

# Hearsay

*A Publication of the Minnesota State Bar Association New Lawyers Section*

***Fall 2010 Edition***  
***Volume XIII, No. 1***

## In This Issue

Greetings from the Chair <i>Christina Weber</i>	2
Show Your Work: Drafting Child-Support Stipulations and Proposed Orders <i>Karen L. Helgeson</i>	3
Estate Planning: Incorporating Flexibility in Uncertain Times <i>Jamie F. Held</i>	6
The Intersection of Immigration and Criminal Law in the Wake of Padilla v. Kentucky <i>Sandra Feist</i>	9
The 2 a.m. Phone Call <i>Landon Ascheman</i>	13
Getting Along to Get Ahead: The Case for New Lawyers' Investment in Professional Development of Interpersonal Skills <i>Jessica Slattery Karich</i>	17
Because We Live Where Water Reflects the Sky <i>Jamie Ford.</i>	19

**Editors:**

Andy Loose - [andyloose@yahoo.com](mailto:andyloose@yahoo.com)

Janie Catherine Paulson - [jcpaulson@gmail.com](mailto:jcpaulson@gmail.com)

If you have any questions about the publication or would like to submit an article for a future issue, please contact Janie Catherine Paulson or Andrew Loose.

**MSBA**



[www.mnbar.org](http://www.mnbar.org)

---

## Greetings from the Chair

*Christina Weber*

Greetings and welcome to another promising year for the New Lawyers Section. I am honored and excited to act as Chair for the upcoming year and welcome any comments and suggestions from any of our Members. We have an exhilarating year ahead of us; a year that is already in full swing.

We held the annual Tri-Bar Winter Social/Toys for Tots Fundraiser on December 2, 2010, which was held in conjunction with the RCBA and HCBA New Lawyers Sections. The event was held at Faces/Mears Park in St. Paul and proved to be a great success. There were approximately eighty people that attended and we raised almost \$900 in support of a worthwhile charity. Thank you to our sponsors, ExamWorks, Excelsior Wealth Management, First Class Mortgage, Depo International, Trust Point, and Executive Suites of Minnesota, and to the numerous Section members who made the event a success! Stay tuned for information concerning the Spring Tri-Bar Social and Fundraiser.

We kicked off a major service project this month with our first of several Serving our Senior training sessions. The New Lawyers Section is working to provide basic estate planning services to low-income senior citizens around the state of Minnesota. The program is based on the American Bar Association's annual service project. A special thanks to Sam Edmunds and several other Members who are taking the initiative to get this program off the ground and running.

We have also held several informative CLEs for our Members and have more planned for the upcoming year. Some of those topics include a family law CLE, a presentation on preparing and examining experts, and a session on how to prepare a DWI case. More information regarding those CLEs can be found in our monthly emails and on the [website](#).

We are also collecting new or gently used coats, gloves, hats, scarves, etc. for local organizations. You can bring those items to our monthly meetings in December and January.

It's hard to believe I have been practicing law for five years now. Looking back on the roller coaster ride, what sticks out in my mind is how the New Lawyers Section helped me find clarity in what was, at times, a scary and daunting period. I urge you to join us. There are numerous ways, big and small, to become involved. Our meetings are held the second Thursday of every month at 5:30 p.m. in the MSBA offices. Our next meeting is December 9<sup>th</sup>.



If you have any questions about the New Lawyers Section, its activities, or how you can become involved, please contact me. I hope to see you at one of our upcoming events.

*Christina Weber, is the chair of the New Lawyers Section and an attorney with Wilford & Geske in Woodbury. You can reach Christina at [cweber@wilfordgekse.com](mailto:cweber@wilfordgekse.com) or 651-209-3300.*

---

# Show Your Work: Drafting Child-Support Stipulations and Proposed Orders

*Karen L. Helgeson*

Drafting child-support findings is like working through any math problem—you have to show your work. I review child-support stipulations and proposed orders frequently in my position as a judicial clerk. Many attorneys, both new and senior, appear to struggle when composing child-support findings for review by a judicial officer. Key factual information and important legal analysis are often missing from submissions that address child support. This article presents some suggestions to guide you when you are faced with the most common family-court math problem—calculating child support and drafting the necessary findings.

## 1. Know the Statute

Minnesota statutory law *requires* specific findings in all child-support orders.<sup>1</sup> Orders generated by a judicial officer must include a determination about whether the child support ordered comports with the Minnesota Child Support Guidelines.<sup>2</sup> In addition, the findings must present the parents' incomes, the parents' respective shares of the total income available for support purposes (also known as PICS), and other significant factors that impact the child-support calculation.<sup>3</sup> The result of proper findings is a complete set up of the child-support equation, providing all of the necessary components.

Stipulations are also subject to statutory requirements.<sup>4</sup> Stipulations must be reviewed by a judicial officer to determine if the parties' agreement is consistent with the

Minnesota Child Support Guidelines.<sup>5</sup> The judicial officer must engage in this review regardless of whether parties are represented by counsel or acting *pro se* and, as such, all stipulations must include the findings that allow the judicial officer to assess the agreement fully.<sup>6</sup> There is no deference to attorney-drafted stipulations. Attorneys have to show their work too.

With judicial officers under increasing pressure to ensure comprehensive findings in their orders,<sup>7</sup> a stipulation or proposed order that is light on findings is likely to concern the judge, referee, or magistrate reviewing your drafting. The practical effect on you and your client could take several forms. The judicial officer may ignore proposed orders that lack essential findings in part or in whole. If the judicial officer has to start from scratch when writing a child-support order, the parties and their counsel are looking at a longer under-advisement period. Similarly, stipulations that lack essential findings are not likely to be signed without additional time and effort.<sup>8</sup> The parties and their counsel may be ordered (i) to appear for a hearing on the stipulation, (ii) to participate in a telephone conference to discuss the stipulation's deficiencies, and/or (iii) to rewrite and re-execute the stipulation. These delays are expensive for your client and can be embarrassing to the professional. Providing ample findings from the start—as required by statute and as outlined by statute—will save money and time in the long run.

---

## 2. Use the Online Calculator

It can be tempting when negotiating child support to avoid the Minnesota Child Support Guidelines<sup>9</sup> altogether. You may think that the more productive discussion is how much the parents are able or willing to provide in financial support. Especially when one or both parties are self-employed or have varying monthly income, a focus on the determination of income and the resulting *presumptive* obligation may just welcome fights between the parties.

Nevertheless, child-support stipulations and proposed orders that pass judicial review must address the Minnesota Child Support Guidelines (as explained above). Rather than running away from the guidelines, you should use the free online child-support calculator to run different fact scenarios.<sup>10</sup> The online calculator is user-friendly and produces a printable summary that should be an attachment to any stipulation or proposed order addressing child support. Integrating the online calculator into your child-support negotiations will ground the discussion and create realistic expectations for the parties. Confronting the guidelines from the start will lead you to draft findings that have optimum use, particularly if the order is challenged later. If you choose to ignore the Minnesota Child Support Guidelines when drafting child-support findings, expect the judicial officer's first question to be whether you used the online calculator!

## 3. Keep Deviations Child-Centered

Child-support deviations, both upward and downward, are permitted by Minnesota statute.<sup>11</sup> The statute outlines numerous factors for consideration when a deviation is proposed,<sup>12</sup> and ultimately the judicial officer needs to be satisfied that the deviation serves the minor child's best interests.<sup>13</sup> As is

common in family-law matters, the district court's focus and primary inquiry is into the best interests of the minor child involved.<sup>14</sup>

A parent's concern about his or her ability to pay support is not likely to be as persuasive as a child-centered purpose driving the deviation. When drafting findings to support a deviation, consider the impact of finances on the minor child's daily life. Will the deviation allow one parent to afford transportation that will facilitate parenting time? Will the deviation allow the parents to live in the same neighborhood, improving the minor child's attachment to his or her community and providing consistency? Will the deviation allow the parents to purchase items that will help in managing a health condition or educational need of the minor child? Is a job loss or income reduction expected for which the parents must create emergency savings that can be used to meet the minor child's basic needs? When drafting a stipulation or proposed order with a child-support deviation, ask yourself questions like these and keep the needs of the minor child as your central theme. Do not assume that a deviation is obvious; show the judicial officer your reasoning by presenting specific findings and supplementing with informative exhibits.

These three suggestions should help you avoid some common pitfalls in drafting child-support findings. The bulk of the work when dealing with child support is setting up the equation—just like in a math problem. Review the statute and know which inputs you need to collect. Once the facts are in place, use the online calculator to run various scenarios. Finally, any deviations should be thoughtful, well supported by facts in the record, and intended to serve the best interests of the minor child. Showing your work through solid findings will save time, save money, serve as a meaningful reference when modification or enforcement motions

---

are filed, and demonstrate that you know how to handle child-support issues.

---

*Notes*

<sup>1</sup> Minn. Stat. § 518A.37 (2009) (outlining the minimum findings for child-support orders).

<sup>2</sup> *Id.* at subdvs. 1–2.

<sup>3</sup> *Id.*; see also *id.* at subd. 2(3–5) (requiring that when deviating from the Minnesota Child Support Guidelines, the findings must outline the amount of the deviation, the reasons for the deviation, and how the deviation serves the minor child’s best interests).

<sup>4</sup> *Id.* at subd. 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> I was fortunate to attend the 31st Annual Family Law Institute in March 2010, where the resounding theme of the annual caselaw update was the importance thorough findings in district-court orders. See, e.g., *Perez v. Mitchell-Perez*, No. A09-459, 2010 WL 346386 at \*3–4 (Minn. Ct. App. Feb. 2, 2010) (remanding a child-support magistrate’s order denying a modification of child support for failure to make detailed findings about the parties’ expenses and their impact on the presumptive child-support award); *Chung v. Chung*, No. A09-0231, 2009 2928760 at \*3 (Minn. Ct. App. Sept. 15, 2009) (holding that a summary finding of no harm to the minor child is not a sufficient best-interests analysis to support a deviation in child support); *Fields v. Nwokenku*, No. A08-1507, 2009 WL 1684463 at \*2 (Minn. Ct. App. Jun. 16, 2009) (remanding a district court’s decision granting a downward deviation in child support for failure to provide best-interests findings). For a recent and precedential example, read *Welsh v. Welsh*, where a child-support magistrate’s order was remanded for failure to provide findings for every statutory factor in the caretaker’s income exception at Minn. Stat. § 518A.32, subd. 5. 775 N.W.2d 364, 370–71 (Minn. Ct. App. 2009).

<sup>8</sup> Judicial officers and their clerks work hard to ensure that every order signed and every stipulation approved contains the findings required by Minnesota statutes. When errors in child-support findings are identified during a

judicial review, the attorney(s) will be instructed to make corrections. Sometimes, however, small deficiencies in findings are not caught by judicial officers and their clerks despite best efforts. An attorney should not rely entirely on the judicial review to identify and correct missing or incomplete child-support findings. In my experience, a great attorney actually tends to show the judicial officer how thorough findings should look.

<sup>9</sup> Minn. Stat. §§ 518A.34–35 (2009) (listing the necessary steps to calculate child support).

<sup>10</sup> Minnesota Department of Human Services, Minnesota Child Support Guidelines Calculator, available at <http://childsupportcalculator.dhs.state.mn.us/Calculator.aspx>. The online calculator is particularly helpful because key terms are linked to pop-up definition windows, but unfortunately the definitions do not contain citations to the applicable Minnesota statutes. Also, child-support calculations can be run using West’s FinPlan computer program.

<sup>11</sup> Minn. Stat. § 518A.43 (2009).

<sup>12</sup> *Id.* at subdvs. 1–2 & 4; see also *id.* § 518A.42 (providing limits for the self-support reserve).

<sup>13</sup> Minn. Stat. § 518A.37, subd. 2(5) (2009).

<sup>14</sup> See, e.g., Minn. Stat. § 517.17, subdvs. 1 & 3 (2009) (defining the best-interests factors and providing the legal standard for initial custody determinations as best interests); *id.* § 517.175, subd. 5 (providing the legal standard for parenting-time modifications as best interests).

*Karen L. Helgeson is a 2002 graduate of Wellesley College and a 2007 graduate of the University of Iowa College of Law. Ms. Helgeson was a student writer and editor for the Iowa Law Review. She is currently serving as judicial clerk to the Honorable Susan M. Robiner in the Fourth Judicial District and may be contacted by e-mail at [Karen.Helgeson@gmail.com](mailto:Karen.Helgeson@gmail.com) or [Karen.Helgeson@courts.state.mn.us](mailto:Karen.Helgeson@courts.state.mn.us). Special thanks to fellow clerks Kathryn Van Etta-Olson, Rebecca Vandenberg, and Sarah Pollex for their feedback on this article.\**

---

## **Estate Planning: Incorporating Flexibility in Uncertain Times**

*Jamie F. Held*

2010 has been a tumultuous year in the area of estate planning. Currently, there is no federal estate tax. As a result, estate planners find themselves in unfamiliar territory. How do you plan when there is so much uncertainty?

### **Estate Tax Update**

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) provided that the federal estate tax would be repealed in 2010 unless Congress enacted legislation to keep it. So far, Congress has failed to act. As such, since January 1, 2010 there has been no federal estate tax.<sup>1</sup>

Minnesota, however, did not repeal its estate tax. Minnesota imposes an estate tax on a decedent's estate in excess of \$1 million. Minnesota estate tax is imposed under a graduated rate schedule based on the value of the taxable estate. The tax rate starts at 41% and goes down to 9%.<sup>2</sup>

The fate of the federal estate tax is still unknown. Several proposals have been offered; however, we are no closer to knowing with any degree of certainty what new legislation might look like. If Congress does not act in 2010, the federal estate tax and separate generation skipping tax (GST) will automatically return in 2011 with an exemption amount of \$1 million and an estate and gift tax rate of 55%.<sup>3</sup>

### **Estate Planning**

All of the uncertainty can make it difficult to plan for your clients. Doing nothing, however, is not a good idea. Clients still need assistance in minimizing taxes in order to maximize potential benefits. It is important to

educate your clients on the current and future status of federal and state estate taxes and to clearly understand their goals and objectives. Then, armed with the facts, it is your job to create a plan!

### **Using Disclaimers**

Given the uncertainty in federal exemption amounts, a flexible plan is crucial. One such flexible estate planning tool for married couples is the use of disclaimers. The marital deduction permits spouses to transfer unlimited amounts of property to each other free of estate tax. However, upon the death of the second spouse, any value above the exemption amount (currently \$1 million for Minnesota estate tax purposes and not applicable for federal estate tax purposes) is taxable. Consequently, the marital deduction may not eliminate estate taxes. Instead, it may simply defer estate taxes until the death of the second spouse, as illustrated in *Example 1*.

*Example 1.* Husband and Wife currently have a combined net worth of \$2 million (or \$1 million each). Their estate planning objectives are simple: at the death of the first spouse, all assets are to be transferred to the surviving spouse and at the survivor's death, everything is left to their adult children.

Currently, if Husband dies and leaves his \$1 million to Wife, no estate tax is due at the time of his death because of the unlimited estate tax marital deduction. Wife now has a net worth of \$2 million. When Wife passes, she can utilize only her exemption amount. Given current exemption amounts, \$1

---

million passes free of estate tax while the remaining \$1 million will be subject to Minnesota estate taxes of approximately \$35,000. While Wife's estate is not currently subject to federal estate tax, it could incur greater estate taxes depending on any future changes enacted by Congress, including changes to federal exemption amounts.

There is a better solution: use both spouses' exemptions. Disclaimer planning utilizes both spouses' estate tax exemption amounts in order to minimize or eliminate estate tax on a couple's accumulated wealth. Upon the death of the first spouse, the surviving spouse has the option of accepting assets outright (which then become part of his or her estate) or disclaiming them. A disclaimer is an irrevocable refusal to accept property, an interest in property, or a right to property. The disclaimed assets are treated as never having been transferred to the disclaiming spouse.

Given the current uncertainty with the federal estate tax system, flexibility in estate planning is more important than ever. Disclaimer planning builds flexibility into a couple's estate plan by deferring tax planning decisions until the passing of one spouse. At which time, the surviving spouse can determine, based on the tax laws in effect and his or her personal and financial circumstances, the appropriate amount of and which assets to disclaim, in order to best utilize each spouse's estate tax exemption.<sup>4</sup>

*Example 2.* Drawing on the facts from *Example 1*, Husband's estate plan leaves everything to Wife. Upon Husband's death, Wife can decide whether to disclaim some, or all, of Husband's \$1 million in assets. If Wife properly makes a qualified disclaimer, Husband's property passes as if Wife had predeceased Husband.

Remember, however, the couple's objective:

all assets are to be transferred to the surviving spouse at the death of the first spouse, and at the survivor's death, everything is left to their adult children. This objective is achieved through appropriate drafting in the Will. The deceased spouse's Will directs that upon disclaimer by the surviving spouse, the disclaimed assets will be held in trust for the benefit of the surviving spouse. As long as certain conditions are included and met, the surviving spouse may be the beneficiary and serve as the trustee (see *Example 3* below). Therefore, the disclaimed assets are still available to support the surviving spouse. Upon the passing of the second spouse, the remaining trust assets may pass to charity, to children or otherwise, at your client's discretion.

*Example 3.* In his estate plan, Husband named a trust as the contingent beneficiary. He then named his Wife as the trustee and trust beneficiary. Therefore, the disclaimed assets are transferred to a family trust and are excluded from the estate of the surviving spouse.<sup>5</sup>

In short, disclaimers are an effective way to implement tax planning into an estate plan yet allow the client to remain in control of what will happen to his or her assets.

### **Disclaimer Requirements**

In order to effectively disclaim assets, the surviving spouse must comply with strict federal and state requirements in making a qualified disclaimer.<sup>6</sup> In general, for a disclaimer to qualify for all intended tax benefits, the following requirements must be met:

1. The disclaimer must occur within nine months of the spouse's death.
2. The disclaimer must be in writing and delivered to the personal representative of the estate.
3. The disclaimer must be irrevocable and unqualified.

4. Prior to the disclaimer, the surviving spouse must not accept or have enjoyed the benefits of the disclaimed property.
5. The surviving spouse cannot direct where the disclaimed assets go.

It is important to remember that the surviving spouse cannot enjoy the use of property and then later disclaim the property, accept property and then later disclaim the property, or direct the disposition of property to be disclaimed.<sup>7</sup>

Also, note that if the surviving spouse is insolvent, a disclaimer cannot be made to avoid creditors reaching assets.

Upon the passing of a spouse, the surviving spouse or a family member should be encouraged to notify their attorney. The attorney can then keep track of the nine month disclaimer window and assist the surviving spouse, when he or she is ready, in making the appropriate disclaimers before the time restriction expires.

Only time will tell what action Congress will take. Because of the uncertainty, clients may prefer taking a wait and see approach. However, doing nothing is not advisable. Incorporating disclaimer planning is a great way to deal with the uncertainty of what lies ahead.

---

#### Notes

<sup>1</sup> Congress' failure to act in 2009 also resulted in the repeal of the separate generation skipping tax (GST) which was imposed on certain lifetime gifts and transfers at death to grandchildren and/or more remote descendants in excess of the applicable exemption amount. However, there is still a federal gift tax imposed on lifetime gifts exceeding the annual exclusion amount (\$13,000 per donee per year) and the lifetime gift exclusion amount (\$1 million). The 2010 gift tax rate is 35% (reduced from 45% in 2009).

<sup>2</sup> See Minnesota Department of Revenue FAQ: Estate Tax ([http://taxes.state.mn.us/estate\\_trust/pages/other\\_supporting\\_content\\_Estate\\_faq.aspx#P231\\_11109](http://taxes.state.mn.us/estate_trust/pages/other_supporting_content_Estate_faq.aspx#P231_11109)).

<sup>3</sup> The Minnesota exemption amount and estate tax rate are not scheduled to change. The automatic return in 2011 of a federal estate tax and exemption amount is directed under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). EGTRRA was legislation signed into law in 2001 by President George W. Bush. EGTRRA implemented various tax cuts, including estate tax relief beginning in 2001 and set to expire at the end of 2010 unless Congress acted to extend them. To-date, Congress has not acted. Therefore, the EGTRRA estate tax cuts will expire at the end of 2010 and revert back to 2001 levels beginning in 2011.

<sup>4</sup> Even if an estate plan does not specifically provide for a disclaimer, the option still exists upon an individual's death. However, disclaimers are particularly useful where the estate plan and beneficiary designations are drafted in anticipation of a disclaimer.

<sup>5</sup> The surviving spouse does not have a general power of appointment; therefore, the assets in the trust are excluded from the surviving spouse's estate at the time of his or her death. IRC § 2518.

<sup>6</sup> The statutory basis for a disclaimer is found in Internal Revenue Code § 2518 and in Minn. Stat. §§ 524.2.1101 to 524.2.1116.

<sup>7</sup> There are certain exceptions for the homestead and other jointly held assets.



*Jamie F. Held is a solo practitioner at Held Law Office located in Edina. Jamie's practice focuses on estate planning and estate and trust administration. If you have any questions or comments, please contact Jamie at [jheld@heldlaw.com](mailto:jheld@heldlaw.com) or (952) 836-2747. Visit [www.heldlaw.com](http://www.heldlaw.com) to learn more about Jamie and Held Law Office. Also check out Jamie's blog at [heldlaw.wordpress.com](http://heldlaw.wordpress.com) for information on estate planning, probate and other related topics.*

---

# The Intersection of Immigration and Criminal Law in the Wake of *Padilla v. Kentucky*

*Sandra Feist*

## I. A New Era in Representation of Foreign Nationals Accused of Crimes

In *Padilla v. Kentucky*, the United States Supreme Court significantly expanded the Sixth Amendment right to counsel as it pertains to foreign nationals charged with crimes that could result in removal (hereafter referred to as “deportation”).<sup>1</sup> Specifically, the Court held that the “ineffective assistance of counsel” analysis found in *Strickland v. Washington* should extend to cases where a foreign national faces deportation as the result of criminal proceedings.<sup>2</sup> Under *Padilla*, the Court held that counsel has a constitutional obligation to tell the client that a guilty plea carries a risk of deportation where that risk is “truly clear.” The Court found that “when the deportation consequence is truly clear...the duty to give correct advice is equally clear.”<sup>3</sup>

While the interpretation of “truly clear” is not itself *truly clear*, there is no doubt that the Supreme Court’s decision in *Padilla v. Kentucky* significantly alters the obligations of criminal defense attorneys representing foreign nationals. The goal of this article is to outline the basic principles at the intersection of criminal and immigration law. Specifically, this article will discuss the broad definition of conviction under immigration law as well as the immigration consequences to foreign nationals charged with a crime.

## II. The Definition of “Conviction” in the Context of Immigration Enforcement

The definition of “conviction” in the

immigration law context is broader than it is in criminal law. For example, “withholding of adjudication” or a “stay of adjudication” could be considered a conviction for immigration purposes even though it would be a positive outcome in the context of criminal proceedings.

A “conviction” for immigration purposes, is a “formal” judgment of guilt entered by a court or, if adjudication of guilt has been withheld, where:

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has *admitted sufficient facts* to warrant a finding of guilty, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>4</sup>

When assessing the optimal outcome in a criminal defense case, it is therefore important to take into account the broader applicability of the immigration laws to the various possible outcomes. After careful analysis, it might become apparent that accepting a more severe sentence would be preferable to the standard plea agreements that often involve admission to certain key facts.

## III. The Immigration Consequences of Criminal Activity

Foreign nationals can either be found “inadmissible” to enter into the United States, or deportable from the United States.<sup>5</sup> Deportation analysis applies to a foreign

---

national who has been formally admitted to the United States. Inadmissibility analysis applies to those who have not been legally admitted as well as applicants for new status, which is considered the equivalent of a new request for admission.<sup>6</sup>

Grounds of inadmissibility address a broad range of adverse activities and conditions, from health concerns to a potential financial burden on the government. These categories of inadmissibility represent a minefield of potential problems in each immigration case. For the purposes of this article, I will only discuss the general criminal grounds of inadmissibility. However, the full list of grounds of inadmissibility found in the Immigration and Nationality Act (INA) § 212 (a) include specific crimes, such as terrorist activity and international child abduction, the commission of which would render a foreign national inadmissible.<sup>7</sup>

**a. Crimes involving moral turpitude**

A foreign national is inadmissible based upon either a criminal conviction *or admission to* the essential elements of a crime involving moral turpitude (CMT).<sup>8</sup> Whether a crime constitutes a CMT depends on an examination of the foreign national's intent in order to determine the presence of a "vicious motive or corrupt mind."<sup>9</sup>

There are two automatic exceptions to this rule. The most commonly applicable exception is the "petty offense exception."<sup>10</sup> This exception excludes any CMTs for which "the maximum possible penalty . . . did not *exceed* imprisonment for one year."<sup>11</sup> Practically speaking, one brush with the law will generally not result in deportation. For example, even a gross misdemeanor<sup>12</sup> in Minnesota fits within the petty offense exception because the maximum possible punishment is up to exactly one year.<sup>13</sup>

The second exception to this rule is where the crime was committed when the foreign national was under 18 years of age and more than five years before the date of application for the immigration benefit (*e.g.*, a visa or permanent residence).<sup>14</sup> Notably, findings of juvenile delinquency are not convictions for immigration because acts of juvenile delinquency are not considered crimes.

Conviction for two or more offenses, other than purely political offenses, for which the aggregate sentence to confinement was five years or more, also renders a foreign national inadmissible.<sup>16</sup>

The rules are slightly different in the context of removability. A foreign national is deportable if convicted of a CMT within five years after the date of "admission" (grant of permanent residence) for which a court may impose a sentence of one year or longer.<sup>17</sup> A foreign national convicted of two or more CMTs, regardless of duration of sentence, at any time after admission is deportable.<sup>18</sup>

**b. Violation of controlled substance laws**

The immigration laws are extremely harsh in dealing with violations of controlled substance laws. A foreign national is inadmissible if there is *reason to believe* that the foreign national is a drug trafficker.<sup>19</sup> Thus, no conviction or even admission is required.<sup>20</sup> The deportability rules are even harsher and render deportable any foreign national who has been convicted of a law relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.<sup>21</sup>

**c. Aggravated felonies**

A foreign national is deportable if convicted of an aggravated felony.<sup>22</sup> The long list of aggravated felonies, found at INA § 101(a) (43), includes specific criminal acts such as

---

murder and rape, but also extends to broader categories of crimes such as “crimes of violence” for which the term of imprisonment is at least one year.<sup>23</sup>

Conviction of one of the long list of aggravated felonies can have an intangible impact on an immigration case, such as the attitude taken by Immigration and Customs Enforcement (ICE) in a deportation hearing. Conviction of an aggravated felony also creates very real limitations on the types of relief available to a foreign national faced with deportation.<sup>24</sup>

#### **d. Expungement**

Expungement has absolutely no impact on whether there has been an arrest or conviction of a crime for purposes of immigration law. Furthermore, expungement of criminal records can have two dangerous side effects for a foreign national. First, foreign nationals have the common misconception that expungement allows them to answer in the negative to questions on prior arrests and convictions. Misrepresentation of such facts can result in harsher consequences than the crime itself.<sup>25</sup> Furthermore, immigrants who wish to become U.S. citizens will need to present full documentation of any criminal proceedings to the U.S. Citizenship and Immigration Services as part of their application for naturalization to U.S. citizenship. Failure to provide these materials, even due to an inability by the court to provide them due to expungement, could permanently bar the individual from naturalization.

#### **IV. Conclusion**

In the new era of *Padilla*, criminal defense attorneys should be familiar with the general structure of the immigration laws relating to crimes and should know when the immigration implications of a potential outcome for a client could have ramifications

for their client’s future in the United States. *Padilla* guides these attorneys to either provide thoroughly researched advice on these implications or ensure that their client retains the services of an immigration law specialist.

---

#### *Notes*

<sup>1</sup> 130 S.Ct. 1473 (2010).

<sup>2</sup> 466 U.S. 668 (1984) (requiring a two-prong test in order to demonstrate ineffective assistance of counsel: First, did the representation fall below the “objective standard of reasonableness”? Second, was there a reasonable probability that the results would have been different, had counsel provided adequate representation).

<sup>3</sup> 130 S.Ct. 1473, 1483 (2010).

<sup>4</sup> Immigration and Nationality Act (INA) § 101(a)(48)(A). Thus, a continuance for dismissal with a stipulation to the facts of the crime could be considered a conviction for immigration purposes. While there is room for argument that a stipulation does not equate to an admission, this gray area should be avoided where possible.

<sup>5</sup> See INA § 212(a) and INA § 237.

<sup>6</sup> This is a very generalized explanation of the difference between the two categories, as the detailed analysis of when to apply each is very complex. For example, permanent residents returning from a trip abroad who have committed an offense that renders them inadmissible are nonetheless considered to be applying for a new admission. INA § 101(a)(13)(C)(v). This means that until the permanent resident becomes a U.S. citizen, they would have to prove their admissibility to the United States after each international trip.

<sup>7</sup> INA § 212(a)(2)(D).

<sup>8</sup> INA § 212(a)(2)(A)(i)(I).

<sup>9</sup> *Matter of B-*, 6 I. & N. Dec. 98, 107, 1954 WL 7824 (BIA 1954).

<sup>10</sup> INA § 212(a)(2)(A)(ii)(II).

<sup>11</sup> Note that under the *deportability* provisions, a permanent resident becomes deportable if he is convicted of a CMT for which the maximum possible punishment is “one year or longer.” INA § 237(a)(2)(A)(i)(II) (emphasis added). This

---

difference of one day can make a huge difference in the outcome.

<sup>12</sup> Minn. Stat. § 609.02, subd. 4.

<sup>13</sup> Compare Minnesota's definitions of felonies and misdemeanors in Minn. Stat. §609.02, subd. 2 & 3, respectively. Although a gross misdemeanor can be punishable by more than the maximum 90 days in prison for a misdemeanor, a gross misdemeanor cannot be punishable by as much as a felony. A felony "means a crime for which a sentence of imprisonment for *more than one year* may be imposed." (emphasis added). Therefore, the punishment for a gross misdemeanor "does not exceed" one year and fits within the petty offense exception.

<sup>14</sup> INA § 212(a)(2)(A)(ii)(I). Note that five years must also have passed since the foreign national was released from prison.

<sup>15</sup> *Matter of Devison-Charles*, 22 I. & N. Dec. 1362, 2000 WL 1470461 (BIA 2000) (instructing that for immigration purposes, a determination of juvenile delinquency is defined under the Federal Juvenile Delinquency Act as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x)." 18 U.S.C. §§ 5031-5042 (1994 & Supp. II 1996). The distinction between the exception to the ground of inadmissibility for offenders under the age of 18 and the juvenile delinquency exception to the rule is only relevant where the crime was committed within five years of the request for admission.

<sup>16</sup> INA § 212(a)(2)(B).

<sup>17</sup> INA § 237(a)(2)(i)(I)-(II).

<sup>18</sup> INA § 237(a)(2)(ii). This statute includes an exception where the two or more CMTs arose out of a single scheme of criminal misconduct.

<sup>19</sup> INA § 212(a)(2)(C). *See*, INA § 212(a)(2)(C)(i) (extending inadmissibility to anyone who has been a "knowing aider, abettor, assister, conspirator, or colluder with others" in drug trafficking); *See*, INA § 212(a)(2)(C)(ii) (extending inadmissibility to the spouse, son or daughter of a trafficker who has received any financial benefit from this activity in the previous five years and "knew or reasonably should have known that the financial or other benefit was the product of such illicit activity). Therefore,

Catherine Zeta Jones' character in *Traffic* would have been out of luck if she were a foreign national applying for permanent residence.

<sup>20</sup> The Supreme Court held in 2006 that "conduct made a felony under state law but a misdemeanor under the [Controlled Substances Act (CSA)] is not a 'felony punishable under the Controlled Substances Act' for INA purposes. A state offense comes within the quoted phrase only if it proscribes conduct punishable as a felony under the CSA." *Lopez v. Gonzalez*, 549 U.S. 47, 47 (2006).

<sup>21</sup> INA § 237(a)(2)(B)(i). Relevant laws are defined in the Controlled Substances Act. 21 U.S.C. § 802 2007.

<sup>22</sup> INA § 237(a)(2)(A)(iii).

<sup>23</sup> INA § 101(a)(43)(F).

<sup>24</sup> For example, permanent residents in deportation proceedings are ineligible for cancellation of removal (deportation), one of the common defenses against deportation, if they have been convicted of an aggravated felony at any time. INA § 240A(a)(3).

<sup>25</sup> INA § 212(a)(6)(C).



*Sandra Feist is a Partner with Grell & Feist LLC in Minneapolis where she specializes in employment-based and family-based immigration law. Sandra has specialized in the field of immigration law for nearly ten years and is a 2007 graduate of William Mitchell College of Law. She can be reached at 612-354-2682 or [sfeist@grellfeist.com](mailto:sfeist@grellfeist.com).*

---

## The 2 a.m. Phone Call

*Landon Ascheman*

*Ring! Ring! Huh? What's going on? Ring! Ring! What time is it? Ring! Ring! "Hello?" "I need your help. I was heading straight home. I got arrested. I'm at the jail. What do I do?"*

When it comes to the random phone calls we get, the 2 a.m. phone call is probably one of the more dreaded calls. Your friend drove home from the bar; now your friend, lets call him Jack Daniels is facing serious criminal charges. He is depending on you to help him out. You, however, just woke up 5 seconds ago and you're still not sure what day it is, let alone what to do in this situation. This is intended to be a quick little step by step for all the non-criminal attorneys out there.

### **First: Let's Bring You Up To Speed**

It is estimated that one in seven Minnesota drivers have a DUI on their record.<sup>1</sup> Here is how the night went down from a legal perspective. As soon as Jack approached the vehicle with keys in hand he was fair game for an officer. When Jack started driving away an officer needed either reasonable suspicion or probable cause to stop him.<sup>2</sup> This requirement is easily met. Simply watching your friend violate a traffic law is generally all an officer needs.<sup>3</sup> Some of the more common reasons for a stop include: swerving, speeding, not coming to a complete stop, unlawful turn, not wearing a seatbelt, a loud stereo,<sup>4</sup> and - my personal favorite - something hanging from the rear view mirror.

After the stop has occurred the officer will approach the driver side of the vehicle. The officer's goal at this point is to identify enough factors to legally ask your friend Jack

to step out of the car. One of the easiest ways to do this is the concept of divided attention. By using the divided attention concept, the officer will be asking Jack to answer questions while getting his Driver's License and or proof of insurance. Sometimes they will ask for these one at a time while asking other questions to see if the driver can remember what was being asked for. In doing so, Jack will be forced to divide his attention between the two tasks, increasing his chances of exhibiting signs of intoxication. During this conversation the officer will most likely ask Jack these questions: "Do you know why I pulled you over? Where are you coming from? Where are you headed tonight? Have you had anything to drink?"

It is important to note that while the Supreme Court made a recent ruling<sup>5</sup> on the Fifth Amendment, your friend still has the right to remain silent and not answer these questions. In addition to the questions of divided attention, the officer will also ask for license and registration. Your friend can remain silent and not answer the questions, but must produce his license and registration even if he asserts his right to remain silent. Most people will waive their right to remain silent. Why you ask? Well, your friend isn't being Minnesota-nice if he refuses to answer the officer's questions.

At this point the officer has identified your friend's blood-shot, watery, glassy eyes, and smells the odor of alcohol emanating from his breath. Based on this information along with the time (1 am), where Jack was coming from (the bar), and the fact that your friend told the

---

officer he “only had 1 or 2,” the officer will ask Jack to step out of his vehicle.

After stepping out of the vehicle, the officer will instruct your friend in the Standardized Field Sobriety Tests (SFST). These tests include: Walk-and-Turn, Horizontal Gaze Nystagmus, and the One Leg Stand. Other tests, such as the alphabet, count down, and finger count, are not generally considered part of the SFST battery. To be accurate, three tests are generally used to achieve the most accurate reading of an individual’s impairment level. Although arrests are occasionally made based on fewer than three tests, the National Highway Traffic Safety Administration (NHTSA) studies show that three tests are needed to ensure reliability.<sup>6</sup>

After the SFSTs, the officer will ask your friend to submit to a Preliminary Breath Test (PBT).<sup>7</sup> The reasoning behind the PBT, officially, is to confirm the officer’s belief that they are making the right decision to arrest the person. In most cases the officer will rely on the PBT to make the arrest, in addition to the fact that your friend has slurred speech and cannot perform the SFSTs with accuracy.

At this point the officer will inform Jack that he are being placed under arrest because the officer believes that Jack was driving under the influence. The officer will then transport your friend to the local police station, or whatever location the police have set up for going through the Implied Consent Advisory (ICA).<sup>8</sup> There are several statements and questions in the ICA, these are the most important two: “refusal to take a test is a crime,” and “you have the right to consult with an attorney, but that right is limited to the extent that you cannot unreasonably delay the administration of the test.”

The first statement out of your friend’s mouth should be, “I want to speak to an attorney.”

He will be given a period of time to try and contact an attorney. In many cases it can be difficult to get a hold of an attorney at 2 a.m. But lucky for you, there is an attorney in your friend’s phone. And here is where you come in...

### **Take the Test**

One of the first questions your friend will ask is whether he should take the test. Luckily this is an easy answer - “Yes.”

Test refusal is not a situation you want your friend to be in. While I won’t say there is *never* a reason to refuse – I can’t think of a single situation in which the test refusal would be a better option than taking the test. Tell him to take the test.

Now, there are three types of tests that will generally be offered: blood, breath, and urine. The breath test is currently done by the Intoxilyzer 5000 EN.<sup>9</sup> The person that conducts this test needs to be certified to do so. The courts are currently reviewing discovery demands for the source code of the Intoxilyzer 5000 EN. The claim is that the source code has never been peer reviewed and for the most part, has not been made available to the defense, and thus has not been proven to be accurate. However, the courts still generally admit this evidence, and therefore breath tests above the legal limit still results in a high percentage of DUI convictions. In the near future this system will be replaced with the “DataMaster” by the National Patent Analytical Systems. While there may still be questions about the source code, this company has a much better track record of working with the court system to provide discovery regarding their systems.

A urine test is another option that is generally given to people arrested for DUI. For the most part the urine test can be accurate.

---

However, there are still several factors that are still being clarified by the courts. Among these is urine pooling. The State of Minnesota is one of the very few states, if not the only state, that does not require the person to void their bladder before providing a sample. In fact, Minnesota does not even allow a person to void the bladder first. Many people that go out drinking try to avoid “breaking the seal,” but in doing so, their bladder can contain a higher level of alcohol than what is found in their blood. Challenging this test can be iffy, and in the very least it can be expensive. Refusal to take this test is only actionable if an alternative test (such as breath or blood) was offered.

The final test offered is the blood test.<sup>10</sup> This test is the most accurate, and must be performed by a qualified person. This is the only test that truly measures an individual’s blood alcohol concentration (BAC). Just like the urine test, refusal to take this test is only actionable if an alternative test (breath or urine) was offered. It should be noted previously this test was required to be performed by a medical professional, but under a new change in the law “qualified person” was added. This has paved the way for a new “Phlebotomy Program” (40 hour training session) that seeks to allow officers to draw blood of DUI suspects.

It’s a good idea for the person to request a second test. Many police stations will not have information about local secondary testing facilities, and your friend will likely need to get that information from you. The reason for getting a second test is to assist in showing any changes in the level of intoxication, especially if the levels are close to being below the .08 threshold. In addition, if their request for a second test is not honored, it can assist in getting the results of the first test thrown out.

## **What comes next?**

The next thing your friend will want to know is when he can get out of there. Actually this may be their first question. The rule in Minnesota is a person can be held for 36 hours before seeing a Judge to get a bail determination.<sup>11</sup> As with most rules, there are several exceptions and exemptions to this rule. In most first time DUI cases the person will be released soon after taking the test and being issued a citation.<sup>12</sup>

The next court appearance will be the bail hearing, which may be as high as \$4,000 for the lowest level DWI.<sup>13</sup> Followed by the first appearance, and other standard hearings through trial and possibly sentencing. This is all taking part through the criminal process.

It is important to keep in mind that there can be several battle fronts when fighting DUI charges. The most well known being the criminal charges brought forth by the state.<sup>14</sup> The more notorious is the Implied Consent Hearing regarding the individuals Drivers License.<sup>15</sup> But there are also issues with Whiskey Plates<sup>16</sup> and Vehicle Forfeitures.<sup>17</sup>

A first time offender will normally not be facing issues with Whiskey Plates or Vehicle Forfeitures. However a first time offender will likely have his or her driver’s license suspended. The driver’s license can be suspended by the officer almost immediately or it may take months to file the paperwork for the license suspension.<sup>18</sup> Upon being notified that their driver’s license is suspended, the person has 30 days to file for an Implied Consent Hearing. Failure to challenge the license revocation is an automatic win for the State. At the hearing, unlike criminal matters, the State needs only prove that the defendant drove a vehicle under the influence by a preponderance of the evidence as opposed to beyond a reasonable

doubt. Implied Consent Hearings are much harder to win. The accused cannot get a public defender for these civil charges. However, they can be used in future DUI offenses to enhance the severity of a future DUI, even when the person won their DUI criminal charges.

## Conclusion

For many of the above reasons and factors, after getting off the phone with your unfortunate friend, the first thing you should do is help him or her find an attorney that is capable and willing to look at the specific issues in the case. While there are cases where the best that can be done is damage control, there are many issues in DUI law that are often overlooked, such as identifying errors in testing procedure, the use of secondary tests, issues with aggravating factors, and being aware of the vast ramifications of various plea offers.

---

### Notes

<sup>1</sup> Office of Traffic Safety at the Minnesota Department of Public Safety – this only reflects licensed Minnesota Drivers.

<sup>2</sup> See *U.S. v. Billups*, 442 F.Supp.2d 697 (D. Minn. 2006) (discussing both reasonable suspicion and probable cause).

<sup>3</sup> *State v. Branson*, 2008 WL 2796589 (Minn. Ct. App., July 22, 2008) (quoting *State v. George*, 577 N.W.2d 575, 578 (Minn. 1997)).

<sup>4</sup> *State v. Johnson*, 2008 WL 2727206 (Minn. Ct. App. July 15, 2008).

<sup>5</sup> *Berghuis v. Thompkins*, 560 U.S. \_\_\_\_ (2010) (docket 08-1470) Holding that a suspect's right to remain silent must be unambiguous. Voluntarily and knowingly responding to police interrogation after remaining silent constitutes a waiver of the right to remain silent.

<sup>6</sup> NHTSA DWI Detection & SFST Instructor Manual February 2006

<sup>7</sup> Minn. Stat. § 169A.41 Preliminary Screening Test

<sup>8</sup> Minn. Stat. § 169A.51 subd. 2

<sup>9</sup> Minn. Stat. § 169A.51 subd. 5

<sup>10</sup> Reference to the change in the law

<sup>11</sup> Minn. R. Crim. Pro. 4.02 Arrest Without a Warrant (exclusive of the day of arrest, Sundays, and legal holidays)

<sup>12</sup> Minn. R. Crim. Pro. 6.01 Release on Citation (See Minn. Stat. § 169A.40 for some exceptions to this Rule)

<sup>13</sup> Minn. Stat. § 169A.44 Conditional Release (Defendant will also generally be required to abstain from alcohol and submit to chemical monitoring).

<sup>14</sup> Minn. Stat. § 169A.20 & Minn. Stat. § 169A.27

<sup>15</sup> Minn. Stat. § 169A.53 Administrative and Judicial Review of License Revocation

<sup>16</sup> Minn. Stat. § 169A.60 Administrative Impoundment of Plates

<sup>17</sup> Minn. Stat. § 169A.63 Vehicle Forfeiture

<sup>18</sup> Minn. Stat. § 196A.52 Test Refusal or Failure; License Revocation



*Landon Ascheman is an owner & managing partner at Ascheman & Smith, LLC, where he practices criminal defense law. Landon graduated from William Mitchell College of Law, and can be reached at [Landon@AschemanSmith.com](mailto:Landon@AschemanSmith.com) or (612)217-0077.*

---

## **Getting Along to Get Ahead: The Case for New Lawyers' Investment in Professional Development of Interpersonal Skills**

*Jessica Slattery Karich*

A new lawyer in their first, second, or third year of practice may find that their success is largely dependent on strong interpersonal relationships. Interpersonal relationships result from social connections and interactions with others that establish common ground, build bridges through communication, and encourage mutual understanding. Although interpersonal relationships are important for new lawyer's success regardless whether they are working for a law firm, company, or government agency, this article focuses on the importance on developing interpersonal skills for long-term success at a law firm.

Law firms primarily measure an associate's success with billable hours. But clients do not want to pay for a new lawyer's work if that lawyer does not have the requisite experience and know-how to add value to the client's case. So how can new lawyers gain the professional development, training, and experience to allow them to become indispensable to law firms and their clients? It begins with interpersonal relationships, which lead to professional development and career growth. The ability to develop interpersonal relationships, known as "social capital," can be a new lawyer's hidden weapon. Good social capital allows lawyers to draw on internal networks and mentorships to get things done better and gain new experiences. This article addresses the importance of new lawyers' investments in Professional Development CLEs that focus on self awareness, interpersonal communication,

and relationship building.

The pressure to bill hours can often stagnate a new lawyer's professional development. With so many hours to bill, and so little time to do it, new lawyers often find themselves deprived of experiences meaningful for their development, such as observing how other lawyers work in practice, undertaking diverse and challenging assignments that enable them to expand their legal knowledge, and forging valuable relationships with mentors to provide feedback and advice about their work. These experiences are precisely what allow new lawyers to grow and steadily gain the professional judgment and capability to handle multi-faceted client work short-term and enjoy a fruitful career long-term.

Interpersonal communication skills contribute profoundly in the formation and elevation of mentoring and other relationships within a law firm or legal practice. Mentoring is a proven technique for new lawyer education and professional development. Although partner or senior associate mentors are themselves pressured to bill hours, new lawyers might be surprised by how some more experienced lawyers will be generous with their knowledge and advice, and will actively contribute to their mentee's success. Mentors can provide diverse and challenging work to their mentees or refer them to another partner or senior associate who can. They can provide their mentee with shadowing experiences to observe client interaction and court appearances and assist

---

the mentee in cultivating meaningful relationships with other attorneys. Mentors can serve as a sounding board for new lawyers and can urge new lawyers to think about solutions to problems creatively. Additionally, mentors can be a source of guidance for mentees regarding changing expectations of competencies and by providing performance assessments and honest feedback.

Mentors, on the other hand, get to share their knowledge and skills to help their mentee to succeed. The experience a mentor gains can contribute to their own professional growth and the growth of the legal profession generally. Moreover, mentoring contributes to associate retention and performance, impacts organizational culture, and leads to more mentoring relationships within the workplace.

So how can a new lawyer develop his or her capacity to connect with others and form meaningful interpersonal relationships such as mentorships? New lawyers must first engage in introspection to gain self-awareness of their personal communication styles. This involves discovering their unique strengths, their areas needing development, and their framework for understanding themselves and others. Once a new lawyer has this self insight, he or she can learn to improve interpersonal communication dynamics with assistants, paragalogs, other associates, managing associates, partners, opposing counsel, court personnel, judges, and clients. Insight into self and others can then be used as a tool to enhance working relationships, forge mentorships, create diverse and challenging work opportunities, and create a pathway to realize full potential. New lawyers should give at least as much attention, if not more, to the professional development of their interpersonal skills as to their substantive legal skills because good

interpersonal relationships lead to depth in substantive legal knowledge.

Although they are perhaps more scarce than substantive legal CLEs, associates can find CLEs, Professional Development Institutes, or books focused on insights into their own communication styles, the communication styles of others, and how to develop and use social capital through forging relationships. By looking inside and out, new lawyers can learn the most effective way to influence others and find success.



*Jessica Slattery Karich is an attorney and graduate student in Central and Eastern European History and International Relations at West Virginia University, Collegium Civitas (Poland), and University of Tartu (Estonia).*

---

## Because We Live Where Water Reflects the Sky

*Jamie Ford*

Minnesota gets its name from the Dakota word *minisota*, meaning “water that reflects the sky.”<sup>1</sup> As an attorney practicing in Minnesota, a state with eleven Indian<sup>2</sup> reservations, there are a few things you need to know about the law as it relates to Indian people. In many cases, Native American people and their property are treated differently under the U.S. legal system than are other Americans.

You are likely to run across clients, cases and legal issues that require at least a little understanding of the issues. Estate planning and probate, taxation, home and business finance, and family law are just a sampling of the practice areas you might explore in your legal career – and each of these areas involves a special rule or an altogether different framework for Indian people, their families and their property. Over the course of the next few issues of *Hearsay*, I will introduce non-Indian Law practitioners to some basic concepts of Indian Law that apply to commonly encountered legal scenarios.

In order to better understand the legal issues, you should have some background information on Minnesota’s eleven reservations and the federally recognized<sup>3</sup> tribal nations to which they belong. Of the 11 reservations in Minnesota, seven belong to Anishanabe<sup>4</sup> nations and four to Dakota nations. Six of the Anishanabe nations, the Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs and White Earth bands are members of the Minnesota Chippewa Tribe (MCT). Though also an Anishanabe nation, Red Lake withdrew from

the General Council for the Chippewa, a precursor to the MCT, in 1918.<sup>5</sup> The four federally-recognized Dakota bands include the Lower Sioux, Prairie Island, Shakopee Mdewakanton, and Upper Sioux Communities. These eleven reservations are distinct tribal communities and they are each separately governed as sovereign tribal nations.

Land ownership on Minnesota reservations and throughout Indian Country is rather complex, and it can be confusing even for those with experience in the field. I will do my best to explain it. Before non-Indian settlers “discovered” America, tribal nations had their own land use and occupation systems. Many have confused Native land use systems for a total lack of regulation because these systems don’t resemble European styles of land ownership and title. To characterize pre-settlement land usage by Native Americans as unorganized or haphazard would be erroneous. Tribal nations had systems in place to regulate ownership, stewardship, agriculture (yes, agriculture!), hunting and gathering rights on North American soils well before non-Indian settlers began arriving from Europe.

Once non-Indian settlers arrived on the scene, negotiations, wars and ultimately treaty-making between tribal nations and the colonies (and later the United States) ensued to resolve land disputes. One solution that the federal government adopted was the practice of reserving some of the land that belonged to tribal nations for tribal members’ perpetual use and occupation; these areas are called reservations. Since the creation of

---

reservations by federal treaties or executive orders, tribal nations have seen their land gradually shrink over time as valuable resources have been discovered on Indian lands, non-Indian settlers violated treaty agreements by settling on reservation land, and federal policies have shifted over the years to the detriment of Indian land bases.

Today, tribal nations and many individual Indian landowners hold land in trust – meaning the federal government owns title the land while Indian people have rights to use and occupation as beneficiaries. Reservation land lost from Indian ownership loses its trust status and is therefore outside the jurisdiction of tribal nations. Trust and fee lands are interspersed on reservations today, resulting in a phenomenon called checkerboarding. Checkerboarded land ownership makes management, use and regulation of reservation land difficult for tribal, state and county officials.

Now that you have the basics of how reservations came to be and an overview of land ownership patterns today, let's move on to current law. The first of the laws we will cover is the [American Indian Probate Reform Act](#), or AIPRA.<sup>6</sup> AIPRA governs inheritance and probate of reservation land. As mentioned above, land ownership in Indian Country can be fairly complicated, and consequently, inheritance of Indian land is too. Most reservations<sup>7</sup> were allotted under the General Allotment Act of 1887<sup>8</sup>, or Dawes Act, a law that distributed reservation land parcels, usually of 160 acres, to beneficiary individual Indians.<sup>9</sup> (The Dawes Act is the law that created the “trust” status of Indian lands whereby Indian people hold rights to use and occupy reservation land while the United States holds legal title.<sup>10</sup>) Any land that remained after allotment was declared surplus, “in excess of Indian needs”<sup>11</sup>, and sold to non-Indian settlers.

The General Allotment Act created individual interests in reservation property but did not allow for testamentary dispossession of Indian land (i.e. dispossession by will). Rather, the law prescribed that the state in which an allotment was located was to govern inheritance.<sup>12</sup> In most cases reservation property passed to heirs under state intestate succession rules.<sup>13</sup> This is problematic because 1) some reservations and allotments straddle state lines<sup>14</sup>, and 2) most states' intestacy rules provide for inheritance in common.<sup>15</sup> The question of which state's intestacy laws applied and the feasibility of managing land with several, and after the passage of decades thousands<sup>16</sup>, of tenants in common have created major problems for the federal government, for tribal nations and for individual Indian people. The concept of fractionated title, or fractionation, has become a major impediment to economic development in Indian Country. Combine fractionation with checkerboarding and you've got an altogether nightmarish situation. Congress, as a result, has acted several times to try to address these issues.

The American Indian Probate Reform Act is one of the more recent laws enacted to try to remedy some of the problems caused by the Dawes Act, the Indian Land Consolidation Act (ILCA)<sup>17</sup> and other federal regulations related to land ownership in Indian Country<sup>18</sup>. AIPRA creates a uniform, federal probate code, meaning there are now special rules for inheritance applicable to reservation land nationwide<sup>19</sup>. AIPRA also allows for tribal nations to develop their own probate codes subject to the approval of the Secretary of the Interior.<sup>20</sup> The Secretary has yet to approve any of the probate codes submitted by tribal nations for approval.

There are a number of elements of AIPRA of which you need to be aware if you encounter a client with reservation land assets. Under

---

the national code created by AIPRA, the size of an individual landowner's interest in a land parcel impacts procedures during probate.<sup>21</sup> For example, if a person with less than a 5% ownership interest to a parcel of reservation land dies without a will in place, his interest will pass to a single heir and will not be divided up equally among all the heirs as the case would have been pre-AIPRA. If there is no eligible heir to assume the 5% or less interest, the interest may pass to the tribe on which the allotment is located, *without payment to your client's estate*. See this [helpful factsheet](#) for more information on this particular scenario. It is important to note that because of the changes that Congress has periodically made regarding inheritance of Indian land (like AIPRA), your client's previous experiences with inheritance or probate might not be helpful at all in determining what will happen this time around.

Knowledge of ILCA and AIPRA, along with their amendments, is critical when your client has an ownership interest in reservation land. You can always [contact your local regional BIA office](#) if you have questions about an Individual Trust Interest Report (ITI), a Title Status Report (TSR) or another document that seems to indicate your client has an interest in Indian land. In any case, do some preliminary investigating about how AIPRA might affect a potential client and his or her heirs. [Indian Land Tenure Foundation](#), a nonprofit headquartered here in Minnesota that is dedicated to supporting tribal nations and individual Indian landowners with land ownership needs, offers a wealth of information on history and available resources related to land ownership in Indian Country. Montana State University has also created a series of [fact sheets](#) that can be helpful to you.

Neither AIPRA nor this discussion of it is

meant to speak to the fairness of the legal system created by the federal government for Indian people and their property. If you take the time to look at the law as it relates to Native American reservations and Indian people, you'd probably be shocked. Today, because of the federal policies throughout history that were designed to break up reservation lands, tribal nations and individual Indian people own less than 1/3 of the land *within reservation boundaries*.<sup>22</sup> The best thing you can do now is to familiarize yourself with the issues and the law so you can not only serve your clients better, but you can help raise awareness about the current state of Native America by taking the initiative to be informed.

Stay tuned for the next issue of *Hearsay*, where I'll cover another important aspect of the law that involves special rules or exceptions for Indian people. Always seek the assistance of a more experienced attorney when you're dealing with areas of the law with which you are unfamiliar.

---

#### Notes

<sup>1</sup> Minnesota State Government Website, <http://www.state.mn.us/portal/mn/jsp/home.do?agency=NorthStar>, 9/17/2010.

<sup>2</sup> I use the terms Native American, Indian and American Indian interchangeably in this article and in practice. I have yet to meet a Native American person who identifies him or herself as such. Rather, many of the Indian people I know identify themselves by their tribal affiliation, e.g. "Lakota Sioux" or "Ojibwe." The U.S. legal system, statutes and governmental agencies use the term "Indian" almost exclusively.

<sup>3</sup> I make the distinction between federally recognized and non-federally recognized tribal nations. There are some tribes that are not recognized by the federal government but are distinct cultural groups that have sometimes gained other forms of recognition, such as state-recognition (often due to agreements between

---

pre-statehood territory officials and tribal leaders). These tribal groups typically do not have reservation land nor do they enjoy some of the benefits (or difficulties) tribal members of federally recognized tribes do.

<sup>4</sup> Anishanabe, Chippewa and Objiwe are different names for the same tribal grouping. Tribal members refer to themselves as Anishanabe, meaning “first people.”

<sup>5</sup> Red Lake Net News, “About the Red Lake Indian Reservation: A brief overview of Red Lake,” <http://www.rlnn.com/newsarticlesnov03/aboutRL.html>, 9/30/2010.

<sup>6</sup> American Indian Probate Reform Act, Act of October 27, 2004, 118 Stat. 1773, codified at 25 U.S.C. §§ 2201 – 2221. The federal rules implementing AIPRA were finalized and published November 13, 2008. The new regulations include: 25 CFR Part 15 Probate of Indian Estates, 25 CFR Part 18 Tribal Probate Codes, and 25 CFR Part 179 Life Estates and Future Interests, 43 CFR Part 4 Department Hearings and Appeals Procedures, and 43 CFR Part 30 Indian Probate Hearing Procedures. American Indian Probate Reform Act of 2004, Public Law 108-374, 118 Stat. 1773-1810 (2004).

<sup>7</sup> In Minnesota, only the Red Lake Nation was able to successfully avoid allotment of their lands. Their reservation lands are still owned by the Red Lake Nation. Red Lake Net News, “About the Red Lake Indian Reservation: A brief overview of Red Lake,” <http://www.rlnn.com/newsarticlesnov03/aboutRL.html>, 9/30/2010.

<sup>8</sup> Act of February 8, 1887, 24 Stat. 388, codified in part at 25 U.S.C. §§ 331 – 381

<sup>9</sup> Allotment of Minnesota reservations was codified in the Nelson Act of 1889 and later laws that divided reservation land into 80 acre parcels for individual Indian people. State of Minnesota Government Website, [http://www.indianaffairs.state.mn.us/tribes\\_whiteearth.html](http://www.indianaffairs.state.mn.us/tribes_whiteearth.html), 9/30/2010.

<sup>10</sup> Act of Feb. 8, 1887, 24 Stat. 388, 389, § 5.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> AIPRA, 118 Stat. 1773, codified at 25 U.S.C. §§ 2201 – 2221.

<sup>14</sup> The Lake Traverse, Standing Rock, and Fort Yuma Reservations are three examples of reservations whose territory lies in two states.

<sup>15</sup> AIPRA 118 Stat. 1773, codified at 25 U.S.C. §§ 2201 – 2221.

<sup>16</sup> Testimony of Ross O. Swimmer, Special Trustee for American Indians, House Resources Comm. Hrg. on S. 1721 (AIPRA) (June 23, 2004).

<sup>17</sup> Indian Land Consolidation Act, Public Law 97-459 (1983).

<sup>18</sup> AIPRA, 118 Stat. 1773, codified at 25 U.S.C. §§ 2201 – 2221.

<sup>19</sup> AIPRA, excluding Alaska, the Five Civilized Tribes and Osage.

<sup>20</sup> Id. at Sec. 2206(b)(2)(B).

<sup>21</sup> Id. at Sec. 2206(o), 2206(o)(5).

<sup>22</sup> Cohen, *Handbook of Federal Indian Law*, 306 (1982 Ed.).

*Jamie Ford is a 2008 graduate of William Mitchell College of Law and works for the Indian Land Tenure Foundation. Indian Land Tenure Foundation is headquartered in Little Canada and is the only national organization dedicated to the return of reservation land to Indian ownership. Jamie can be reached at [jford@iltf.org](mailto:jford@iltf.org) or 651-766-8999.*



---

## RCBA NLS NEWS

Greetings from the Ramsey County New Lawyers Section! As many of you know, the RCBA NLS has been very active so far this Bar Year! We have had great turnout at our happy hours held the first Thursday of the month! If you have not had the opportunity to join us for a happy hour yet this year, please do so!!

On December 2, 2010 we are again thrilled to join with the MSBA NLS and the HCBA NLS for the Tri-Bar Social and Toys for Tots drive at Faces Mears Park in St. Paul's vibrant lowertown neighborhood. This event is always well attended and we are looking to raise a substantial amount of money for Toys for Tots. Representatives will be presenting our monetary donation during the KARE 11 10:00 p.m. newscast!

As always, we are looking to increase the RCBA NLS participation in community service and Bar events throughout the year. Please stay tuned for any announcements or contacts us to volunteer for our upcoming events.

*Lesley Adam and Aaron Eken are the Co-Chairs of the Ramsey County Bar Association New Lawyers Section. Lesley can be reached at [ladam@murnane.com](mailto:ladam@murnane.com). Aaron can be reached at [aaron.eken@farmersinsurance.com](mailto:aaron.eken@farmersinsurance.com).*

*Also, please check us out on our webpage: [www.ramseybar.org/newlawyers.html](http://www.ramseybar.org/newlawyers.html).*

---

## 2010-2011 MSBA New Lawyers Section Contacts

### Executive Board

---

**Chair:**

Christina M. Weber  
Wilford & Geske  
7650 Currell Blvd. #300  
Woodbury, MN 55125  
Phone: 651-209-3300  
[cweber@wilfordgeske.com](mailto:cweber@wilfordgeske.com)

**Treasurer:**

Samuel J. Edmunds  
Campbell Knutson PA  
1380 Corporate Ctr #317  
Eagan, MN 55121  
Phone: (651) 452-5000  
[sedmunds@ck-law.com](mailto:sedmunds@ck-law.com)

**Vice-Chair:**

Charles A. Delbridge  
Christensen & Laue PA  
5101 Vernon Ave S. #400  
Edina, MN 55436  
Phone: 952-927-8855  
[cad@edinalaw.com](mailto:cad@edinalaw.com)

**Secretary:**

Sitso Bediako  
Gray Plant Mooty Mooty & Bennett PA  
80 S Eighth St #500  
Minneapolis, MN 55402  
Phone: (612) 632-3000  
[sitso.bediako@gpmlaw.com](mailto:sitso.bediako@gpmlaw.com)

---

### New Lawyers Liaisons

---

**Sections:**

**Alternative Dispute Resolution**  
Elise Peterson

**Bankruptcy Law**  
L. Kathleen Harrell-Latham

**Business Law**  
Jennifer Santini

**Children & the Law**  
Becky Fritz

**Civil Litigation**  
Janie Paulson

**Computer & Technology**  
Larry McGee

**Corporate Counsel**  
Hannah Wolf

**Elder Law**  
Laura Orr

**Employee Benefits**  
Natalie Kohner

**Family Law**  
Munazza Humayun

**Food & Drug Law**  
Sarah Bohman

**Health Law**  
Jason Seashore

**Immigration Law**  
Munazza Humayun & Sarah Brenes

**Labor & Employment Law**  
John Lassetter

**Practice Management & Marketing**  
Sarah McGuire

**Probate & Trust Law**  
Jennifer Santini

**Real Property**  
Christina Weber

**Solo and Small Firm**  
Sarah McGuire

**Tax Law**  
Kyle Brehm & Erica Stock

**Committees:**

**Civic Education**  
Elise Peterson

**Diversity**  
Sitso Bediako

**Human Rights**  
Tokunbo Okanla

**Judicial Elections Campaign  
Conduct Committee**  
Mike Miller

**Judiciary**  
Evan Weiner

**Legislative**  
Mike Miller

**Life & Law**  
Elise Peterson

**Rules of Professional Conduct**  
Bryan Seiler

**Women in the Legal Profession**  
Anna Horning Nygren