

# Hearsay

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# Greetings From The Chair

By: Jason Kohlmeyer

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Well, another bar year is coming to an end, and instead of the usual Chair's article thanking everyone for all their hard work during the Bar year (thank you all) or saying what a great experience this year has been (it has been fantastic), I want to discuss job movement among new lawyers.

As I enter my last year of having the title "New Lawyer," (both aging out and having too many years of practice), I have noticed an interesting, and I think disturbing, item of interest; the frequency of job movement among new lawyers. As the New Lawyer Chair, I had the opportunity to talk to new lawyers throughout the state, and as we talked, I would always end up asking "How is work?" To be honest, I first asked this question simply to make small talk, but later I became genuinely interested as I started to really listen to the responses. As I would take my informal survey, what I started to hear from a majority of new lawyers was not positive. I heard "it's okay," "you know," "I'm keeping my options open." These are not the phrases you would expect to hear from people who love their job, or are even satisfied with their job.

This prompted me to look into lawyer satisfaction rates around the country. The ABA conducted a survey a few years ago and it found that 33% of all attorneys were actively seeking to leave their jobs and an additional 31% were willing to consider changing jobs. A 2001 study by the University of Indiana found that the average salary for a large firm associate after 5 years is approximately \$80,000, while public service/government attorneys can expect to earn, on average, \$35,000 after 5 years. Somewhat surprising was that the study indicates that job satisfaction is lowest among large firm associates and highest among public-sector/government attorneys. I say surprising because, according to the Indiana study, the large firm associate makes more than twice what a public sector lawyer makes, yet is not as happy with his or her job.

Is job movement and dissatisfaction a bad thing? I don't necessarily think so, but what is destructive is the constant job movement solely in order to earn more money. I think a legal headhunter friend of mine said it best when, many years ago, I asked what I could earn if I changed jobs. Instead of answering my question, he

asked me a question, "Do you like your job?" I answered I loved it, but wanted to "keep my options open." His reply has stuck with me ever since. He said there is more to look at than the paycheck and if you love your job, keep it, even if you can earn a few more bucks at the firm down the road.

So, as I leave the New Lawyer Section, I will descend from my soap box and leave you with some thoughts on the issue of job movement. If you are lucky enough to find a job where you get to practice an area of the law that gets you excited to go to the office in the morning, keep it, you might not find it again. I think we need to look at the Indiana survey and realize what public sector/government attorneys have known for years, you don't go to the office solely for a paycheck, but for the type of work that you do.

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# Considerations For Your First Civil Case

By: Arthur G. Boylan

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At some point in the career of any new lawyer, a case arrives on your desk and you are given the responsibility of handling the case from start to finish. Even in the context of a simple claim, this type of assignment cannot be taken lightly. Here are a few things to consider when approaching your first civil case.

1. **Get your Bearings:** Simply put, a new lawyer must know the file. Despite the fact that experienced attorneys may expect you to instantly grasp the issues of the case, a new lawyer should closely examine the initial pleadings, the correspondence, and the contents of the file in order to get a complete understanding of the story. If you have questions, ask the assigning attorney or speak directly with the client. You may be surprised at how much information you can collect from the documents and from discussions with the client. Next, determine which venue the case is in. Is it Minnesota State Housing Court, Conciliation Court, Family Court, or Minnesota State Court. This is important because each court has its own specific rules. For the core documents of a case, make your own copies and start a working file (don't copy everything – just the essential material). Develop this base and you will be well on your way to identifying the salient issues and making substantial contributions to a case.
2. **Answer.** If you need to respond to a Complaint, the time spent learning about the case will allow you to proceed with ease. At the beginning of a case, consider the following:
  - 1) Will you need to make any motions under Rule 12, such as failure to state a claim or improper venue? Generally once these motions are waived, they are gone forever.
  - 2) Should you make a counterclaim under Rule 13?
  - 3) Should you simply Answer the Complaint?

Specifically, pay attention to whether any defenses can be raised, whether service was proper, and whether there is proper jurisdiction. If you have concluded it is best to Answer, think about the case and make firm decisions about the claims and the best course of action for your client. With the help of your client, you will be able to respond to each allegation in the Complaint. Throughout this entire process be mindful of the obligations imposed by Minnesota Statutes section 549.211 and Rule 11.

3. **Know the Players:** One very important tip to remember is to use care in all your interactions. The sheer number of people involved in an average claim can be surprising, and each relationship must be handled with respect. At an early stage, identify the players in your case (opposing counsel, the Judge, the Judge's clerk, and the other parties) and learn what you can about each of them. Consult with your colleagues and look for basic information on the internet. After developing a sense of the players, you will be better equipped to manage each interaction. Proceed with caution and be consistently professional. But if you have a gut reaction to something – you sense opposing counsel is being unreasonable (they probably are) or if you sense that opposing counsel might be willing to reach an early amicable resolution – be willing to trust your intuition. Your dealings with the Court are equally important – respect the clerks and the administrators. Their opinion of you will undoubtedly be shared with the Court at some point. Being prepared and consistent in your dealings with people will enable you to quickly shed the indicia of a new lawyer and earn the respect of your colleagues.
4. **Don't Forget The Filings!:** If you are a new lawyer on a case in Minnesota State District Court, you will inevitably be asked to tend to the routine filings. The Court will not ask for these, but they are required. For example, in Minnesota State District Court, this includes the Certificate of Representation, the Informational Statement and the Joint Statement of the Case. After a case is filed, revisit the General Rules of Practice and add due dates for these filings to your calendar. The Certificate of Representation must be filed by the party filing the action and it must include the contact information for any party (and counsel) involved in the action. If the information is not known at the time the party files the action, Rule 104 requires that it be provided to the Court within seven days of acquiring such knowledge. Within sixty days of the filing of an action, General Rule of Practice 111 requires a filing of the Informational Statement. The Informational Statement includes a variety of information, including names of parties and counsel, general positions on the case, timelines, and information regarding discovery. Sometime thereafter and in accordance with the Schedul-

ing Order from the Court, a Joint Statement of the Case is also required. See Minn. Gen. R. Prac. 112.01. Generally, you must work with opposing counsel to prepare a single filing for the Joint Statement of the Case. However, the court may also choose to direct separate filings or, if opposing counsel is uncooperative, a party may file a separate statement with an affidavit setting forth the efforts made and reasons why a joint statement could not be filed. Check out each of these rules and the forms available for download from the Minnesota Courts website at: <http://www.courts.state.mn.us/rules/general/GRtitleII.htm>.

Overall, the most important tip is to be prepared and be organized. Ask questions when you are unsure of the next step. Keep your calendar up to date and review it frequently. Know the local rules and double check all your submissions to court to make sure the information is correct. Attending to your first civil case can be daunting, but if you follow these simple steps you should be successful, even if you don't win.

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# Evidence-Based Prosecutions And The Admissibility Of Hearsay After *Crawford v. Washington* In Minnesota

By: Benjamin P. Hayek

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## I. Introduction

In *Crawford v. Washington*<sup>1</sup> the United States Supreme Court altered the way trial courts approach the issue of admissibility with respect to hearsay statements. Prior to *Crawford*, courts functioned under the precepts of *Ohio v. Roberts*,<sup>2</sup> whereby a trial court could admit hearsay statements upon a showing that the statement proffered was reliable. *Crawford* rejected this method, as it had become a rather permissive stance toward the admissibility of such statements and thus violative of the Sixth Amendment's Confrontation Clause. Under *Crawford*, courts must now bar the admission of "testimonial" statements unless the government can lay a foundation demonstrating that (1) the accused had a prior opportunity to cross-examine the declarant, and (2) the declarant is unavailable at the time of trial.<sup>3</sup>

The new *Crawford* rule creates a particularly interesting dilemma<sup>4</sup> with respect to cases involving domestic and criminal sexual abuse. Prosecutors in such cases are fully cognizant that they often must proceed in such cases where the victim recants testimony, is unable, or is otherwise unwilling to cooperate with the prosecution.<sup>5</sup> The hurdle for prosecutors appears high, as *Crawford* seems to bar almost all types of statements traditionally utilized in abuse related offenses, ranging from statements made during 911 calls and statements made to law enforcement officers, to statements made to medical and social services person-

nel.<sup>6</sup> Given the nature and prevalence of domestic violence and the corresponding social need to address such problems,<sup>7</sup> two suggestions have been proposed to avoid Confrontation Clause problems with respect to testimonial hearsay statements.<sup>8</sup>

## II. Define "Testimonial"

The first way to avoid Confrontation Clause problems is to deem the statement proffered "nontestimonial," because only testimonial statements require confrontation; nontestimonial statements do not.<sup>9</sup> *Crawford* explicitly left open the meaning of "testimonial" for definition by inferior courts,<sup>10</sup> and they have obliged.

Within the context of statements made by a declarant to law enforcement officers, *Crawford* held that the right to confrontation turns on whether the statement proffered was "testimonial" at the time it was uttered.<sup>11</sup> Statements made to police are generally deemed testimonial and require confrontation if proffered in court.<sup>12</sup> But some states have distinguished between statements made spontaneously to police, statements made in response to mere police questioning, and statements made during police interrogation<sup>13</sup> – thereby suggesting a rather hierarchical approach. Likewise, a California appellate court has drawn a distinction between statements made to police prior to the initiation of an official investigation and those made after such initiation.<sup>14</sup> Min-

nesota has followed Indiana in adopting a scheme based on the hierarchical approach that focuses more on the subjective spontaneity of the utterance rather than the objective actual timing of the formal investigation's commencement.<sup>15</sup> In *Hammon v. State*, the Indiana Court of Appeals espoused its subjective viewpoint on the issue:

When police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what happened, statements given in response thereto are not "testimonial." Whatever else police "interrogation" might be, we do not believe that the word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police "interrogation," bolstered by television, as encompassing an "interview" in a room at the stationhouse. It also does not bear the hallmarks of an improper "inquisitorial practice."<sup>16</sup>

The Minnesota adopted this rationale in *Wright*, reasoning that:

[The declarant] took the initiative to make the 911 call and he volunteered his statements to the officer at the scene. There is no indication in the record that [the declarant] was subjected to structured questioning by the officer, nor is there any indication that [the declarant] should have reasonably expected his statements to be used at [the defendant's] trial more than one year later....At the time [the declarant] made the statements, he had not been notified that a crime had been committed, so it would have been objectively unreasonable [for him] to believe that his statements would be used at a later trial. [The declarant] was also not subjected to formal police interrogation, which lends [further] support to classifying his statements as nontestimonial. Therefore, [we hold that the declarant's] statements are not testimonial.<sup>17</sup>

By contrast, the Court of Appeals noted in dicta that statements made by a declarant, at jail, and after being arrested on suspicion of another crime, "appear[] to be the type of testimonial statement that concerned the [United States Supreme] Court in *Crawford*."<sup>18</sup>

Thus, it appears that Minnesota trial courts are free to deem statements "nontestimonial" in situations where law enforcement are responding to a call for assistance<sup>19</sup> and the initial fact-gathering after arrival, but "testimonial" in situations where the declarant has been placed under custodial arrest.<sup>20</sup> However, the analysis does not end there, for the statements must not only satisfy the Confrontation

Clause, but must also satisfy the Minnesota Rules of Evidence. As such, an exception must apply to each state ment before a trial court allows its admission.

### III. Rules of Evidence

The three bread-and-butter exceptions to the admissibility of hearsay when prosecuting domestic violence cases where the victim is later unavailable or otherwise refuses to cooperate (i.e., is "unavailable" to testify) are the rules governing excited utterances,<sup>21</sup> present sense impressions,<sup>22</sup> and statements made to medical personnel for purposes of medical diagnosis.<sup>23</sup> Both excited utterances<sup>24</sup> and statements made to medical personnel<sup>25</sup> have been deemed "nontestimonial" in nature by Minnesota appellate courts. The same result can be expected with regard to present sense impressions, although a Minnesota court has yet to make this explicit.<sup>26</sup>

Hearsay exceptions are also crucial in victimless prosecutions to help establish the identity of the assailant.<sup>27</sup> Identifications made during 9-1-1 calls and after law enforcement arrive to the scene, are admissible as excited utterances.<sup>28</sup> Identifications contained in the course of obtaining medical diagnosis are likewise admissible wherever the identity of the assailant is critical to the medical treatment received, such as in cases where the assailant's identity can help determine a release date and location, the need for other services, the proper course of treatment, and prevention of future injury.<sup>29</sup>

Another dilemma arises with respect to the admissibility of laboratory reports under *Crawford*.<sup>30</sup> Both Justice Scalia in the Court's opinion,<sup>31</sup> as well as Chief Justice Rehnquist in his dissent,<sup>32</sup> recognized that statements contained in *business records* are nontestimonial and therefore do not raise a Confrontation Clause issue. Only a few states have considered how analogous laboratory results are to business records, and whether they are "testimonial" in nature. For example, the Alabama Court of Criminal Appeals recently held that autopsy reports are nontestimonial in nature.<sup>33</sup> The Supreme Court of Nevada reached the opposite conclusion.<sup>34</sup> However, this dilemma can be instantly resolved if the examiner who prepared the report testifies (i.e., the witness and the declarant are the same person).<sup>35</sup>

To sum up the effect of *Crawford* in the context of domestic violence:

Excited utterances, present sense impressions, and statements to medical personnel [will] fall outside *Crawford*'s minimum definition of "testimonial." Statements to medical personnel are the easiest cases: The victim makes the statement to a doctor, nurse, or social

worker, and not to a police officer or prosecutor. Although these individuals are investigating, their investigation is medical, not criminal, in nature. Additionally, the questioning is at the initiation of the person seeking medical assistance rather than at the initiation of law enforcement personnel. The patient who is also a domestic violence victim can hardly be accused of exploiting the system over which she has no control.

The fact that the victim, rather than the state, initiates the questioning make excited utterances and present sense impressions in domestic violence situations nontestimonial statements: The primary purpose of the statement is to summon aid and not to incriminate.... The fact that the state incidentally collects incriminating evidence [does] not convert a statement made for the purposes of receiving assistance into a testimonial statement.<sup>36</sup>

#### IV. Forfeiture by Domestic Violence or Intimidation

Domestic abusers do not necessarily stop the abuse when the criminal justice system becomes involved.<sup>37</sup> Instead, many of them actually intensify the abuse in an attempt to reassert control over their victim for purposes of discouraging cooperation with the prosecution effort.<sup>38</sup> In such situations, the prosecution may have evidence that triggers the rule of forfeiture, first enunciated in *Reynolds v. United States*.<sup>39</sup>

The forfeiture rule simply states that if a witness is absent as a result of the defendant's wrongful conduct, the defendant lacks standing to complain if competent evidence is admitted in place of that which he has kept away.<sup>40</sup> As Professor Krischer notes, "[t]hrough Crawford changed the nature of Confrontation Clause analysis, requiring the opportunity to cross-examine where a showing of reliability previously sufficed, it left the rule of forfeiture unchanged."<sup>41</sup> Indeed, Justice Scalia acknowledged as much when he penned "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation [problems] on essentially equitable grounds ...."<sup>42</sup> As such, if prosecutors have evidence that supports an argument that a defendant has forfeited his right to confrontation by his own wrongdoing, the right itself fails to attach and any attempt to raise the objection fails.<sup>43</sup>

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#### Notes

<sup>1</sup> 124 S.Ct. 1354 (2004).

<sup>2</sup> 448 U.S. 56 (1980).

<sup>3</sup> Edward J. Imwinkelried, *The Impact of Crawford v. Washington*, 28 OCT CHAMPION 16, 17 (2004).

<sup>4</sup> It should be noted at the outset that *Crawford* creates no confrontation problem if the declarant is available at trial to testify. *State v. Courtney*, 682 N.W.2d 185 (Minn. Ct. App. 2004) (victim's tape recorded *statement to police* did not violate *Crawford* because the victim testified at trial); *State v. Tate*, 682 N.W.2d 169, 176 n.1 (because [the declarant] testified at trial and was subject to cross-examination concerning the [prior] statement, the Confrontation Clause does not apply"); *State v. Yanez*, 2005 WL 894649, \*3 (Minn. Ct. App. Apr. 19, 2005) (unpublished). If the prosecution calls the declarant as a witness at trial then the Confrontation Clause is satisfied. See John F. Yetter, *Wrestling With Crawford v. Washington and the New Constitutional Law of Confrontation*, 78 OCT FLA. B. J. 26, 29-30 (2004) (and cases cited therein) (noting that availability at trial cures any potential Confrontation Clause issue). This is so irrespective of the content of the testimony at trial, even if the witness does not recall either making the hearsay assertion or the events described in it. *Id.* at 30 (citing numerous Supreme Court, federal, and state cases for support). See also Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases*, 38 DEC PROSECUTOR 14 (2004) ("When a victim testifies on behalf of the defense or recants while testifying for the prosecution, the requirements of the confrontation clause are met; the witness has been subject to cross examination (or [has been] made available for confrontation).").

<sup>5</sup> Krischer, *supra* note 4 at 14.

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

<sup>7</sup> Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 301-14 (2005).

<sup>8</sup> Krischer, *supra* note 4 at 14-15.

<sup>9</sup> *Id.* See also *State v. Maring*, 2005 WL 949033 (Minn. Ct. App. Apr. 26, 2005) (unpublished) (holding that statements made by one truck driver to another are nontestimonial).

<sup>10</sup> "We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 124 S.Ct. at 1374 (emphasis added).

<sup>11</sup> Krischer, *supra* note 4 at 15.

<sup>12</sup> *Id.* at 18.

<sup>13</sup> *Id.*

<sup>14</sup> *People v. Cage*, 120 Cal. App. 4th 770 (2004).

<sup>15</sup> *State v. Wright*, 686 N.W.2d 295 (Minn. Ct. App. Sept. 03,

2004), *review granted* (Minn. Nov. 23, 2004).

<sup>16</sup> 809 N.E.2d 945, 948-49 (Ind. Ct. App. Aug. 09, 2004), *rehearing denied* (Ind. Aug. 9, 2004), *transfer granted* (Ind. Dec. 09, 2004)

<sup>17</sup> *Wright*, 686 N.W.2d at 302.

<sup>18</sup> *State v. Tate*, 682 N.W.2d at 172-73, 176 n.1.

<sup>19</sup> It should be noted that this proposition holds even where the presence of law enforcement officers at the scene is not requested or summoned. *State v. Veesenmeyer*, 2005 WL 623277, \*4 (Minn. Ct. App. Mar. 15, 2005) (unpublished).

<sup>20</sup> *State v. Courtney*, 682 N.W.2d 185 (Minn. Ct. App. 2004) (finding statements made to child protection worker where investigating police officer arranged the interview, observed the interview via television satellite, and at one point interrupted the interview and directed the questioning “testimonial”).

<sup>21</sup> MINN. R. EVID. 803(2).

<sup>22</sup> MINN. R. EVID. 803(3).

<sup>23</sup> MINN. R. EVID. 803(4).

<sup>24</sup> *Wright*, 686 N.W.2d at 302.

<sup>25</sup> *State v. Scacchetti*, 690 N.W.2d 393, 396-97 (Minn. Ct. App. Jan. 04, 2005), *review granted* (Minn. Mar. 29, 2005) (citing *State v. Castilla*, P.3d 1211, 1214 (2004) (concluding that statements made by sexual assault victim to sexual assault nurse regarding rape were nontestimonial) with approval). The medical diagnosis exception has traditionally included statements made to paramedics, ambulance drivers, nurses, hospital social workers, and doctors. *King-Ries*, *supra* note 7 at 310.

<sup>26</sup> It should be noted that this proposition also holds within

the context of statements made to third-parties. *Maring*, 2005 WL at \*3. *See also Evans v. Leubbers*, 371 F.3d 438 (8<sup>th</sup> Cir. 2004) (statements made by deceased victim regarding her fear for her life deemed nontestimonial and within present sense impression and excited utterance exceptions).

<sup>27</sup> *King-Ries*, *supra* note 7 at 312.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See generally*, Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-Crawford*, 19 FALL CRIM. JUST. 26 (2004) (outlining the admissibility of laboratory reports under *Crawford*).

<sup>31</sup> *Crawford*, 124 S.Ct. at 1374.

<sup>32</sup> *Id.* at 1378 (Rehnquist, C.J., dissenting).

<sup>33</sup> *Perkins v. State*, 2004 WL 923506 at \*6 (Ala. Ct. Crim. App. 2004).

<sup>34</sup> *City of Las Vegas v. Walsh*, 91 P.3d 591, 595 (2004). *See also*, *People v. Rogers*, 780 N.Y.S.2d 393, 396 (Sup. Ct. App. 3<sup>rd</sup> Div. 2004) (“Because the test was initiated by the prosecution and generated by the desire to discover evidence against the defendant, the results were testimonial.”).

<sup>35</sup> *Giannelli*, *supra* note 30 at 33.

<sup>36</sup> *King-Ries*, *supra* note 7 at 322-23.

<sup>37</sup> *Krischer*, *supra* note 4 at 15.

<sup>38</sup> *Id.*

<sup>39</sup> 98 U.S. 145 (1879).

<sup>40</sup> *Id.* at 158.

<sup>41</sup> *Krischer*, *supra* note 4 at 15.

<sup>42</sup> *Crawford*, 124 S.Ct. at 1370.

<sup>43</sup> *Krischer*, *supra* note 4 at 15.

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## Uncharted Waters: The Risks Associated With Weblogs

By: Kevin S. Brady

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In the past few years, the popularity of weblogs, or “blogs,” has risen exponentially. The means to publish one’s own material to a wide audience, once nearly the sole domain of the major publishing and broadcasting entities, is now accessible to anyone with an Internet connection. With this ability, a “blogger” can freely discuss any topic, viewable by anyone online. Weblogs are relatively simple to set up, and by use of distribution formats such as RSS (really simple syndication), blogs can be syndicated to online subscribers (“feeds”). A blogger can use RSS syndication to disseminate digital audio files, in what is known as

“podcasting.” Many Internet service providers, such as Yahoo, provide hosting and easy-to-use templates to help users set up a weblog. The current blog count is well into the millions, and by some estimates the number of weblogs worldwide is doubling every 5 months. *See* <http://www.sifry.com/alerts/archives/000298.html>.

Blogging has brought media accessibility to netizens of all stripes. Although sometimes downplayed by members of the traditional media, it is hard to deny the influence of weblogs. Many believe that bloggers were a significant

factor in shaping the outcome of the 2004 election. See <http://www.bizreport.com/news/8304/>. Webloggers are credited with uncovering the credibility problems of the documents relied upon in Dan Rather's reports on George W. Bush's National Guard service. And let us not forget the original online non-journalist-turned-journalist, Matt Drudge, whose pointed political commentary and gossip has been an online fixture since the mid-1990s. [http://en.wikipedia.org/wiki/Matt\\_Drudge](http://en.wikipedia.org/wiki/Matt_Drudge). Drudge is perhaps best known for breaking the Monica Lewinsky scandal in 1998. Weblogs are definitely here to stay.

Many in the legal community are now publishing legal blogs, or "blawgs," with topics covering nearly every aspect of the profession. Weblogs are a great vehicle for expressing one's views, sharing information, questioning the status quo, collaborating on important issues, and promoting services. Some legal blogs are using podcasting to distribute audio clips of events, such as oral arguments. Weblogs provide a forum for critical discussion, and may become instrumental in effecting change in law and policy. Many blogs have developed into credible and respected sources of legal information. I find some of my best legal news via weblogs, and I subscribe to more than 40 daily feeds.

However, the ability for anyone to publish online can give rise to some risks. The potential for a vast audience online could bring your blog some unwanted attention. Sooner or later, certain people are bound to discover your weblog and not like what they see. Therefore, you will want to minimize the legal risks surrounding your weblog.

As with any nascent technology, the law surrounding blogging is very uncertain, and the amount of relevant caselaw is scant. It is not always possible to view the legal concepts surrounding blogging as being on par with those of traditional media. Your client may have a weblog, or perhaps you are publishing a blog of your own. It is wise to consider the legal uncertainties that a blogger may face.

#### *What is a "Journalist," Anyway?*

Are bloggers bona fide journalists? While many bloggers may assert that they are, the law on this is far from clear. In about 30 states, including Minnesota, journalists enjoy certain protections, under the so-called "reporter's privilege," or "shield." See <http://iml.jou.ufl.edu/projects/Spring05/Vaught/state.html>. This privilege allows journalists to withhold from discovery certain unpublished information and the identities of sources. Depending on the state, the privilege may be statutory, or derived from the common law. California's shield law is embodied in the state constitution as well as in statute. There is currently

no reporter's privilege at the federal level. The extent of this privilege varies from state to state, as does the definition of "journalist" as it applies to the shield law. Many states expressly define the term "journalist," the scope of which also varies by jurisdiction.

The uncertainty of online publication has been underscored by the recent case of *Apple v. Does*, Cal. Super. Ct., Case No.: 1-04-CV-032178, in which Apple Computer Co. sued a number of Apple "fan" weblogs. See [http://news.com.com/Apple+wins+round+in+lawsuit+against+fan+sites/2100-1047\\_3-5611285.html?tag=nl](http://news.com.com/Apple+wins+round+in+lawsuit+against+fan+sites/2100-1047_3-5611285.html?tag=nl). In *Apple*, the defendants had posted proprietary information regarding some of Apple's upcoming products. Apple sued the bloggers, seeking discovery of the sources of the posted information. The trial court applied a balancing test, holding that the protection of trade secrets outweighed any public interest in the information, and thus ordered the defendants to hand over the information to Apple. As to whether the defendants were bona fide "journalists," the court's response was indeterminate. The court based its order on the premise that protecting trade secrets trumps free speech, regardless of the defendants' status, and that the California reporter's privilege statute was not intended to protect infringing speech. Thus, the question of bloggers-as-journalists remains open to debate in California. *Apple* is now being appealed. See [http://www.eff.org/Censorship/Apple\\_v\\_Does/](http://www.eff.org/Censorship/Apple_v_Does/).

In Minnesota, the privilege is embodied in Minn. Stat. §§ 595.021-5, which was amended in 1998 after the Minnesota Supreme Court had narrowed the scope of the previous statute. The statute currently states:

"...no person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required by any court, grand jury, agency, department or branch of the state... to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data..."

Minn. Stat. § 595.023. This language appears to support a broad construction of the definition of journalist. Whether it can be applied to protect the operator of a weblog remains to be seen, as there is no Minnesota caselaw on point.

The journalistic status of bloggers may become a question of fact, based on the type of content, rather than the cre-

dentials of the blogger. Is Matt Drudge a journalist? Probably. Is a disgruntled Wal-Mart customer who posts rants against the company a journalist? Probably not. Will the status of “journalist” encompass anybody with a modem and a story to tell? I doubt many courts would be comfortable extending privilege to such a broad group. The millions of weblogs that exist run the gamut on the credibility scale, from highly respected journals all the way down to rumor and gossip sites.

Finally, publishers generally enjoy greater protections from liability when defamation is at issue. Since the seminal case of *New York Times v. Sullivan* more than 40 years ago, a publisher is subject to liability only for publishing with actual malice. 376 U.S. 254 (1964). The question thus becomes whether a weblog would enjoy the same status as a “publisher” under *New York Times*. And once again, the answer is unknown.

### *Blogging and Your Employer*

There have been a number of recent instances involving employees disciplined or even discharged by their employers due to the employees’ blogging activities. See <http://homepage.mac.com/popemark/iblog/C2041067432/E1132564304/>. While the First Amendment protects expression from governmental regulation, generally nothing prevents an employer from sanctioning an employee whose online speech is deemed objectionable by the employer, particularly if the employment is at-will. This becomes a thorny issue of free speech standing at odds with an employer’s desire to control an employee’s off-work activity. The Electronic Frontier Foundation (EFF) has an extensive article discussing “safe blogging” to help webloggers avoid such conflicts. <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php>.

Nevertheless, common sense should always be your guide. The easiest way to avoid conflict is to refrain from discussion of work-related topics online. Many of the people who lost jobs over blogging had been posting material critical of their employers. Do not post anything that you would not send to your boss. If you choose to post commentary that may be controversial, you must weigh the risks associated with the activity and decide if it is worth the possible repercussions, or find a way to publish anonymously.

### *Intellectual Property Concerns*

Obviously, you will want to avoid posting content that includes confidential information, such as client communications and trade secrets. Be careful not to post copyrighted content without the owners’ express permis-

sion. Rather than just copying and pasting someone’s news article into your blog, it is far safer to place a link to the source. Fair use will generally allow you to paraphrase an article, but wholesale copying may get you into trouble. It is all too easy to find interesting text and images on the Internet. Be aware of who might own it before you incorporate it into your blog. Check the source’s copying policy -- they will often have a notice on their site expressly stating if and under what circumstances copying is allowed. Podcasters need to be particularly aware of the copyright status of the sound clips they distribute online. Don’t let your weblog become a vehicle for infringement.

It is certainly not the intention of this article to chill anyone’s free speech online. Blogging can be an excellent tool for disseminating information and engaging in meaningful discussion. But there are some legal uncertainties that go with the territory. Being aware of the potential dangers and taking prudent steps to protect yourself will help you avoid some legal headaches in the event some one does not like what you have to say online.

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# Protect The Client's Liability: The Basics of Corporate Governance For New Lawyers

*By: Kyle W. Wilcox, Esq.*

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A task often assigned to new attorneys is the preparation of business organizational documents such as the articles of incorporation, bylaws, corporate minutes, share certificates, and shareholders' agreements. Once business entities are formed, though, what advice should a new attorney provide to clients as they prepare to operate their businesses without the daily advice of an attorney? This article provides an overview of why business owners form limited liability business entities and what actions a new attorney should take to protect business owner clients.

Limiting personal liability for the owners is the primary function of the corporation and the limited liability company ("LLC"). For a single-member LLC or single-share holder corporation, having limited liability is typically the sole reason for forming an LLC or corporation. While maintaining separate records and a separate management structure for a subsidiary corporation is often beneficial for businesses purposes, protecting the assets of the parent corporation and other subsidiaries from the obligations of a subsidiary is often the primary reason for maintaining the parent-subsidiary corporate structure.

Great care should be taken by shareholders, directors and officers (or members, governors and managers in the case of an LLC) so that the limited liability status of the business is not sacrificed. While assets may have been transferred into a corporation or LLC and business is being conducted by the company, it is possible that a court will "pierce the corporate veil" in certain instances. By piercing the corporate veil, a court essentially disregards the corporate or LLC entity and holds the owners liable for company obligations. The reasoning behind piercing the corporate veil is that there are situations in which the corporation or LLC as a business form is so misused that fairness requires the form of the transaction to be disregarded in favor of the substance. It has been said in a parent-subsidiary context that courts pierce the corporate veil "to avoid wrongful acts taken by a parent in order to insulate itself from liability generated by a subsidiary, where fairness and equity suggest that obligations of the subsidiary be satisfied by the parent."<sup>1</sup>

Attempting to determine when a court will disregard the corporate structure for the sake of fairness is a difficult task fraught with uncertainty. If the corporate form is to be disregarded in every instance that a corporation is utilized to protect the assets of the owners, then it is likely the corporate veil would be pierced in every situation and using a corporate or LLC form of entity would be useless. Fortunately, this is not the standard used by courts. Courts will examine several factors when deciding if the corporate form should or should not be respected.<sup>2</sup>

In order to protect the limited liability status, it is important that the shareholders and the corporation, or parent and subsidiary, as the case may be, maintain the trappings of an arms-length relationship with one another. The subsidiary, shareholders or parent should not control the corporation or act on its behalf to such a degree that the corporation is essentially an alter ego of the shareholders or parent. The corporation or subsidiary should have its own records and bank accounts. Actions such as entering into contracts should be taken by the officers of the corporation on behalf the corporation to be bound.

It is also important that the corporate formalities be observed. This proves that the corporate entity is being respected by the shareholders and that corporate actions are those of the entity, not its owners. Shareholders should have a meeting or execute written actions at least annually to elect directors and authorize or ratify major corporate actions. Under Minnesota Statutes, "the business and affairs of a corporation shall be managed by or under the direction" of the board of directors. The board of directors is responsible for electing officers, setting the salaries of the principal officers and making general business decisions. The board should meet from time to time in order to elect officers and authorize certain business transactions. The officers of the company manage the day-to-day affairs of the company, under direction of the board, and enter into contracts on behalf of the company. Although certain individuals may have multiple roles as shareholders, directors and/or officers of

a corporation, the existence of shareholders, board minutes electing directors or officers, and the authorizing of certain corporate actions will provide strong evidence that the individual was acting on behalf of the corporation and not as a shareholder. It is important, however, that the individual ensure that he or she is acting within the scope of the specific role and that third parties understand the nature of that role.

The corporate formalities described above also apply to LLCs – but the LLC form is more flexible and less exacting in terms of organizational structure and the formalities required within that structure. Nonetheless, it is equally important that the formalities required in an LLC are observed.

The corporate status of a firm that is undercapitalized is much more likely to be disregarded than one that is not. A court will be more inclined to believe that a corporation is being used to avoid corporate creditors if the corporation lacks enough equity to pay its known obligations.

Of course, a reasonable amount of leverage will not cause a court to disregard the corporate form – especially with regard to creditors who are aware of the corporation’s capital structure. In addition, the corporate entity is designed to protect shareholders from substantial loss from unknown creditors such as a potential successful tort claimant. Shareholders are also protected from trade creditors who should be aware that they are engaging in business with a limited liability entity. A

corporation should be adequately capitalized upon formation and at anytime a distribution is paid out to the shareholders. However, shareholders are not required to invest more money in the corporation for the purpose of maintaining adequate capitalization otherwise the shareholders would be exposing more than their initial investment to potential loss. The amount of equity that will be considered adequate will depend on the industry and particulars of the corporation.

Corporations need to ensure that the limited liability status of its shareholders is never in jeopardy. It can be difficult to predict whether a court would disregard the corporate structure in any given instance. However, observing corporate formalities, treating the corporation as an entity separate from its parent or shareholders and providing the company with adequate capitalization will protect the owners and ensure that the corporate structure is respected by the courts.

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#### Notes

<sup>1</sup> Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 *BUS. LAW.* 109, 113 (2004).

<sup>2</sup> The remainder of this article will use the corporation nomenclature, but the same principles apply to an LLC.

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## Representing Non-Citizens

*By: Vincent P. Martin*

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When representing a client who is not a U.S. citizen, it is important to know his or her precise immigration status so that you do not unwittingly cause the client difficulty with his or her immigration matter as a result of your actions.

A person’s immigration status can be adversely affected by a number of issues including, but not limited to, criminal proceedings, divorce, domestic violence and employment issues. The following are some examples of how an uninformed attorney may jeopardize his or her client’s immigration status when handling a case that is not perceived as an “immigration case.”

### I. Criminal Proceedings and Convictions

I regularly receive calls from people questioning the immigration consequences of a criminal conviction for some particular offense. First, a consultation with an immigration attorney should occur *before* any plea is entered for a non-citizen. In addition, pro se defendants all too often rely on the advice of the prosecuting attorney regarding the immigration consequences of entering a plea, yet I am not aware of any case in which a non-citizen has avoided deportation based on an argument that he or she received bad advice from the prosecuting attorney.

The Department of Homeland Security (“DHS”), through its immigration branches of U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, etc., view criminal matters through the lens of the Immigra-

tion and Nationality Act (the “Act”), which can result in unforeseen consequences for a criminal defendant. For example, the term “conviction” has a very different meaning under the immigration laws than in many state statutes and courts. As such, a foreign national who enters a plea in which he or she believes, under advice of counsel, will not result in a “conviction” for criminal purposes, may be quite surprised to learn that the Immigration Service considers the matter a “conviction” under the Act and thereby places the person into removal (deportation) proceedings. An attorney who fails to advise his or her client about possible immigration-related consequences of accepting a plea, or at least to seek counsel from an immigration attorney, may be headed toward a malpractice lawsuit or board complaint. It is noteworthy that if a non-citizen wishes to raise the defense of “ineffective assistance of counsel” in his or her removal proceedings, usually he or she must first file a complaint against his or her attorney before such a defense will be entertained by the court. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

## II. Family Law Concerns

Another area in which legal proceedings can affect a person’s immigration status is in family law. One issue that is getting more attention by the courts is spousal maintenance involving a non-citizen spouse. A factor considered by the courts when determining spousal maintenance is whether the spouse seeking maintenance can financially support himself or herself. It is commonly assumed that in cases that involve two young, healthy people in a short-term marriage, payment of spousal maintenance is rarely ordered. However, as the courts become more educated on the limitations placed on non-citizens regarding their ability to gain legal employment, they are becoming more open to arguments requesting spousal maintenance for spouses who cannot work because they lack the necessary employment authorization from the Immigration Service. In addition, spouses who have been “sponsored” by their U.S. citizen partners have been seeking to enforce the sponsorship agreement. When a U.S. citizen sponsors a foreign spouse, the U.S. citizen signs an Affidavit of Support, also known as Form I-864. This document states:

*I acknowledge that section 213A(a)(1)(B) of the Act grants the sponsored immigrant(s) and any Federal, State, local, or private agency that pays any means-tested public benefit to or on behalf of the sponsored immigrant(s) standing to sue me for failing to meet my obligations under this affidavit of support. I agree to submit to the personal jurisdiction of any court of the United States or of any State, territory, or possession of the United States if the court has subject matter jurisdiction of a civil lawsuit to enforce this affidavit of support.*

Family law courts are becoming increasingly aware of such “contracts” and consider these documents when determining spousal maintenance.

## III. Employment

The last example on this topic is one that involves a non-citizen client who may approach you for representation regarding a business transaction – i.e., he or she would like to start a business. Many non-citizens who are present in the United States pursuant to a temporary visa do not know that it may be a violation of their immigration status to be self-employed. Unless a person is a U.S. citizen or Lawful Permanent Resident (i.e., Green Card holder), “employment authorization” is typically required by the Immigration Service before *any* employment may take place, even self-employment. In *Matter of Tong*, 16 I&N Dec. 593 (BIA 1978), it was held that, “The word ‘employment’ is a common one, generally used with relation to the most common pursuits, and therefore ought to be received as understood in common parlance and includes the act of being employed for one’s self.” The court went on to find that any and all types of employment taken without proper authority constitute unauthorized employment. Unauthorized employment cannot only result in removal proceedings, but also cause a denial of an otherwise approvable application for permanent residence.

These are only a few examples in which a person’s immigration status may be affected by legal matters, but they are important issues for new lawyers to learn and familiarize themselves with for a successful practice in any area of law.

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# Hennepin County Affiliate News

By: *Craig Sandok*

## **Hennepin County New Lawyers Celebrate Blockbuster Year**

The 2004-05 bar year is quickly coming to a close, but not without an impressive list of highlights from the Hennepin County New Lawyers Section.

### **Community Service**

The Hennepin County New Lawyers have a long history of community service, and this year they were involved in more service projects than ever before. In the fall, they raked the lawns of seniors for Catholic Charities and conducted a school supply drive equipping students from South High School with necessities for their school year. Partnering with the Community Relations Committee and the Diversity Committee, the New Lawyers presented the ABA's "Helping Kids Belong" seminar at several local elementary school classrooms. For Halloween, New Lawyers volunteers planned a party for youngsters at the Children's Home Society. During the holiday season, volunteers helped brighten the lives of children by conducting a toy drive for Gillette Children's Specialty Healthcare and worked in a warehouse to distribute gifts through the Sponsor-a-Family program for Catholic Charities and Lutheran Social Services. As a Section, the New Lawyers sponsored a family by purchasing items from their holiday wish list. Spring brought the annual Wish Upon a Prom project, which proved to be a huge success. Over 200 dresses, along with jewelry, other accessories, and 35 gift certificates were distributed to students at Patrick Henry High School allowing nearly 100 girls to attend their prom. Early in the year, the New Lawyers served dinner at the People Serving People shelter, aiding the homeless. Finally, the New Lawyers prepared and served dinner at the Jeremiah Program, a residential facility for single mothers who are currently in high school.

### **Social**

Eight fun happy hours kept the New Lawyers socializing, nearly all of them sponsored by local businesses and firms. Happy hours included everything from an evening at the local watering hole to ice skating at the Depot. Attendance reached as high as 300 attorneys at these happy hours. If you haven't been there, you don't know

what you are missing!

A spring tradition finds New Lawyers planning their annual afternoon at the ballpark with the St. Paul Saints. The sellout crowd always enjoys a pre-game cookout, the hot tub in left field and — of course — a little baseball.

In addition to happy hours and baseball, the New Lawyers reached out to other young professionals and had several networking events with such groups as the Young CPA Society and the Risk Management Society.

### **CLE & Professionalism**

Some great CLE and Professionalism events helped equip New Lawyers for the practice of law. Our flagship presentation — the Nuts & Bolts CLE — brought together nearly 65 attorneys, most of them new admittees, to a session focused on the difficult transition from law student to legal practitioner. The Section also produced six other lunch time CLEs at the bar association and eight Breakfasts with Judges CLE programs. Topics ranged from juvenile law to TROs.

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*Craig Sandok is the Chair of the Hennepin County New Lawyers Section and can be reached at [craigs@esquiregroup.com](mailto:craigs@esquiregroup.com).*

## Ramsey County Affiliate News

By: *Laura Hage*

Since the last *Hearsay* publication in January, the Ramsey County Bar Association New Lawyers Committee have continued hosting monthly happy hours, held the annual Spring Social with Minnesota State Bar Association New Lawyer Section and Hennepin County New Lawyer Section, and presented several free New Lawyer CLEs.

RCBA New Lawyer upcoming events include happy hour at Sweeney's on June 9, 2005 from 5-7, and a networking boat cruise on lake Minnetonka on June 23, 2005 with HCBA

New Lawyers, the Minnesota Society of CPA's and the Risk Management Association (a/k/a Young Professionals). The cost of the networking cruise is \$35. For more information and/or to purchase a ticket please call Laura Hage at (651) 690-1584.

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*Laura Hage is the chair of the Ramsey County New Lawyers as well as a solo practitioner in St. Paul, who focuses on litigation and employment matters. Ms. Hage can be contacted at [LAHagelaw@aol.com](mailto:LAHagelaw@aol.com).*

## Duluth Affiliate News

By: *Jessica Durbin*

The Duluth New Lawyers have been busy the past couple of months. In February, the Duluth New Lawyers Section ("NLS") volunteered to package food at the Second Harvest Northern Lakes Food Bank. In April, the NLS volunteered at the Damiano Center by preparing and serving a meal at the Damiano Center's soup kitchen.

Early this spring, Duluth New Lawyers invited all local judges to attend one of the NLS's monthly lunch meetings. Judge Sweetland attended the April meeting, and Judge Floerke (the newest local judge) attended the May meeting. Judge Munger is scheduled to attend the August NLS meeting. Several other judges have

expressed an interest in attending a future meeting as well.

The Duluth NLS continues to meet on the first Thursday of each month for lunch, and on the third Tuesday of each month for happy hour. Please join in if you're in town!

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*Jessica Durbin is the President of the Duluth New Lawyers. She works at the law firm of Johnson, Killen & Seiler P.A. She can be reached at [jdurbin@duluthlaw.com](mailto:jdurbin@duluthlaw.com).*

## Mankato, St. Cloud and Willmar Affiliate News

No reports submitted.

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## NLS Open Liaison Positions

**COMMITTEES**

Attorney Referral Committee  
Bar Media  
Community Outreach Committee  
Court Rules and Administration Committee  
Convention  
Diversity Committee  
Fair Response Committee  
Insurance for Members Committee  
Internet Law Committee  
Judicial Elections Committee  
Law and Literature Committee  
Law School Liaison Committee  
(University of Minnesota Law School)  
Legal Assistance to the Disadvantaged Committee  
Legal Education and Bar Admissions Committee  
Legislative Committee

Legislative Coordinator  
Life and the Law Committee  
Membership Committee  
Minnesota Law Related Education  
Newsletter Editor  
Paralegal Committee  
Pro Se Implementation Committee  
Publications Committee  
Rules of Professional Conduct Committee  
Senior Lawyers Committee  
Technology Committee  
Women in the Legal Profession Committee

**SECTIONS**

Administrative Law Section  
ADR Section

Appellate Practice Section  
Art & Entertainment Section  
Children and the Law Section  
Communications Law Section  
Computer Law Section  
Construction Law Section  
Criminal Law Section  
Employee Benefits Section  
Family Law Section  
Food and Drug Law Section  
Health Law Section  
International Business Law Section  
Labor & Employment Law Section  
Outstate Practice Section  
Public Law Section  
Public Utilities Section  
Real Property Law Section

As the list indicates there are a number of openings for New Lawyers to become liaisons to various sections in the MSBA. This is a great opportunity to get involved with a substantive or procedural area of law. If you are a new lawyer and interested in becoming a liaison you should contact the upcoming New Lawyers Section Chair, Rebecca Fisher at [rfisheressq@aol.com](mailto:rfisheressq@aol.com) for more information.

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