTLEMENT, MEDIATION, TRANSACTIONAL PRACTICE OR JUST FOR DAILY LIVING

BY RICHARD L. PEMBERTON (1984-85)

INTRODUCTION

Nearly everyone negotiates every day about a host of things. Most domestic partners negotiate with each other; parents negotiate with children and children with parents. Business partners negotiate with each other on such subjects as how to successfully practice law together. Most who take any interest in this particular breakout session will be thinking of the negotiations involved in formal mediation. The so-called tips which it has been decided that I should offer apply to formal mediation, by and large, but the ones that I find most interesting are much more general and philosophical in nature than to be limited only to formal mediation. My tips will be a kaleidoscopic presentation, skipping in and around substance and procedure, formally conducted negotiations and as happen in social contexts and/or private life. We begin with some thoughts about psychology and philosophy:

Tip 1: Understand the Tension Between Logic and Emotion

Logic is the process of the conscious mind. Emotion is largely the process of the unconscious mind. We can acknowledge the logical thoughts and communications of one another but we very often can't be in touch with our emotions, because they radiate from the unconscious mind. These thoughts have been well expressed in the 2011 book, *The Social Animal* by *New York Times* Op Ed columnist and Sunday morning political program guest David Brooks. Brooks refers to, "The role of the inner mind — the unconscious realm of emotions, intuitions, biases, longings, genetic predispositions, character traits and social norms." Brooks goes on to state:

> We are living in the middle of a revolution in consciousness. Over the past few years, geneticists, neuroscientists, psychologists, sociologists, economists, anthropologists, and others have made great strides in understanding the building blocks of human flourishing. And a core finding of their work is that we are not primarily the products of our conscious thinking. We are primarily the products of thinking that happens below the level of awareness.
>
> The unconscious parts of the mind are not primitive vestiges that need to be conquered in order to make wise decisions. They are not dark caverns of repressed sexual urges. Instead, the unconscious parts of the mind are most of the mind — where most of the decisions and many of the most impressive acts of thinking take place. These submerged processes are the seedbeds of accomplishment.

I used to tell participants at the beginning of a mediation session I was about to conduct that we needed to work in the realm of logic rather than in the realm of emotion. Most people seemed to agree to that proposition. The problem was, nobody was capable of doing it and nobody is capable of doing it now. What we need to do is recognize the role of emotion and assess what emotion is doing in the process of negotiation.

Tip 2: Understand the *Parallax Effect*

Two observers of the same phenomenon see a different thing because they are in a different position (often referred to in reports of celestial observations). The parallax effect is often at work in the conduct of negotiations. Anais Nin said, "We don't see things as they are, we see them as we are." "Beauty lies in the eyes of the beholder" is attributed to Plato. One of the challenges in a negotiation is for the participants to come to the realization that the hurdles confronting them are not two different things as each is describing but rather the same thing. They are just looking at it differently.

Tip 3: Understand the Thomas Kilmann Conflict Resolution Grid

This is the Pemberton interpretation of the copyrighted work product as further adopted by Pepperdine University's Straus Institute for Dispute Resolution and frequently presented by stellar negotiation author and lecturer Nina Meierding, MS, JD, a frequent lecturer at MCLE seminars, and Thomas J. Stipanowich, William H. Webster Chair in Dispute Resolution at Pepperdine University, a keynote presenter at this seminar.

COMPETITION	ACTIONS	COLLABORATION
DOUBT		EMPATHIZE
DENY		RELATE
RESIST	COMPROMISE	RESPOND
TAKE		GIVE
AVOIDANCE	ATTITUDES	ACCOMMODATION

Compromise is a midpoint of both attitude and action.

Tip 4: Understand the Differences Between Wants and Needs (Desires and Necessities)

Wants or desires are an emotion. Needs or necessities may be rationally based (to breathe, to eat, and to sleep), or may be wants elevated emotionally to appear as needs. Parallax effect may present the result of one negotiator seeing a want in the bargaining and the other seeing a need. "I want" may be negotiable, while "I need" may not be negotiable. The mediator may succeed in convincing the non-negotiable need to be viewed from a different point of view to become a negotiable want. A skilled negotiator may be able to do the same thing without the help of a mediator if able to avoid hostility in the negotiations. Hostility is an action, a course of conduct, that occasionally may be driven by logic but most often is driven by emotion. I can't think of an example of hostility in negotiations being anything other than a dangerous hurdle to be overcome.

Tip 5: Understand that Knowledge Is Strength

Know the issues. Define them precisely. Know the facts, including relevant history. Know your opponent. Is he a risk avoider, or a risk taker who enjoys walking on the edge and trying to avoid falling off? Is he a ground holder who is not always right, but never in doubt? Does he believe himself in that regard or is he posturing? If this is a new opponent, there is usually someone you know who knows the opponent and will be willing to give you a heads-up on who you are about to deal with. However, sometimes the information you get turns out not to be very reliable and you may have to learn as you go with this unknown quantity opponent. Know where the balance lies in bargaining power. How many dollars are at stake in the outcome and how many dollars are at stake in getting to the outcome? Who's got the war chest? What is the value of a dollar today in settlement as against a dollar one, two or three years hence after a district court trial, and appeal and a remand? Know the odds. Odds of a favorable verdict, odds of being able to collect the verdict, odds of getting it collected in time to do any good and the odds of various other outcomes — either procedural or substantive. Sometimes you will have a basis for making the odds but sometimes you will be speculating. At least you are coming to the realization that there are odds to be considered and that how you consider them will affect what you do or don't do in the negotiating process.

Tip 6: Understand the Right or Wrong Negotiating Team

Negotiation often is not a solo venture. A right partner might be better than trying to do it all by yourself.

The right legal, medical, scientific or psychological consultant might be added to the team. The right mediator might be part of a right team and the wrong mediator the fatal element in a wrong team. Vet the mediator. Mediators have histories. Or, if one doesn't have a history, ask why not? You are about to undergo major surgery — do you want the surgeon to be performing the procedure for the first time? Is it more important to have a mediator who knows the subject matter of the dispute or to have a mediator who knows how to negotiate and overcome hurdles in the way of reaching settlement? Do you have to educate the mediator on the subject matter or make the mediator sufficiently expert in the subject matter and if so, isn't that easier than trying to teach the expert on the subject matter who knows nothing about mediation how to become an effective mediator?

Tip 7: Understand the Right or Wrong Venue and Ergonomics for Negotiation

Years ago I encountered a mediator who had a long history of being a negotiator for one side in statewide labor management disputes. He went on to a judicial career and upon retiring from that was sought after as a mediator, at least for a while. His philosophy was to start the mediation at about 9:00 at night when people were already tired. He liked to smoke cheap cigars and in those days it was permissible almost anywhere. His strategy was to get people so miserable that they would settle in the wee hours of the morning just to escape him and each other. One of my partners and I entered a mediation under those circumstances and we left as dawn was coming, revealing a thick fog in which we were going to attempt to drive a couple hundred miles. We were plenty miserable. We did reach a mediated settlement agreement, but I'm not willing to admit that it was because of the mediator's strategy rather than that it was in spite thereof. My tip is to make the negotiation as comfortable as possible. If I do a mediation on my turf rather than on the turf of the parties, they get coffee and cookies at the beginning of the morning, a lunch that is catered in and that I don't charge them for, something to drink with ice cubes in it at the middle of the afternoon, and if we are still at it in the evening, there will be pizza. People become cranky and polemic as physical discomfort and fatigue wear on. My tip is to recess the negotiation before it gets to that point and resume it when people are refreshed and feeling better. There should be opportunities for negotiators to separate and caucus with the mediator or by themselves and the ergonomics should be of quality. Sometimes the negotiation is over some feature of geography and it makes little sense to try to conduct that negotiation in a law office 100 miles away from the geographic point of contention. I have mediated lakeshore disputes on the lakeshore, boundary line disputes on the boundary, and partition actions while traversing with the parties the real estate to be partitioned in order to discuss how it can be partitioned reasonably. I recently did an eight-party construction dispute on one floor of a conference hotel where we had the whole row of conference rooms reserved and with lots of facilities available from the hotel. The mediation went on for the better part of a week and was ultimately successful. The venue and attendant ergonomics were very helpful in the process.

Tip 8: Understand the Importance of Timing in Negotiation

The right answer at the wrong time is a wrong answer — perceptually. Should we try to negotiate before we start the civil action? Should we try for an early mediation after the action is started but before discovery and motion practice expenses eat up defendant's war chest while simultaneously increasing plaintiff's litigation expenses? Should we complete discovery and motion practice so we really know what we're doing when we negotiate for settlement? Switch to daily timing rather than broad-based timing in the process. Should we throw out this particular proposition at 9:00 a.m. in the morning of mediation or save it until 3:00 p.m. in the afternoon? Switch to the domestic scene. Shall I ask my wife to agree to me buying that $30,000 Harley over breakfast of burned toast and weak coffee at home this morning or should I wait until dinner next week on vacation on the Caribbean beach? Or should I ask my husband to buy me those $2,000 killer Jimmy Choos or Manolos as we drive on Interstate 35 on Friday at 4:30 p.m., trying to get out of the metro or wait until bedtime at Lutsen Lodge after he has had a couple of Manhattans and a steak and is thinking about getting to go fishing tomorrow morning?

Tip 9: Understand the Hurdles to be Overcome or End Run (Potential Failure Modes)

If you can't figure out **why** you are not getting anywhere, you will **never** get anywhere.

Hurdle 1: No motivation. Negotiation is a voluntary process, including court ordered mediation — to the degree that the court can order the horse to water but can't make the horse drink. Is the opponent saying, "I like the fight and I am going to win it and I'd rather see you in court?" And if so, does the opponent really mean it? So how do you motivate?

Hurdle 2: It is the wrong day. Something that hasn't happened yet needs to happen and that will be a better day to try to settle. Opponent thinks it will have won the summary judgment motion, or will have tied down the right expert witness and gotten an opinion it doesn't have yet. Business events will change or the economy will change or the litigation prospects will in some way change. "I'll just wait for a better day to negotiate" says opponent to herself, but doesn't say it out loud to you. So, do you say it to her and point out that something that hasn't happened yet always has to happen — which is the **trial**, if we don't settle now. So, let's calculate the odds for each of us and bargain now.

Hurdle 3: There is an empty chair. There is a player who is not present. It could be the insurance claims representative who actually has the authority to settle but has sent someone else who lacks that authority. Or, the bargaining power of the opponent or maybe of yourself is dependent upon someone like a bank that has the money and you don't know if it is available to you today or not. Or, maybe it is the spouse who stayed home instead of coming to the mediation or the defendant who should be at the mediation personally rather than leaving it to insurance defense counsel and a claims representative when the insured has a personal interest in getting the case settled. So, try to fill that chair with the right person.

Hurdle 4: It is too complex to figure out how to settle. Someone else will have to do it because we can't figure out how to do it. Consider the odds that a judge and jury won't master the complexities any more easily than you can and probably not as easily. It is almost always better to settle a dispute yourself than to rely on a judge and jury to settle it for you. You know the complexities better than anyone else ever will.

Hurdle 5: "I am right — he is wrong — once he gets it through his thick head, he will surrender unconditionally". And next ask if it is you or the opponent who is perhaps not right but never in doubt, or is it both of you? How do you escape past this hurdle?

Tip 10: Understand the Danger Zones in Negotiation

(1) "It's a matter of principle." How do you calculate the dollar value of principle?
(2) "Pride cometh before the fall." The more accurate quotation is from the King James Version of the Bible, Book of Proverbs, 16:18, "Pride goeth before destruction and an haughty spirit before a fall." It is not uncommon in negotiation that someone will refuse to do something as a matter of pride even when all logic calls for it to be done.
(3) "Saving face." Maybe it's the same thing as pride but it seems to work a little differently. Pride is an assertive proactive attitude that is synonymous with bravado; whereas, saving face is often conduct of abstention or holding the line, because to step over the line risks embarrassment or shame. Cultural considerations are important in assessing this danger zone.
(4) "Externalities." Sometimes a bargainer will insist on some term or refuse to agree to some term for a reason that has absolutely nothing to do with the bargaining process — neither substantively nor procedurally. There is something else going on that the opponent and most likely the mediator don't know about. What could the externality be? Is there some way to segregate it from this bargaining process if you can figure out that it exists and what it is?
(5) "Endowment Effect." Maybe it is synonymous with pride, but maybe it's a little different. I did a mediation on the shore of a beautiful northern Minnesota lake. The fight was between two cabin owners over a five-foot strip of land which each of them claimed to be its five-foot strip of

land and not the other's. The apparent content of the five feet was brush. I had to ask them if they thought that there was the possibility of drilling for oil within that five-foot strip and the answer that each had for me was, "It's mine, not theirs, and I intend to keep it". The endowment effect can materialize in a lot of forms other than in regard to who owns the land. It is harder to give up something you have in order to complete a negotiation than it is to stop fighting for something that you never have had but think you need but can be convinced that while you want it, maybe you don't need it.

(6) "Cognitive Overload." I have had people very literally express this danger zone to me by saying that you're telling me more than I need to know and more than I want to know. I can't process this right now. I can't deal with any more. Maybe the answer is to suggest a recess or maybe it is to find an analogy or some type of simplification. Very often cognitive overload manifests itself as a long day of negotiation goes on with people continuing to demand reasons from the other side for the other side's obstinance and the reasons come flowing in both directions with lots of detail, sometimes including charts, diagrams, graphs, cited authorities and so forth. I have often suggested in the middle of the afternoon that we might better spend our time working with Arabic numerals than with the English alphabet.

Tip 11: Understand the Necessity of Considering Alternatives to Negotiated Agreement Before You Give Up Trying to Agree

This tip is worth thinking about before you start negotiating; continue thinking about it during the negotiation right down to when you are at the point of deciding whether to give up and declare impasse. Straus Institute for Dispute Resolution of Pepperdine University Professor T.J. Stipanowich, Plenary speaker at this seminar, and Nina Meierding discovered some acronyms which are helpful to remember. The Best Alternative To a Negotiation Agreement is BATNA. The Worst Alternative To a Negotiated Agreement is WATNA and the Most Likely Alternative To a Negotiated Agreement is MLATNA. These acronyms are pronounceable and worth testing against whatever negotiation point you are stuck on at the minute. Ask, "What are the odds of defaulting to either BATNA or WATNA?" If one negotiator might achieve BATNA and the other one is facing WATNA, the one facing WATNA ought to be motivated to try for MLATNA if there is a MLATNA. The alternatives may be in the form of a jury verdict, court judgment, business or other financial outcome, preservation or rupture of family ties, or possibly life or death, depending on who are the negotiators, what is the subject and what emotions are at work.

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EX. A

FILE NO [redacted]

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against [redacted] a Minnesota Attorney, Registration No. [redacted]	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION FOR DISCIPLINE**

The above-captioned matter was heard on July 10 and 11, 2014, by the undersigned acting as referee by appointment of the Minnesota Supreme Court. [redacted] appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Philip A. Cole appeared on behalf of respondent, [redacted] who was personally present throughout the proceedings.

The hearing was conducted on the Director's January 16, 2014, petition for disciplinary action ("petition"), April 1, 2014, supplementary petition for disciplinary action ("supplementary petition") and June 26, 2014, second supplementary petition for disciplinary action ("second supplementary petition"). The Director presented the live testimony of [redacted]d respondent. Respondent testified on his own behalf and presented the live testimony of [redacted]

Director's Exhibits 1-36 were received into evidence. Respondent's Exhibits 101-129 were received into evidence.

The Director was instructed to provide to respondent's counsel on or before July 25, 2014, proposed findings of fact, conclusions of law and recommendation for appropriate discipline. Respondent was instructed to propose changes to the Director's

proposed findings of fact, conclusions of law and recommendation for discipline no later than August 6, 2014. The parties were instructed to file memoranda of law no later than July 25, 2014. Respondent was directed to submit any reply memorandum no later than August 6, 2014. The referee's findings of fact, conclusions of law and recommendation are due to the Supreme Court no later than September 24 , 2014.

In his answers to the petition ("R. Ans."), to the supplementary petition ("R. Supp. Ans.") and to the second supplementary petition ("R. Second Supp. Ans."), respondent admitted certain factual allegations and denied others. The findings and conclusions made below are based upon respondent's admissions, the documentary evidence the parties submitted, the testimony presented, the demeanor and credibility of respondent and the other witnesses as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony. If respondent's answer admits a particular factual finding made below, then even though the Director may have provided additional evidence to establish the finding, no other evidence will necessarily be cited. For each factual finding made below, the undersigned evaluated the relevant documents and testimony, accepted as credible the testimony consistent with the finding and did not accept the testimony inconsistent with the finding.

Based upon the evidence as outlined above, and upon all of the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

1. [redacted]

He is in good standing. He has fully cooperated with the proceedings against him.

[redacted] Matter

2. In late August 2007 [redacted] met with respondent to discuss representation regarding (1) a lawsuit [redacted] had commenced against attorney [redacted],[1] and (2) a malpractice claim against attorney [redacted] (R. Ans.)

3. On or about September 2, 2007, [redacted] and respondent entered into a contingent fee retainer agreement regarding [redacted] malpractice claim against [redacted] (R. Ans.; Ex. 1). On September 12, 2007, respondent wrote to [redacted] and stated that he would represent [redacted] in the [redacted] matter, "or any other matter requiring legal representation, at the hourly rate of $200 plus expenses." (R. Ans.; Ex. 2.) Respondent further stated, "If you have paid the amount of $5,000, any further time and expenses incurred in these matters will be charged to your share of any recovery in the case of [redacted]" (R. Ans.; Ex. 2.)

4. [redacted] paid the $5,000 fee contemplated by his agreement with respondent on the following dates and in the following amounts: $1,000 on September 4, 2007; $1,000 on March 12, 2008; and $3,000 on July 31, 2008 (R. Ans.; Ex. 6, p. 38).

5. Thereafter, based on newly discovered case law, respondent concluded that continued pursuit of [redacted] malpractice claim against [redacted] would be frivolous and a violation of Rule 11, Minnesota Rules of Civil Procedure (R. Ans.). Respondent informed [redacted] of this fact and discontinued his representation of [redacted] on the [redacted] matter (R. Ans.). Respondent continued to represent [redacted] in the [redacted] and related matters (R. Ans.).

6. Respondent and [redacted] did not enter into a new fee agreement regarding the [redacted] matter (R. Test.; [redacted] Test.). Respondent was not entitled to recover from [redacted] any fees or costs in the [redacted] matter beyond the $5,000 [redacted]

[1] The [redacted] matter was later consolidated with another matter involving a substantial judgment against [redacted].

paid pursuant to respondent's September 12, 2007, letter (Ex. 2). Respondent continued to represent [redacted] in the [redacted] matter on the basis of $200 per hour plus expenses. (Ex. 114).

7. In early 2010 summary judgment was granted in favor of [redacted] and another party to the consolidated proceedings with respect to [redacted] claims against them (R. Ans.). At that time the total unpaid billings on the [redacted] matter amounted to a sum in excess of $30,000 including expenses. (Ex. 112.) [redacted] and Mr. [redacted] agreed that [redacted] would take the appeal on [redacted] behalf from the adverse decision for the sum of $1200, flat rate to cover fees and expenses. Mr. [redacted] confirmed the arrangement in his check payable to Mr. [redacted] in the amount of $1200 with the memo on the check, "cover fees for appeal." The memo had been written on the check by Mr. [redacted] wife at his direction according to Mr. [redacted] direct testimony. In his testimony at the hearing, Mr. [redacted] declared that the payment was for "fees and expenses." Mr. [redacted], a [redacted] lawyer, learned from Mr. [redacted] at the time of the appeal being taken that Mr. [redacted] had taken on the appeal for a "nominal fee." (Ex. 117, Aff. of [redacted]. In his affidavit to the Director, Mr [redacted] reported that he had assured Mr. [redacted] that $1200 would cover his fee and costs for the appeal. (Ex. 117).

8. [redacted] paid the $1200 by check dated February 2, 2010. The check was deposited by Mr. [redacted] into his business account on February 16, 2010. (Ex. 4, p. 8). By the same date Mr. [redacted] had his wife write the check, February 2d, Mr. [redacted] had advanced from his own funds $1,050 in appellate costs and had posted time for work on the appeal of $360.

9. By the time the check was deposited on February 16, Mr. [redacted] had advanced from his own funds a total in costs for the appeal of $1,075 consisting of a $500 cost bond, a $550 filing fee and $25 UPS fee. In addition by that time, the appeal was under way. The notice was filed on February 5th, eleven days before the check was

deposited. (Ex. 6 and see record of the appellate court attached to Respondent's brief). Also by that time Mr. [redacted] had posted time on the appeal at the rate of $200 per hour amounting to $1260. It was Mr. [redacted] habit in practice to post his time contemporaneously even if working on a flat fee or contingent fee arrangement. Respondent ultimately paid a total of $1404.75 from his business account for appellate costs.

10. The $1200 was never placed in Mr. [redacted] s trust account. Under the arrangement testified to by both Mr. [redacted] and Mr. [redacted] all of the $1200 for "fees and expenses" had either been earned or expended by the time the $1200 came into Mr. [redacted] possession. Mr. [redacted] conduct was consistent with his understanding and from the weight of the evidence, also of Mr. [redacted] understanding. All of the $1200 by February 16th constituted Mr. [redacted] funds which need not have been placed in his trust account.

11. At no time did respondent retain any undisbursed balance of [redacted] cost advance in a trust account (R. Test).

12. [redacted] appeal was unsuccessful (R. Ans.). At that point Mr. [redacted] had expended $1,404.75 in appellate costs on [redacted] behalf. In August 2010 respondent withdrew from [redacted] representation in the [redacted] and related matters. (R. Ans.)

13. In January 2011 respondent received a $500 check payable to his trust account in refund of [redacted] cost bond (R. Ans.; Exs. 8 and 9). Respondent did not inform [redacted] of his receipt of this check (R. Ans.; [redacted] Test.).

14. Respondent did not deposit the cost bond refund check into his trust account (R. Test). Instead, respondent deposited the check into his business account and retained the proceeds (R. Test.). Respondent's handling of the payment in this manner was the product of his understanding that the refund check was his money, a belief that was, in good faith, justified by the facts of the transaction with the client.

15. Given that the $500 refund on the cost bond funded by Mr. [redacted] reduced his cost outlay on the appeal to $904.75 and allowed him to earn a nominal fee of $295.25 for the appeal, Mr. [redacted] properly applied the refund to his own account. Mr. [redacted] obtained representation on the appeal for $1200 inclusive of fees and costs precisely as both he and Mr [redacted] understood the arrangement. The fact that the check was payable to his trust account is not determinative of the issues in this matter.

16. On June 20, 2014, during the pendency of these disciplinary proceedings, respondent filed in the Houston County District Court and served upon [redacted] a notice of attorney's lien claiming entitlement to the $500 as fees and costs due him under his arrangement with Mr. [redacted] (Ex. 125). This proceeding was instituted by Mr. [redacted] to resolve the claim initiated by the Director that he was not entitled to claim a fee on the $500 fund.

17. Respondent used the caption of the [redacted] and related litigation matters on the notice of attorney's lien he served upon [redacted] (Ex. 125). In that notice of attorney's lien, respondent stated that he is entitled to $500 "in any money or property involved or affected by the above-captioned matters." (Ex. 125.) Respondent further stated that this amount consists of $295.25 for attorney fees and $204.75 for litigation expenses "incurred in the above-captioned matters." (Ex. 125.)

18. Respondent did not disclose to the court with which he filed his notice of attorney's lien that the $500 claimed in his attorney's lien was at issue in these disciplinary proceedings (R. Test.). Respondent did not submit any documents—billing statements, affidavits, and the like—to the court in support of his attorney's lien (R. Test.).

19. Prior to service of the notice of attorney's lien, and since at least January 2011, respondent had not provided [redacted] with any billing invoices or otherwise made any attempt to collect the amount he claimed in his notice of attorney's lien ([redacted] Test.; R. Second Supp. Ans.).

20. On June 26, 2014, without conducting a hearing, the court issued an order granting respondent "an attorney lien in the amount of $500 upon the interest of [redacted] in any money or property involved or affected by the above captioned matters." (Ex. 126.)

21. In a satisfaction of judgment dated July 1, 2014, respondent certified that the $500 judgment entered in his favor and against [redacted] was fully satisfied (Ex. 127).

22. In light of the findings set forth above, respondent was entitled to keep the cost bond refund. Respondent's notice of attorney's lien, while perhaps unnecessary, especially in light of these pending proceedings, does not rise to the level of a violation of the Rules of Professional Conduct.

J.B. and M.B. Matter

23. In 2007 respondent represented J.B. and M.B. in litigation regarding an easement ([redacted] Test.). The trial court's decision was not favorable to J.B. and M.B. and they determined to appeal the decision to the Minnesota Court of Appeals ([redacted] Test.).

24. In a December 2, 2008, letter to his clients, respondent reminded them of the impending appeal deadline and stated, "I am willing to handle an appeal at no additional cost for attorney fees provided that the outstanding bill attached to the letter ($3100.68) plus $1,100 (for expenses) is paid on or before an appeal is undertaken." (Ex. 13.) The [redacted] never responded to this offer, but agreed to a different arrangement four days later in a phone call with Mr. [redacted].

25. Respondent's proposal as set forth in his December 2, 2008, letter was never performed and was changed in a phone call between the [redacted] and Mr. [redacted] on December 6th. (Ex. 101, handwritten note). The fact that this phone call took place is further evidenced by the references to it in respondent's invoice. (Ex. 12, p. 0012)

26. Prior to having been charged with misappropriation, respondent consistently characterized his appellate fee agreement with J.B. and M.B. in a manner consistent with his December 2, 2008, letter. For example, in his November 21, 2013,

letter to the Director, respondent stated, "As in the [redacted] case, I agreed to do the appeal for a minimal amount, viz., for the payment of an outstanding bill plus $1,100.00." Respondent further stated, "I could take a hit on fees if I knew that my expenses would be covered. For that reason, the lump sum amount I asked for was premised on the estimated costs of the appeal." (Ex. 36.) In his December 5, 2013, letter to the Director, respondent stated, "The outstanding bill as of 12-2-08 was $3,100.68. By paying $2,500 on 12-9-08 and $1,700 on 2-16-09, [J.B. and M.B.] satisfied the condition for the appeal as stated in my letter to them dated 12-2-08, viz., payment of 'the outstanding bill plus $1,100.'" (Ex. 109, p. 1, ¶ 2.) When confronted with this evidence on cross-examination, respondent claimed he was relying on his memory (R. Test.) when he, not once, but twice, stated to the Director that he agreed to do the appeal for payment of the outstanding bill plus $1,100 for appellate costs. However, in his affidavit dated October 4, 2013, respondent stated, "I am attaching a copy of the check that I received from [redacted] on 2-5-10, which I located today. Prior to receiving the Board's submissions yesterday, I did not fully realize the seriousness of the charge I am facing. As a busy lawyer with a lot on my mind, I sometimes do not grasp things when I should." (Ex. 11, pp. 3-4, ¶ 12.) Therefore, by the time he submitted his November and December 2013 responses to the Director, respondent was on notice, by his own admission, that the matters under investigation were serious.

27. As of December 2, 2008, respondent's "outstanding bill" to J.B. and M.B. showed an amount due of $3,100.68 (Ex. 12, p. 11). In the fee arrangement made in the phone call of the 6th, the [redacted] agreed to pay Mr. [redacted] $2500 "today" and $2500 in thirty days. This total sum was to cover the $3100.68 outstanding balance plus the fees for the appeal. On December 9, 2008, J.B. and M.B. paid to respondent $2,500 (Ex. 12, p. 12), reducing the "outstanding bill" to $600.68 ($3,100.68 minus $2,500) but leaving the second installment of $2500 due in 30 days. In reliance on the fee arrangement, Mr. [redacted] advanced from his own funds a total of $1126.67 in appellate costs including a

$500 cost bond. This amount was fully advanced by January 7, 2009, and in addition by that date Mr. [redacted] had billed $2300 in time on the appeal using his rate of $200/hour. He wrote to the [redacted] on January 19, 2009 reminding them that the second payment of $2500 was due: "Just a reminder that the second payment of $2,500 is due, as per our agreement. Once that has been paid, your account will be paid in full." (Ex. 104.) At that time Mr. [redacted] was out of pocket on the [redacted] matter a total of $4,027.35 including the unpaid balance on the bill before the appeal (600.68 + 1126.67 + 2300). Without a word of protest or disagreement about the reminder to pay the "second" $2,500, the [redacted] on January 31, 2009—sent in a second check for $1,700.68 marked "paid in full." Respondent did not request any additional amounts from J.B. and M.B. following their subsequent January 31, 2009, check for $ 1,700.68 (R. Test.; [redacted] Test; Ex. 105).

28. [redacted] testified that she was acting on the belief the original proposal in the December 2nd letter to do the appeal for free, was in place. She claimed not to remember the phone call agreement of December 6th but was unwilling to testify it had not occurred. She also received the January 19 letter seeking the second $2,500 installment but made no protest to the demand for $2,500. Although claiming no memory of the agreement to make two payments of $2,500, Ms. [redacted] attempted on cross examination to claim she was attempting to comply with an agreement of that nature when she made a $2,500 payment in November, a month before the agreement of December 6, was discussed and made. The Director did not call [redacted] the other participant in the December 6 phone call, to testify. The file of the [redacted] on their communications with Mr. [redacted] was not produced. The weight of the evidence on the fee agreement between the [redacted] and Respondent supports the Respondent's claim that he had agreed with his clients to take the appeal for a $5,000 fee inclusive of payment of the balance due him prior to the appeal of $3,100.6

29. It is stipulated by the Director that Mr. [redacted] $1,899.32 net fee for the appeal was reasonable.

30. In November 2009 respondent received a $145.21 check in partial refund of J.B. and M.B.'s cost bond (Ex. 14, p. 9; Ex. 36, p. 3).

31. The sum alleged to have been "misappropriated", $145.21, represents a partial refund of the cost bond to Mr. [redacted] in November, 2009 after the appeal was over and the costs settled. As in the case of [redacted] this refund was Mr. [redacted]s money, not the client's, and was properly not placed in his trust account. The refund reduced his cost outlay on behalf of the [redacted] from $1,126.67 to $981.46 and allowed him to apply the refund to the outstanding fee balance per the $5000 agreement.

32. Respondent did not inform J.B. or M.B. of his receipt of the $145.21 refund [redacted] Test.; R. Test.) and did not remit the funds to them. [redacted] Test.). Respondent did not deposit the cost bond refund check into his trust account (Ex. 14, pp. 2, 9). Instead, respondent deposited the check into his business account and retained the proceeds (Ex. 14, pp. 2, 9). His actions in this respect are wholly consistent with his belief that the $145.21 was payable to him on the outstanding balance.

33. On June 20, 2014, during the pendency of the disciplinary proceedings, respondent served upon J.B. and M.B. a notice of attorney's lien (Ex. 124) seeking to claim his fee entitlement on the $145.21 refund which had been challenged as a violation by the Director.

34. Respondent used the caption of the J.B. and M.B. easement matter on the notice of attorney's lien he served upon J.B. and M.B. (Ex. 124). In that notice of attorney's lien, respondent stated that he is entitled to $800 "in any money or property involved or affected by the above-captioned matters." (Ex. 124.) Respondent further stated that this amount "is for attorney fees and litigation expenses incurred in the above-captioned matter." (Ex. 124.)

35. Prior to service of the notice of attorney's lien, and since at least July 2009, respondent had not provided J.B. and M.B. with any billing invoices or otherwise made any attempt to collect the amount he claimed in his notice of attorney's lien [redacted] Test.;

R. Second Supp. Ans.). The only effort made by Mr. [redacted] to collect the balance on his billing in Ex. 104 was the retention of the $145.21.

36. In light of the findings set forth above, respondent was entitled to keep the cost bond refund. Respondent's notice of attorney's lien, while perhaps unnecessary, especially in light of these pending proceedings, does not rise to the level of a violation of the Rules of Professional Conduct.

37. There is no evidence to support the allegation that the [redacted] were not kept reasonably informed about the status of their matter with Mr. [redacted].

[redacted] Matter

38. On approximately December 18, 2009, [redacted] met with respondent to discuss representation in a dispute with [redacted] regarding its handling of [redacted] father's trust (R. Supp. Ans., [redacted] Test.).

39. During their December 18, 2009, meeting, respondent told [redacted] that he would require a $1,200 retainer to begin work on her case (R. Supp. Ans.). At the time Ms. [redacted] had cases pending in the Olmstead County Conciliation Court against the bank. These were dismissed by the court in February, 2010. (Resp. Ans.)

40. On approximately December 22, 2009, [redacted] sent respondent a check for $1,500.[2] Respondent did not enter into a written retainer agreement with [redacted] (R. Supp. Ans.). Respondent deposited [redacted] retainer into his operating account (R. Supp. Ans.).

41. At the time he received [redacted] $1,500 check, respondent had not provided services valued at $1,500 and had not earned that amount (*see* R. Test.). Respondent's deposit of [redacted] check into his operating account constituted a failure to safeguard client funds.

[2] According to [redacted] she included an additional $300 "in a show of good faith on my part for [respondent's] services."

42. At the time he received [redacted] $1,500 check on or near December 23, 2009, respondent billed to her account $400 in time at the rate of $200/per hour. (Ex. 30). Of the $1,500 received, Respondent had earned $400 and was obligated to deposit the balance of the retainer in trust which he concedes he failed to do. Respondent's deposit of [redacted] check into his operating account constituted a violation of Rule 1.15(a). Respondent has not contested a finding that he failed to comply with Rule 1.15(a). Ultimately the funds were applied as intended by the Client to pay for Mr. [redacted]s legal services. When the client complained about her dissatisfaction with the services and demanded a refund, Mr. [redacted] refunded the entire sum to her.

43. A billing statement respondent prepared on February 6, 2014, reflects that, during the period of his representation, respondent billed legal services to [redacted] billed as follows:

DATE	TIME	VALUE	BALANCE
			$1,500.00
12/18/2009	2.00	$400.00	$1,100.00
02/16/2010	1.50	$300.00	$800.00
01/24/2012	.20	$40.00	$760.00
02/29/2012	.10	$20.00	$740.00
06/13/2012	.10	$20.00	$720.00
06/21/2012	.10	$20.00	$700.00
07/02/2012	2.00	$400.00	$300.00
01/29/2014	.10	$20.00	$280.00
01/30/2014	1.50	$300.00	($20.00)
02/06/2014	.50	$100.00	($120.00)

44. At no time did respondent retain the unearned balance of [redacted]s retainer in a trust account (R. Supp. Ans.). Respondent's conduct in this regard constituted a failure to safeguard client funds.

45. On January 29, 2014, [redacted] sent respondent an email in which she terminated respondent's representation and requested that he refund her complete

retainer. By letter dated February 7, 2014, respondent sent a $1,500 check to [redacted] drawn on his operating account in refund of her retainer (R. Supp. Ans.).

46. During the period of representation, Mr. [redacted] prepared a Summons and Complaint attempting to allege Ms. [redacted] complaint and conducted legal research. Ms. [redacted] and Mr. [redacted] differed on their understanding of what was expected of each following a meeting on July 12, 2012. Mr. [redacted] believed Ms. [redacted] would produce to him documents or calculations showing damages and Ms. [redacted] would provide him a copy of the Trustee's final accounting. Ms. [redacted] however, believed that the July meeting required nothing further of herself and a legal action would be commenced. When Ms. [redacted] complained in January, 2014 that no progress had been made, Mr. [redacted] responded that he had been waiting for the additional information and had concluded Ms. [redacted] had decided not to go further. (Ex. 28). After the discharge of Mr. [redacted], Ms. [redacted] and her brother did not pursue the case further.

47. During the period December 18, 2009, to January 29, 2014, respondent did little or no substantive work on behalf of [redacted] and failed to adequately communicate with her regarding her case (Exs. 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, and 30; [redacted] Test.).

48. Respondent's legal services to, and communications with, [redacted] during the period December 2009 to July 2012 are as follows:

- **December 18, 2009.** Respondent met with [redacted] for the first time and she provided him with documents [redacted] Test.). Respondent recalls asking for an "itemization of damages" to assist in establishing a monetary loss, if there was one. (R. Ans.) Ms. [redacted] recalls not being requested to provide information or documents additional to that which she provided him at the meeting. ([redacted] Test.). Mr. [redacted] states he is "certain" he reminded Ms. [redacted] in 2010 when she reported the dismissal in conciliation court to him, of his need for the final accounting and the damage information. (R. Test., Ex. 106).
- **February 16, 2010.** Respondent spoke with [redacted] regarding dismissal of the conciliation court action she had commenced against [redacted] prior to retaining

respondent [redacted] Test.). Respondent recalls reiterating his need for information "regarding the administration of the trust, particularly the final accounting, and the itemization of damages. (R. Ans.) Ms [redacted] did not recall having any additional obligations to supply information. According to respondent, he also conducted legal research and contacted another attorney, [redacted] to discuss [redacted] case on this date (Ex. 30, p. 1).

- **January 23, 2012.** Respondent emailed [redacted] stating, "I am working on your file and will have something to you this week. Sorry for the delay." (Ex. 18.) Respondent did not, at this time, request [redacted] to provide information or documents additional to that which she had already provided to him (Ex. 18; [redacted] Test.), but according to him he had previously requested.

- **February 29, 2012.** On February 7, 2012, [redacted] emailed respondent requesting an update regarding her case (Ex. 20). Respondent responded by email on February 29, 2012, stating, "I will have an update to you by Friday of this week. I have been tied up in court, including cases outside of Olmsted County." (Ex. 21.) Respondent did not, at this time, request [redacted] to provide information or documents additional to that which she had already provided to him. (Ex. 21; [redacted] Test.)

- **June 13 and 21, 2012.** On June 6, 2012, [redacted] emailed respondent again requesting an update regarding her case (Ex. 22). Respondent responded by email on June 13 and 21, 2012 (Exs. 23 and 24). In his June 13, 2012, email, respondent stated, "Sorry for the late response. I'm right in the middle of a couple of things. I will have something to you by Friday or Monday at the very latest." (Ex. 23.) In his June 21, 2012, email, respondent stated, "Just a headsup [sic] that I've not been able to finalize anything since I'm presently involved in a jury trial in Olmsted County District Court. It should be completed tomorrow, then I can turn my full attention to your case." (Ex. 24.) Respondent did not, at

this time, request [redacted] to provide information or documents additional to that which she had already provided to him ([redacted] Test; Ex. 24), but which he claims he had previously requested.

- **July 2, 2012.** At [redacted] request, she and respondent met to discuss her case ([redacted] Test.). Prior to the meeting, respondent prepared a draft summons and complaint on [redacted] behalf (Ex. 26; [redacted] Test.). On July 11, 2012, [redacted] emailed to respondent a July 10, 2008, letter from [redacted] (Ex. 27). [redacted] stated, "I have other attachments that I can send that pertain to my Trust suit. This will be a good test to see if I can send others. Let me know." (Ex. 27.) .) Respondent and Ms. [redacted] disagreed in their understanding of what was expected of each after this meeting. Mr. [redacted] expected some material showing damages that would lay foundation for the suit and also requested, for the second time, that Ms. [redacted] provide him the Final Accounting of the Trustee. Ms. [redacted] on the other hand thought she had no such obligations and/or that Mr. [redacted] would obtain the materials from [redacted] and then move to sue the bank.

49. On a few additional occasions during the period December 2009 to July 2, 2012, [redacted] alled respondent's office to request an update regarding her case ([redacted] Test.). Respondent failed to return some of these calls [redacted] Test.). In response to other calls, respondent informed [redacted] that he was working on her case or that he had been unable to work on her case because of other obligations ([redacted] Test.). Respondent did not, on any of these occasions, request [redacted] to provide information or documents additional to that which she had already provided to him [redacted] Test.).

50. Ultimately Ms. [redacted] in January, 2014 wrote to Mr. [redacted] of her dissatisfaction with his handling of her matter and demanded a refund of her retainer. Mr. [redacted] refunded the retainer.

Aggravating and Mitigating Factors

1. Respondent has extensive experience in the practice of law.

2. Respondent has a history of prior discipline as follows:

a. On September 14, 1995, respondent was issued an admonition for failing to pursue a client's case despite repeated requests to do so and failing to reply to his client's request for information, in violation of Rules 1.3, 1.4(a), and 3.2, Minnesota Rules of Professional Conduct (MRPC) (R. Ans.; Ex. 34).

b. On April 11, 2000, respondent was issued an admonition for failing to diligently pursue a client's case, failing to adequately communicate with the client and failing to prepare a written contingent fee agreement, in violation of Rules 1.3, 1.4, and 1.5(c), MRPC (R. Ans.; Ex. 35).

3. Respondent offered the evidence of witnesses as to respondent's honest character ([redacted] Test.; [redacted] Test.; [redacted] Test.). These witnesses were generally unaware of the nature of the allegations against respondent [redacted] Test.; [redacted] Test.; [redacted] Test.). However they testified generally as follow; He possesses a reputation among lawyers in the legal community, of good repute for honesty and commitment to the interests of his clients. He is active in bar affairs and in the affairs of his community. Evidence was received of Mr. [redacted]'s commitment of "hundreds of hours" devoted to recovering a large sum for the Olmstead County law library from unauthorized use of its Westlaw service. Mr. [redacted] devoted substantial legal effort and time to benefit the Gift of Life transplant house in Rochester from certain adverse city actions. He is known as the "the lawyer of last resort" in Rochester. He takes

on cases of the underdog. It is never about money. " He doesn't charge enough".

These are not the actions of an indifferent or mercenary lawyer and weigh heavily in consideration of the appropriate discipline.

4. Respondent offered, and there is, no other evidence to support a legally recognized claim of mitigation of the sanction for respondent's misconduct.

CONCLUSIONS OF LAW

1. **Regarding the [redacted] matter:**

   a. The Director has not proved misappropriation by the Respondent as charged and that charge should be dismissed.

   b. The claim that Respondent violated Rule 1.4(a)(3) was not proved, and this charge should be dismissed.

   c. The claim that Respondent violated Rule 1.15(a) was not proved, and should be dismissed. The $500 received by [redacted] represented earned fees and costs advanced by him and were his property.

   d. The claim that Respondent violated Rule 1.15(c)(1) was not proved, and should be dismissed. The fund was [redacted] property, and the rule is inapplicable.

   e. The claim that Respondent violated Rules 8.4(c) and (d), the misappropriation charge, has not been proved and should be dismissed.

   f. The Director has not proved that the fee charged and recovered for the appeal of the [redacted] Case, i.e. $295.75, was unreasonable, In fact the Director stipulated it was not unreasonable.

2. **Regarding the [redacted] Matter:**

a. The Director has not proved that Respondent misappropriated the $145.21 cost bond refund and this charge should be dismissed.

b. The claim that Respondent violated Rule 1.4(a)(3) was not proved, and this charge should be dismissed.

c. The claim that Respondent violated Rule 1.15(a) was not proved and should be dismissed. The fund of $145.21 in question was not the property of the [redacted] and the rule was therefore not applicable to its handling by Respondent.

d. The claim that Respondent violated Rule 1.15(c)(1) was not proved, and should be dismissed. The fund was Mr. [redacted] property, and the rule was inapplicable.

e. The Director has not proved Respondent violated Rules 8.4(c) and (d), the misappropriation charge, and that charge should be dismissed.

f. The Director has not proved the fee charged by Respondent for the appeal, i.e. $1899.32, was unreasonable, and that charge should be dismissed. In fact the Director, despite charging the contrary, stipulated the fee was reasonable.

3. **Regarding the [redacted] Matter**

a. Respondent's conduct in failing to deposit [redacted] retainer into his trust account and failing to retain the undisbursed balance of that retainer in his trust account violated Rule 1.15(a), MRPC. Respondent's conduct in failing to work diligently on [redacted] case and failing to adequately communicate with her violated Rules 1.3 and 1.4(a)(3) and (4), MRPC.

b. Respondent's failure to deposit the [redacted] Retainer balance of $1100 in his trust account was careless but not done with intent to use the funds for any purpose other than for that intended.

c. From all indications in the record, Respondent has fully cooperated with the Director and the LPRB in the course of this matter. The Director has made no claim to the contrary, and the LPRB has leveled no charge of failure to cooperate.

RECOMMENDATION FOR DISCIPLINE

Based on the foregoing findings and conclusions, the undersigned recommends:

1. That Respondent [redacted] be Reprimanded.
2. That Respondent [redacted] be placed on supervised probation for a period one (1) year.

Dated: September 16, 2014.

BY THE COURT:

CHARLES A. FLINN, JR.
District Court Judge Retired
SUPREME COURT REFEREE

EX. B

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

[redacted], Plaintiff,

Court File No. [redacted]

vs.

[redacted] Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The claim against Defendant [redacted] alleges legal malpractice arising out of an error in litigation that caused an action of Plaintiff's to be dismissed. [redacted] was representing the Plaintiff in a legal malpractice action against the [redacted] and its member, [redacted] claiming errors by [redacted] had caused Plaintiff to sustain damages from loss of mechanics lien rights in two residential phases of a planned PUD District in [redacted] The PUD was in the initial stages of its development, i.e. raw land, when Plaintiff contracted with developer and property owner [redacted] ([redacted]). The planned PUD District was identified as [redacted]"

[redacted] error was in failing to make a timely filing of the mandatory expert affidavit under Minn. St. 544.42 before the expiration of the 180th day in suit against [redacted] Despite a motion by [redacted] to enlarge the time citing excusable neglect, the Court in [redacted] County granted [redacted] motion to dismiss with prejudice as required by Minn. St. 544.42.

On its face the case is quite complicated, but the attempt in this motion will be to simplify as far as practical. [redacted] professional error in failing to make a timely filing is admitted

by the Defendants, and the fact that such error caused the complaint against [redacted] to be dismissed is admitted although such fact is plainly stated in the [redacted] County court's order of dismissal. What remains, however, are the cases within the case, two of them in fact. [redacted]'s error does not relieve [redacted] of its obligation to prove its case against [redacted] which proof, in addition to showing a deviation from the standard of care by [redacted] must establish that "but for" the error by [redacted] if one is found, the underlying mechanics lien claims would have yielded a more favorable outcome than the $280,000 [redacted] settled for in December, 2010.

This motion for summary judgment, which if granted is fully dispositive, focuses on three aspects of the causation issue. First, citing *S.M.Hentges & Sons, Inc. v. Mensing et. al.*, 777 N.W.2d 228, 231 (Minn. 2010), it is asserted that Plaintiff's failure to file a pre lien notice as required by Minn. St. 514.011 renders all of his liens void and obviates any error, assuming there was one, by [redacted] in its attempt to assert the liens after the work was done. Second, it is argued that under the rulings in [redacted] County District Court by [redacted] it would not have been possible to secure liens on the properties it claims were lost because of [redacted] error. Third, it is argued that no damages were suffered by Plaintiff because [redacted]'s lien statements on 203 lots were found to be validly stated and enforceable to the extent of the full balance due [redacted] With more security in place under [redacted]'s order than necessary to assure recovery of the $356,079 claim against [redacted] settled with its adversaries for $280,000.

ISSUES ARGUED FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT:

1. **Did the failure of [redacted] to comply with Minn. St. 514.011 requiring a contractor under the circumstances of the [redacted] contract with [redacted] to incorporate a pre lien notice in the contract, nullify all entitlement of [redacted] to file a valid lien statement for its work on Phases 1 and 2 or [redacted]?**

This motion contends that it did, and [redacted] lost its lien rights even before it engaged [redacted] The principal authority for this argument aside from the statute is the decision of the Minnesota Supreme Court in *S.M.Hentges & Sons, Inc. v. Mensing et. al.*, 777 N.W.2d 228, 231 (Minn. 2010)("exception" in Mn.St. 514.011, subd. 4b, applies only to "multi-unit buildings . . . and not single family lots within a residential development."

2. **Given the admitted and adjudicated inability of [redacted] to apportion its claim of a lien on properties not owned by [redacted] to meet the requirements of Minn. St. 514.03, subd. 1(b), was [redacted] thereby unable as a matter of law to obtain a lien on such properties?**

A lien claimant can attach a lien to property improved by its services, labor or materials where the property is owned by a party other than the party with whom the contract for the work was made but in making such a lien Minn. St. 514.03, subd. 1, (b) requires the putative lienholder to apportion the lien according to " the reasonable value of the work done, and of the skill, material, and machinery furnished." Defendant argues that this statute given the adjudicated and admitted fact that [redacted] could not apportion to meet the requirement of Minn. St. 514.03, subd. 1(b), denied [redacted] any ability to lien the 86 lots stricken from his lien by Judge [redacted]

3. **Did the settlement of its lien claim for $280,000 in December, 2010, terminate [redacted] s claim to damages in the claim against [redacted]?**

This motion contends that it did, and [redacted] should be found to have made its choice for resolution of its lien claims independent of any handicap imposed on its claims by the alleged error of [redacted] Authority for this argument is *Rouse v. Dunkley & Bennett,* 520 N.W.2d 406, 410 fn.6 (Minn. 1994)("public policy reasons" exist "to decline to subject attorneys to trials every time a client is dissatisfied with his choice to settle a lawsuit . . .").

UNDISPUTED FACTS:

1. By its "Findings & Decision" on May 7, 2003, the City of [redacted] Minnesota by its City Council approved a PUD District, Development Stage Plan and Preliminary Plat for [redacted] a [redacted] owned and planned development in the City. The PUD Master Guide Plan approved by [redacted] contemplated a PUD District after development with residential and nonresidential uses. See Exhibit 1 to the Cole Affidavit.

2. The plat required by the City Council (See Para. 13 of Exhibit 1) submitted by [redacted] obtained approval to begin the staged development of [redacted] in what was described as Phase 1 and Phase 2 of [redacted]. See Exhibit 2. [redacted] filed mechanic's liens on the Second, Third, Fifth, Sixth, Seventh and Ninth Additions as shown on Exhibits 2b and 2c here attached.

3. [redacted] entered into two contracts with [redacted], the Plaintiff herein, for "utility and street improvements" respectively in Phase 1 and Phase 2 of [redacted]. The contracts were dated respectively December 8, 2003 and September 2, 2004. See Exhibit 3, the contracts. [redacted] has testified that the work under the contracts "overlapped" both in location and timing:

> I wouldn't go along – I think this project, all the components of it work together, the land, the drainage, sanitary sewer, and I recall us working on Phase 1 simultaneously with Phase 2.

Exhibit 4, [redacted] Deposition of November 10, 2008, pp. 11-12. See also, Exhibit 6 pp. 86-88.

4. Although at the inception of Plaintiff's work on street and utility improvements in Phase 1 and Phase 2 none of the property in phase I and phase 2 were actually in use, all the lots in the two phases were marked for residential development. No buildings existed whether single family homes, townhouses, or condominiums. See Exhibit 2. Also see Ex. 9, [redacted] opinion, p. 1 of Undisputed Facts.

5. The Contracts between Plaintiff and [redacted] made no provision for prelien notice as required by Minn. St. 514.011, subd. 1. Moreover [redacted] did not otherwise provide prelien notice to [redacted] See Ex. 3 and Ex. 5, excerpts from [redacted] deposition pp. 94-95. [redacted] did employ subcontractors under the contracts with [redacted] on the improvements at issue. See Ex. 4, [redacted] depo., p. 48.

6. [redacted] claimed it was not paid for its work by [redacted] and filed Notices to Terminate its contracts on the two phases on July 27, 2006. See Exhibits 7a and 7b.

7. [redacted] filed an action in [redacted] County District Court claiming among other things that [redacted] had breached its contracts with [redacted] and owed damages. See Ex. 8, the Complaint.

8. [redacted] engaged [redacted] to answer the Complaint, file mechanics lien statements on the phase 1 and phase 2 properties and file an action to foreclose the liens. [redacted] proceeded on behalf of [redacted] to file liens on the properties improved by [redacted] Phases 1 and 2 of [redacted]. [redacted] through [redacted] filed 26 liens to cover 289 lots within Phases 1 and 2 of [redacted][1] improved by the [redacted] services, labor and material. Each lien was for the full amount [redacted] claimed due from [redacted], $356,079.23 plus the full unapportioned amount of attorney fees and costs incurred to produce a lien in each of the 26 statements totaling $362,546.35. Of these lots, 203 were owned by [redacted] the Developer [redacted] and the party with whom [redacted] made the contract, and the owner at the time of the contract and the time of the lien filing. 25 liens were filed on property not owned by [redacted] all of these being cases where a lot had been sold to a builder or a home owner. The liens were subsequently amended in January, 2007 to "Amend the dollar amount, property owners, and to delineate between phased contract work. " The liens were further amended in February 2007. Examples of the lien statements initially filed in August, 2006, showing [redacted] filing methodology are attached here as Exhibits 12A, B and C. Exhibit 12A shows lien of $362,546.35 blanketing all of the Farr owned lots itemized in Exhibit A to the statement. Ex. 12B shows a statement in the same amount blanketing multiple lots owned by [redacted]. Exhibit 12C shows a lien on a single lot owned by [redacted] in the same amount. The lien statements made no attempt to apportion the lien amounts on either the owned or non owned property. See Exhibits 9 and 13, para. 12.

9. [redacted] took the position that it was "impossible to apportion the value of the improvement made to each particular lot." (Citing p. 2 of [redacted] Opinion, Ex. 9). [redacted] concluded that [redacted] was "unable to apportion" and she cites an example at oral argument where [redacted], representing [redacted] declined to amend to apportion when offered the option by the court. See page 7 of Ex. 9, Ex. 6 p. 193 and Ex. 14, para. 37.

10. The two actions were consolidated and came before the [redacted] Judge of District Court, [redacted] County, on competing motions for summary judgment in whole or in part. [redacted] Order issued on November 21, 2007 with provision for finality as to part thereof under Rule 54, Minn. Rules of Civil Procedure. The final part of the judgment was the order that the liens on the 83

[1]As [redacted] Plaintiff's President, testified [redacted] "only liened the lots that we worked on." See Exhibit 5, p. 50, l. 10-11.

non owned lots were void and requiring [redacted] to release those liens forthwith. The remaining issues in the case, of which there were many, were held over for trial. [redacted] struck all lien statements on properties owned by parties other than [redacted] on the ground the statements were knowingly made by [redacted] for more than was "justly due," a violation of Minn. St. 514.74 when [redacted] knowing he was unable to apportion assigned the full value of the claim to each owner. The Orders of the Court are attached here as Ex. 9 but its salient holdings are summarized here for the court's convenience and also to state undisputed facts because to the extent the findings were material to the order on [redacted] lien statement statements, the findings are res judicata as to [redacted] and may not be disputed by it.

a. [redacted] granted summary judgment to [redacted] voiding [redacted] liens on 83 of the 289 lots filed against. The liens voided were liens filed on lots not owned by [redacted] at the time of filing but owned by a mixture of builders and prospective homebuyers. [redacted] found that in the case of these liens, [redacted] had knowingly claimed more than "justly due" in these instances in violation of Minn. St. 514.74 because he conceded he was unable to assert that the value of the improvement in each case satisfied the burden placed upon him by Min. St. 514.03, subd. 1,(b). The ownership of the property became divided because [redacted] sold lots while [redacted] was under development. The liens on the remaining 203 lots which continued to be owned by [redacted] were not invalidated but were upheld subject to fact issues to be tried on multiple issues including "justly due," timing and division of the work between the two contracts. [redacted] construed the liens as imposing a claim of the full amount due - $356,079 "on each lot" but this finding may not be what was intended given that the court found there were 26 liens to cover the 289 lots, a formulation that compels a conclusion that the statements affecting the majority of lots were blanket liens, i.e. comprising a single lien statement to govern more than one unit of property. [redacted] filed an affidavit in the proceeding (Exhibit 13) where he described all of the liens as "blanket liens." Thus the lien on the [redacted] property was one statement describing multiple properties. The liens on the nonowned properties were filed per owner. Thus if a builder owned multiple lots, the statement described the multiple lots in one blanket filing. If the lot was owned by a homebuyer, the lien was the whole amount due levied against a single lot. This latter example apparently generated the "per lot" finding by the Court because in the case of one owner/one lot, the full amount was filed on a single lot.

b. There was no attempt in the filing of the liens to apportion the liens per lot or per owner as required by Minn. St. 514.03. [redacted] found, and [redacted] testified, that such an apportionment could not be done.

c. The point of criticism on the lien filings and the claim by [redacted] against [redacted] for error in taking this approach was that [redacted] had filed on each lot the full amount claimed to be due, $356,079.23 plus about $6000 for costs and interest. [redacted] found this method was permissible in connection with lots owned by the owner who contracted with [redacted] namely [redacted] but not permissible with owners who had in the meantime purchased lots from [redacted] With respect to the findings and conclusions made on the method of lien filing on the non owned lots, the order was a final judgment, and the findings in connection with that judgment estop [redacted] from contending otherwise. Certain of these findings are important here:

I. On Page 2 of [redacted]'s opinion: "[redacted] makes no claim that any one of the properties subject to [redacted] liens individually received labor and material worth the amount claimed on the lien. Rather it was [redacted] position that it was impossible to apportion the value of the improvement made to each particular lot."

ii. On Page 5: "The Court concludes that to the extent [redacted] knowingly claimed liens in the amount of the contract price against lots not owned by [redacted] while acknowledging [redacted] had no way of determining the actual value of labor and material provided to the lots, [redacted] knowingly demanded more than is justly due."

iii. On page 7: This not a case where [redacted] made an honest mistake about the amount it believed was due. . . [redacted] knowingly and intentionally claimed a lien for the amount [redacted] believed it was owed under its contracts with [redacted] against property owned by homeowners who were not parties to the contract."

iv. On page 1 of "Undisputed Facts": ". . . under [the [redacted] contracts] [redacted] was to perform utility and street improvement work in residential property developments named [redacted] Phase I and [redacted] Phase II. . . In connection with the contracts, [redacted] performed work on raw land which was subsequently subdivided and sold as individual lots. [redacted] furnished labor and material for approximately 289 lots and outlots in the developments . . ."

d. After the adjudication was made on the lien statements, the Court denied summary judgment on all other issues which included the [redacted] breach of contract claims, the amount due [redacted] if any, attorneys fees, and timing issues on the liens on [redacted] property. The Court also ordered [redacted]

to release its liens on the 83 lots invalidated. [redacted] complied. See Ex. 10.

11. Slightly more than 3 years of litigation later, [redacted] settled his lien claims. See Mediated Settlement Agreement, Ex. 11. The settlement amount received by [redacted] was $280,000. At the time of settlement [redacted] lien on the [redacted] lots in the amount of $356,079.23 remained in place. No doubt the absence of sales in [redacted] eliminated any urgency to remove them.

12. [redacted] failed, and the properties it owned were recovered by its primary lender, [redacted] has never realized its Plan as a PUD District. It continues to this day with scattered housing in the two phases covered by the [redacted] contracts and improvements. The phases where [redacted] worked contain some single family homes, townhome and condominiums. The nonresidential sectors in the Plan are wholly undeveloped and remain for sale. See Photos at Ex. 15 showing the sectors planned in the PUD District for commercial (nonresidential use) use have never been put to such use. This fact bears on the question of pre lien notice and the exception under 514.011, subd. 4©.

Exhibits in Numbered Order from the Appended Cole Affidavit:

1. [redacted] Council Findings and Decision

2. Exhibit 2 to the November 10, 2008 Deposition (taken in the lien case) of [redacted] Plat showing Phases 1 and 2.

2b. Exhibit 4 to November 10, 2008 Deposition of [redacted]

2c. Exhibit 6 to the November 10, 2008 Deposition of [redacted]

3. Contracts ([redacted] Depo. Ex. No. 16).

4. Cited testimony of [redacted] eposition dated November 10, 2008.

5. [redacted] deposition dated January 30, 2014 (taken in the nstant case).

6. Cited testimony of [redacted] from deposition dated August 20, 2007(also taken in the lien case).

7a. [redacted] Notice of Intent to Terminate (OMG02135).

7b. [redacted] Notice of Intent to Terminate (OMG02138)

8. [redacted] Complaint dated October 5, 2006 (OMG04338-42), the first lawsuit filed in

the underlying controversy.

9. Opinion of [redacted] in the consolidated underlying litigation between [redacted] and others dated November 20, 2007 (OMG02038-64).

10. Title insurance statement showing liens released by [redacted] Exhibit 5 to the November 10 deposition of [redacted]

11. Mediated Settlement Agreement.

12a. Mechanic's Lien Statement dated August 13, 2006 (OMH00499)

12b. Mechanic's Lien Statement dated August 13, 2006 (OMH00501)

12c. Mechanic's Lien Statement dated August 13, 2006 (OMH00502)

13. Affidavit of [redacted] in Support of Defendant's Motion for Summary Judgment dated December 26, 2012 ([redacted] Depo. Ex. 87)

14. Supplementary Affidavit of [redacted] dated September 24, 2007.

15. Photos looking North across portion of [redacted] plan for commercial use; photo looking South across portion of [redacted] plan for commercial use.

16. Deposition of [redacted] dated January 29, 2014.

17. [redacted] Memorandum in support of Summary Judgment filed in the [redacted] litigation.

18. Expert opinion affidavit of [redacted].

ARGUMENT

To retain a singular focus on the causation issue, the Defendant is not moving on the issue of negligence. In legal malpractice cases, the law requires the Plaintiff/former client to show that "but for" the claimed negligence, the Plaintiff "would have been successful in the prosecution or defense of the action." *Jerry's Enterprises, Inc. v. Larkin Hoffman,* 711 N.W.2d 811, 816 (Minn. 2006), citing *Blue Water Corp. v. O'Toole,* 336 N.W.2d 279, 281 (Minn. 1983).

Plaintiff here attacks the lien statements because their expert claims that Minn. St. 514.09[2] would have allowed [redacted] to file a blanket lien on all of the improved properties regardless of differing ownership. It was in fact an unsettled question in Minnesota whether 514.09 permits a blanket lien covering both property owned by the original contracting party and property not owned by the contracting party as was the issue in this case. What is clear, however, from 514.03 and from [redacted] opinion, is that even a blanket lien will not obviate the need to apportion in the case of the non owned properties. Thus if one cannot apportion, as [redacted] asserts it cannot, no manner of lien filing will cause a valid lien to attach given the hurdle of compliance with 514.03, subd. 1 (b).

In fact in its August, 2010 decision, *Premier Bank v. Becker Dev.*, LLC, 785 N.W. 2d 753 (Minn. 2010), the Supreme Court strongly implies that a blanket lien under 514.09 may not extend beyond the properties owned by the contracting owner. In *Premier Bank*, the lien claimant filed a blanket lien under Minn. St. 514.09 on 59 lots under the ownership of Becker Development, its contracting party. It held priority on its liens on three of the lots but was subordinate to a mortgage on the balance of 56 lots. The lienholder argued that it could foreclose for the full amount due on the three lots. The Court held to the contrary and ruled for the first time that a blanket lien holder must foreclose on each property covered by the lien in pro rata fashion. The lien holder in this case was thus entitled to priority on 3/59ths of the amount due but remained subordinate on the balance. The court does not deal expressly with the problem presented to [redacted] concerning whether 514.09 enabled a blanket lien encompassing non

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[2]Three statutes will be cited often in this argument. As a convenience to the Court, Minn. Stats. 514.09, 514.03 and 514.011, subds. 1, 4a, 4b, 4c and 5 are printed in Appendix A.

owned property. This omission left open the question of whether its pro rata apportionment holding would allow a contractor to use pro rata apportionment to overcome the restrictions in 514.03 subd. 1 (b). [redacted] noted the conflict between 514.09 and 514.03 but held that such conflict did not overrule the requirement for apportionment under 514.03. The import of [redacted] construction and the subsequent decision in Premier Bank is to deny the blanket lien option under 514.09 where the improved property is not entirely owned by the contracting party.

Although the parties will go to trial on negligence if this motion is denied, the case ultimately cannot avoid the causation dilemma which presents itself as a question of law. If the lienholder cannot apportion, the lienholder may not attach a lien to property owned by non contracting parties.

Attached as Exhibit 18 is the expert report of [redacted] wherein he discusses and opines on the causation element in addition to his opinion that [redacted] made reasonable judgments in the face of unsettled law and did not breach the standard of care. [3] [redacted] affidavit is attached to demonstrate expert support for the causation arguments made here.

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[3]The "unsettled law" feature of this case is underscored by the fact that everyone involved in the case before the 2010 decisions in S.M. Hentges and Premier Bank were incorrect in their assessment of the interplay between Minn. St. 514.03 and 514.09 and in the requirement for pre lien notice. [redacted] incorrectly held that [redacted] could have a blanket lien on the [redacted] owned property for the full amount of the amount due. [redacted] held to their position that [redacted] could file a blanket lien on the non [redacted] owned property without apportioning. The [redacted] lawyers and their co-defendants erroneously argued that [redacted] could obtain a blanket lien on all of the property, owned and non owned, and could apportion later. In fact, under the decision in Premier Bank (discussed infra.) [redacted] had no blanket lien option because of the divided ownership and his inability to apportion on the non owned properties, and his only option was to apportion the full amount due on each of the [redacted] owned lots. This is exactly the outcome [redacted] order delivered for [redacted] but because of the extended litigation for three more years, the Supreme Court settled the questions of law under Ch. 514, and [redacted] lost the advantage given it in [redacted] order.

I. Pre Lien Notice and the Hentges Decision.

[redacted] did not give pre lien notice to [redacted]. The Contracts with [redacted] did not provide such notice. [redacted] used subcontractors and accordingly fell under the provisions of 514.011, subd. 1:

> Subdivision 1. Contractors. Every person who enters into a contract with the owner for the improvement of real property and who has contracted or will contract with any subcontractors or material suppliers to provide labor, skill or materials for the improvement shall include in any written contract with the owner the notice required in this subdivision and shall provide the owner with a copy of the written contract.

[redacted] did not file a pre lien notice because, as he testified, he did not think the statutory requirement was in place when he contracted with [redacted]. See P. 96, Exhibit 5. It is unclear where he obtained this understanding since the statute was first enacted in 1973 and no part of the statute has been amended since 1989. He did not consult counsel when the obligation to give pre-lien notice arose in the [redacted] contracts. His lawyers, [redacted] and successor counsel [redacted] believed the statute did not require a notice by a contractor in [redacted]'s situation before *Hentges* held to the contrary. [redacted] believed [redacted] was the beneficiary of the exceptions. (see [redacted] Affidavit, Ex. 14) [redacted] testified that [redacted] practice of not filing pre lien notice when he made a direct contract with the Owner was "standard." [redacted] Depo. of January 30, 2104, p. 56, Ex. 16)[4]

Minn. Stat. 514.011, subd. 4(b) made exception to the pre-lien notice requirement in the example described in the subdivision:

> Subd. 4b. Exceptions; multiple dwelling. The notice required by this section shall not be required to be given in connection with an improvement to real property consisting of or providing more than four family units when the improvement is wholly residential in character.

[4]The Hentges decision did not change the law although it did catch the practicing bar by surprise.

The Supreme Court's January, 2010 decision in *S.M.Hentges & Sons, Inc. v. Mensing et. al.*, 777 N.W.2d 228, 231 (Minn. 2010) made clear this exception applied only in the case of "multi-unit buildings." The contractor and putative lienholder in *Hentges*, an engineering firm identified as "SEH," was similarly situated to the development in that case as [redacted] was to [redacted] performed "engineering and surveying work" (Id., p. 230) which services, like the street and utility improvement work by [redacted] does not involve the direct improvement of an individual lot (e.g. installing a driveway) but does serve to improve the lots in a subdivision as a whole. SEH like [redacted] did not file a pre-lien notice arguing in the Supreme Court that the term "improvement to real property consisting of or providing more than four family units when the improvement is wholly residential in character" applied to lots within a subdivision under development. The Court disagreed and ruled the reference in 4b applied only to "multi-unit buildings" (Id., p. 231). Although some of the lots filed on by [redacted] in [redacted] were "planned" for townhouse units or condominiums, perhaps to contain more than four family units, there were no buildings in place when [redacted] improvements were made.[5] As [redacted] found, [redacted] "performed work on raw land."[6]

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[5] As an interesting sidelight to the Hentges case, SEH was contesting its lien rights against mechanics lien claims by S.M. Hentges & Sons, the contractor on the project for "utilities and earthwork. " Hentges did file prelien notice under Subd. 1 of 514.011. Its lien validity was upheld.

[redacted] stubbornly insists that even today his operation is exempt from pre lien notice. His testimony at p. 96 of his 2014 deposition reveals this continued insistence in the face of everything to the contrary:

> Q. Is your practice today, when you come in to do the
> 21 same kind of work, to file a pre-lien notice?
> 22 A. No.

[redacted] lawyer in the lien contest and successor to [redacted] is hopefully in place to advise him going forward. Here is [redacted] reaction to Hentges at p. 55 of his recent deposition (objection omitted):

Although the *Hentges* decision focused only upon the application of exception 4b, the remaining exceptions to pre lien notice in subparts 4a and 4c of 514.011 are more plainly inapplicable. 4a creates an exception to notice when the contractor and owner are managed or controlled by "substantially the same persons." That circumstance does not apply to [redacted]

Subpart 4c of 514.011 creates an exception for "an improvement to real property which is not in agricultural use and which is wholly or partially nonresidential in use if the work or improvement:

"(a) is to provide or add more than 5,000 total usable square feet of floor space; or;

"(b) is an improvement to real property where the existing property contains more than 5,000 total usable square feet of floor space; or

"(c) is an improvement to real property which contains more than 5,000 square feet and does not involve the construction of a new building or an addition to or the improvement of an existing building."

Although the [redacted] plan for the PUD District did contemplate future commercial development, there were no nonresidential properties "in use. " There were no new or existing buildings in place. Such buildings were contemplated in concept but none were in use and none were in development. [7] Moreover all of the properties described in the [redacted] mechanic's lien

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15 Q. Do you agree that the case [Hentges] held basically that the
16 pre-lien notice statute in Minnesota would require a
17 contractor in [redacted]s case to file pre-lien notice
18 in order to preserve the right to file valid liens on
19 the project?
22 A. (Reviews document.) Yeah, I mean, that's what that –
23 that -- that plain meaning, I guess, is on there.

[7]As the photos in Ex. 12 show the areas reserved for "nonresidential use" at [redacted] remain today open prairie. A contractor improving lots in these sectors of the PUD would have

filings and all of those it in fact "improved," were planned for residential use.

[redacted] failure to file pre-lien notice is fatal to the validity of any liens it may have attempted to file under the [redacted] contracts. Accordingly, even if it is assumed that [redacted] erred in the procedures it used in [redacted] lien statements, some of which were invalidated by Judge [redacted] mechanics liens in their entirety were void as a matter of law for reasons of [redacted] failure to file pre lien notice, a disability long in place when [redacted] was hired. [redacted] cannot therefore make proof that but for the alleged errors of [redacted] it would have prevailed on the liens stricken by [redacted]. Notably when the Court struck the original malpractice case against [redacted] was facing a motion for summary judgment on this very point. See Cole Aff'd, No. 17.

II. The Inability to Apportion to Meet the Terms of Minn. St. 514.03, Subd. 1 (b) Renders it Impossible to Establish a Valid Lien on the Non Owned Properties.

It is a fact beyond any dispute that [redacted] was not able to apportion the value of the improvements from its work on the lots purchased from [redacted] and owned by builders and homebuyers with whom it had not contracted at the time of the filing of the statements. Judge [redacted] made a finding that [redacted] could not apportion. [redacted] has testified he could not apportion.

The issue for a lawyer representing [redacted] was most tellingly summarized in the recent testimony of [redacted] During oral argument [redacted] offered to [redacted] as [redacted] lawyer,[8] the opportunity to amend and apportion the value of the improvement to the 83 non

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to serve pre lien notice.

[8] [redacted] and his firm had at [redacted] request, associated with [redacted] as [redacted] counsel, but [redacted] was commanding the representation in the motion. [redacted] was no longer on the pleadings. [redacted]'s daughter was appearing for [redacted] Subsequently [redacted] was fully discharged as counsel, and [redacted] managed the file as sole successor counsel to its end. .

owned lots. If there was ever a time to back away from the original lien statements and try to overcome the objections under consideration by the court, this exchange between [redacted] was the time. [redacted] explained why he stuck with the [redacted] lien statements notwithstanding the Court's invitation to amend, in this passage from his January , 2014 deposition (Ex. 16):

Q. All right. So why didn't you take the judge up on
22 that amendment of the liens instead of standing firm,
23 as she put it?
24 A. Well, I think it could have been a trap that if -- at
25 that point we could have been, I think, adding fuel
00036
1 to the fire as to our lien filing and how we filed
2 the lien. I think we had to stick with the fact that
3 if we believed that we had done the correct thing
4 that our liens were in fact correct, **and in my**
5 **conversations I knew that apportionment of that lien**
6 **was not a possibility.**

(emphasis supplied).

As a matter of law and as decided by [redacted] in the underlying case , a mechanics lien against a noncontracting owner may not be obtained in any amount except that sum apportioned " for the reasonable value of the work done, and of the skill, material, and machinery furnished" as stated in Minn. St. 514.03, subd. 1(b). 514.09, on the other hand, permits a "blanket lien" on all property improved under a "general contract with the owner," and Judge [redacted] her opinion did allow that such a blanket lien could have been used on the nonowned properties "reserving decisions about apportionment for a later time." (Ex. 9; p. 6). It is now apparent in the Premier Bank decision, that [redacted] was incorrect in that construction of

514.09, but the question is moot for the purpose of this motion.[9]

Whether the putative lienholder files a lien statement initially apportioning under 514.03 or reserves apportionment for a later time, the lienholder must be able to apportion in compliance with 514.03, subd. 1 (b) on properties not owned by the person who contracted for the improvement. The only lien one may obtain against property owned by a noncontracting party is one that complies with 514.03, subd. 1(b). As [redacted] held, "the language of section 514.03 is clear and unambiguous." (See P. 7 of the Opinion) If one attempts to impose a lien when lacking any basis to apportion under section 514.03, the lienholder risks the result experienced by [redacted] i.e. a finding that the lienholder claimed more than was "justly due" under 514.74.

Given that [redacted] was not able to apportion the liens on the nonowned properties, [redacted] was denied the ability to establish a lien under Ch. 514 of Minnesota Statutes. That inability was not a consequence of [redacted] attempt to establish such a lien but was a function of the law. The inability to apportion under Minn. St. 514.03, Subd. 1 (b) means that a putative lienholder may not establish a lien on property owned by persons other than the original owner who contracted for the work. All that can be said of [redacted]'s attempt to avoid this consequence is that he failed, but the outcome of no lien was inherent in the problem, not his methodology.

III. [redacted] Settlement of His Lien Claims Resolved His Damage Claims.

In December, 2010, [redacted] settled the underlying lien case for $280,000.00 thereby

[9] In the Premier Bank decision discussed infra., the Supreme Court held that property subject to a blanket lien under 514.09 must be apportioned pro rata based on all of the property improved. If this decision is read in conjunction with a construction of 514.09 that permits a blanket lien to encompass nonowned property, the decision directly contradicts 514.03, subd. 1(b). The Court did not discuss this consequence. The facts in Premier Bank did not pose the issue.

compromising his claim of $356,079.23 alleged due it under the [redacted] contracts plus interest and undetermined attorney fees that might have been allowed at the court's discretion. *Kirkwold Const. Co. v. M.G.A. Const. Inc.*, 498 N.W.2d 465 (Mn. App., 1993)(attorney fees in mechanics lien case are discretionary with the trial court). The settlement also relieved [redacted] of its exposure to [redacted] for liquidated damages for breach of contract. At the time of the settlement [redacted] had been litigating the issues reserved for trial by [redacted] for three years. These issues included [redacted] claim for damages against [redacted] for breach of contract, whether [redacted] had knowingly claimed more than "justly due" on the [redacted] liens,[10] allocation of the liens between the contracts and the timing of the liens. Also in that interim the decisions in Hentges and Premier Bank were handed down creating new issues of concern. [redacted] trial lawyer and successor to [redacted] was asked at his deposition if [redacted] had been prejudiced on these remaining core issues by the [redacted] lien statements. His response was definitive:

Q. Now, apart from the loss of the 83 lots, what as a
19 practical matter interfered with your ability to
20 successfully execute against the other 206 lots until
21 the Premier Bank decision came down?
22 A. Well, I think it was we still had the issues of -- I
23 don't think that the summary judgment necessarily
24 concluded anything about our liens other than that we
25 didn't get summary judgment. I think we still had
00039
1 all the issues about proving up our lien, proving,
2 you know, first date of work, last date of work, what
3 was done. You know, I think the issues were still
4 there for trial.
5 Q. Well, one issue wasn't there for trial. The issue is

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[10]The "justly due" issue on the [redacted] owned lots was not based on apportionment for the value of the improvement. [redacted] had held that each [redacted] lot could be subject to the full amount due. The "justly due" argument in the case of [redacted] was based on [redacted] claim that [redacted] was not owed $356,079.23 for its work, and [redacted] had intentionally overstated what it was owed.

that the filing on the non -- on the Farr-owned lots was in accord with the statute according to Judge [redacted]

A. I think that issue we were okay with.

Q. Okay. So the remaining issue you had was, had [redacted] properly terminated its contract or it had remained in breach, correct? You had that issue?

A. Yes.

Q. And there was a question of whether [redacted] was liable for $500 a day liquidated damages because he hadn't completed on time?

A. Correct.

Q. Okay. Those issues had nothing to do with anything [redacted] did?

A. Correct.

(Ex. 16, pp. 38-39). Also it was [redacted] view that [redacted] was "still secured" for the full amount claimed due by the liens on the [redacted] owned lots:

Q. Well, from the standpoint of [redacted], was it material, however? Because she [redacted] did allow the company to assert the full amount of its liens against the balance of the [redacted] owned lots, correct?

A. Yeah. We felt we were still secured.

(Ex. 16, p. 26). [redacted] greed with this assessment:

Q. Okay. Back to the very beginning question on this sequence. Did the [redacted] owned lots under which you had a first priority lien for $356,000 have sufficient value to pay off your lien?

A. Yes.

(Ex. 5, p. 57).

What is obvious about this malpractice suit on the heels of this settlement is that [redacted] decided to eliminate the risks in the lien case – risks he would get nothing and owe [redacted] money, risks not attributable to [redacted] conduct - secure the $280,000 cash and then seek the balance from

his former lawyer. The question then raised is to what extent may the former client exploit a lawyer's alleged error to eliminate its inherent litigation risks and require the lawyer to bear those risks in a malpractice suit?

The question is not new to legal malpractice litigation. The decision in *Rouse v. Dunkley & Bennett,* 520 NW2d 406, 410 fn.6 (Minn. 1994) while permitting a case within a case based on the loss of a cause of action for defamation drew the policy distinction: " *public policy reasons for declining to subject attorneys to trials every time a client is dissatisfied with his choice to settle a lawsuit, or with his attorney's decisions when the underlying matter has already been litigated or settled . . . We continue to disapprove of allowing a client who has become dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded him more than the settlement.*" *Id.*, p.410, fn.6. The legal malpractice suit is not supposed to serve as an alternative venue for the client to shift the inherent risks of litigation to the attorney. There is, admittedly, an exception where the attorney's error has caused the client to lose a cause of action. In such a case the lost cause of action is tried as the case within a case. This case within a case opportunity does not, however, offer the option to the client to settle its pending litigation where the attorney has committed an error that does not impair the cause of action and then with the profits of the settlement in hand, force the lawyer into court to see how the settled case would otherwise have turned out in the trial of issues not prejudiced by the lawyer's alleged error.

The reluctance of the Minnesota Supreme Court to allow clients to settle and sue the lawyer to see if more was available was most directly expressed in Justice Otis's opinion in *Glenna v. Sullivan,* 245 N.W.2d 869, 873 (Minn. 1976): "*To allow a client who becomes*

dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented" *Glenna* involved a situation where the settling client turned around on the lawyer who represented him in the settlement and claimed more was due in a trial. The instant case involves a client who wants to test the advice of a successor lawyer to settle by testing the waters in a malpractice suit against original counsel. There seems little reason from a policy basis to allow a client to seek malpractice damages in either situation absent a showing that the cause of action compromised in the settlement had been impaired by negligence of the defendant lawyer.[11] In this case [redacted] had to litigate issues not of [redacted] making to prevail on his liens, but [redacted] was secure if it could prevail. The loss of 83 lots attributable to the lien statements on non owned lots did not impair [redacted] security for what it claimed was due.

The recent California Court of Appeals decision in *Fibin v. Fitzgerald,* 149 Cal Rptr. 3d 422 (Cal. App. 2012), rev. den., comes close to the facts of the instant case. In *Fibin,* the clients received allegedly negligent advice from counsel and replaced counsel with a successor. With the successor counsel in place the clients settled their matter and sued former counsel. The *Fibin* court observed that "simply showing the attorney erred is not enough," it must also be established that "but for" the error the outcome of the case would have been "better." *Id.*, p. 432. It will be impossible for [redacted] to meet this burden in the underlying case which is entwined in several

[11] The Court of Appeals in *First Bank v. Olson*, 557 N.W. 2d 621 (Minn. App. 1997), rev. den., attempted to deal with the "settle and sue" issue by relieving Plaintiff of the obligation to prove it would have prevailed in the underlying case and applying a "substantial factor" causation test to the causation element in such cases. This holding was overruled sub silentio in *Jerry's Enterprises v. Larkin Hoffman,* 711 N. W. 2d 811 (Minn. 2006), applying the "but for" test or causation in fact across the board to all legal malpractice claims.

material issues of damages and liability not attributable t[redacted] Thus the result in the underlying case had it been tried and not settled, could have reached different outcomes, some more favorable and some not favorable. The underlying advantage secured for[redacted], however, by the lien statements filed by[redacted] was full security for its claims. This security was tenuous given the ruling some months earlier in the Hentges case. A settlement allowed[redacted] to avoid breach of contract liability, establish the last day of work, win the priority arguments with certain lenders and survive the application of the Hentges ruling to nullify the[redacted] liens. . [redacted] defense of a breach of contract claim, defense of priority over mortgages, defense of timing (the last day of work) and fighting off pre lien notice issues were all inherent to the risk of the lawsuit quite independent of[redacted] The loss of the 83 non owned lots did not impair[redacted]'s security for the full amount. [redacted] always had to litigate those issues with or without a claim on the 83 lots. See, Ex. 16, pp. 37-39, supra. [redacted] also faced the ruling in Hentges, just as it faces the issue here, which ruling directly imposed the risk of losing everything.

[redacted] as a matter of law is not able to prove causation under the "but for . . .would have" test, and therefore its claim against[redacted] must fail. The 83 lots owned by builders and homebuyers, but not [redacted] were always beyond [redacted] reach under Ch. 514 because it could not apportion to meet the requirements of Minn. St. 514.03, subd. 1(b). [redacted]'s decision to void the blanket liens filed by [redacted] on the unjustly due argument made no difference. The 83 lots were not available for a lien, and [redacted] or any lawyer, could have done nothing to salvage a lien on these properties. Whether [redacted] could have done better in settlement than it did after the body blows delivered in the Hentges and Premier Bank is pure conjecture and conjecture is not a basis for causation or damages. *Blue Water Corp. v. O'Toole,* 336 N.W. 2d 279, 284

(Minn. 1983)(where a finding of causation necessarily rests on conjecture, the legal malpractice action fails and must be dismissed.). Since the settlement allowed [redacted] to obviate many issues in the case that had potential not only to nullify his liens but potentially to levy a judgment against it for damages for breach of contract, it becomes a pure matter of conjecture to find a more favorable result but for the error, in the alleged case within a case.

CONCLUSION

It bears noting that at the time [redacted] was moving to enlarge the time for its expert affidavit, it was also defending a motion by [redacted] for summary judgment on many of the same causation issues argued here.[12] These issues are not escaped by settling, and this retention of issues was also true when [redacted] settled with its lien adversaries. [redacted] in essence pursued its lien claims to a successful outcome when it settled for $280,000 and ended over 4 years of litigation. By the time of the settlement, the 83 lot issue was ancient history with no bearing on his ability to obtain his lien recovery if he could prevail on the remaining issues. [redacted] cannot make the required proof, even on a prima facie basis, that but for the loss of the liens on 83 lots, he would have secured a better outcome in the litigation.

[redacted] faced many issues in this complex litigation where [redacted] alleged error in filing on the 83 lots had no bearing. The case within a case doctrine does not contemplate requiring the lawyer to take on those issues. If [redacted] wanted to show he was not liable for breach of contract, he had only to try the case [redacted] had brought against him.

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[12]Ex. 17 is the Memorandum of [redacted] on summary judgment before the Court when it dismissed the Complaint against [redacted]

Date: March 3, 2014

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