

Hearsay

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If you have any questions about the newsletter or would like to submit an article for a future issue, please contact one of the editors.

MSBA



www.mnbar.org

Greetings from the Chair

Dan Gilchrist

Many thanks to all of the people and the firms that donated their time, resources, and funds to make the New Lawyers Section's **3rd Annual Toys for Tots Happy Hour** a huge success. The event, held December 6th at the Graves 601 Hotel, raised over \$4,300 and generated over 100 toys for the Toys for Tots organization. About 100 lawyers attended the event and, along with 15 law firms, donated cash and toys to help hundreds of deserving children enjoy the holiday season.

Mark your calendars for April 24th, when the New Lawyers of the MSBA, HCBA, and RCBA will host the annual **New Lawyers Spring Social** at Solera in downtown Minneapolis. This fundraiser for local food shelves promises to be *the* event of the year for new lawyers in Minnesota.

The Toys for Tots and the food shelf happy hours are among the many ways that the MSBA New Lawyers Section is bringing lawyers together to strengthen the community and the profession. We provided free legal advice and guidance to residents of southern Minnesota last fall when massive flooding destroyed hundreds of homes. We have gone into high schools to encourage children of all backgrounds to "Choose Law" as a profession. We have facilitated the training of volunteers who desire to provide free "Wills for Heroes." We have conducted free CLE sessions for our members. I applaud those of you who continue to take time from your schedule to get involved.

The NLS welcomes your input and your ideas. So, please get involved. I will see you at the April 24th happy hour and at the upcoming NLS Council meetings, which are held at the MSBA offices every third Thursday of the month at 5:30 p.m.

<h3>UPCOMING EVENTS</h3> <ul style="list-style-type: none">• NLS Council Meeting: March 20th, 5:30 - MSBA Offices• Spring Happy Hour/Food Shelf Fundraiser: April 24th at Solera in downtown Minneapolis	
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Dear Future Judges...

Luke Kuhl

Want to be a judge someday? Minnesota may soon decide to change how the judges of tomorrow are selected.

In 2002, the United States Supreme Court's decision in *Republican Party of Minnesota v. White*,¹ put Minnesota's current nonpartisan, contested, judicial election system on a collision course with a politicized future. In response, a group of the state's most distinguished political and legal minds composed the Citizens Commission for the Preservation of an Impartial Judiciary ("the Quie Commission") and are urging adoption of alternative judicial selection systems to preempt future judicial politicization.

The politics of judicial selection are extremely complex. This article is a primer on: (1) Minnesota's current judicial selection system; (2) the politicizing impact of *White* and its progeny² on the system; (3) the recommendations of the Quie Commission; (4) the politics of the Quie Commission's recommendations; and (5) the players with the most at stake. No judicial selection process is perfect or wholly free from politics. The question facing our state today is: Which process is right for Minnesota?

Minnesota's Current Judicial Selection System

For 150 years, Minnesotans have elected appellate and district court judges.³ Anyone licensed to practice law in Minnesota, eligible to vote, and between the ages of 21⁴ and 70⁵ can run for judge, regardless of race, sex, creed, sexual orientation, experience, and years of licensure.⁶ Once elected, judges

serve six-year terms.⁷ Unlike all other candidates for public office, incumbent judges are listed as an "incumbent" on the ballot.⁸

The state constitution provides the Governor can fill judicial vacancies.⁹ The Governor may consult with a selection commission prior to making appointments.¹⁰ Most state judges are appointed¹¹ and stand for election within one year.

Minnesota's judicial selection process is constitutionally mandated. Change would require a constitutional amendment.¹² Recent attempts to change the current judicial election system have stalled in the legislature.¹³

White and Judicial Politicization

Traditionally, state judicial candidates were prohibited from participating in certain political activities, personally soliciting campaign contributions, or speaking on certain legal and political issues.¹⁴ In the *White* line of cases, the state, a Republican Party and others successfully challenged these prohibitions.¹⁵ In 2002, the United States Supreme Court held, 5-4, that Minnesota's limits on issue-oriented speech were unconstitutional.¹⁶ On remand, the Eighth Circuit held judicial candidates could identify themselves as members of political parties; attend political gatherings; seek political party endorsement; personally solicit and accept campaign contributions; and speak on legal and political topics to large crowds.¹⁷

Minnesota's first post-*White* judicial elections in 2006 saw small steps towards judicial politicization.¹⁸ Minnesota did not see all-out political warfare in 2006, as some predicted. Nonetheless, Minnesota's 2006 experience was unique among states with contested judicial elections. Most states, like Wisconsin, saw a dramatic increase in the number of politicized, multi-million dollar judicial races, usually at the appellate level.¹⁹ Without change, Minnesota may witness similar judicial races.

The Quie Commission Recommendations

The Quie Commission was independently formed in 2006 to respond to *White*.²⁰ Members include: former Republican Governor and Commission Chair Al Quie, Justice G. Barry Anderson, Justice Alan Page, former Republican State Representative and current Administrative Law Judge Eric Lipman, Minnesota State Bar Association President and Democratic-Farmer-Labor ("DFL") Party Chair Brian Melendez, and several judges, scholars and political leaders.²¹

The Quie Commission explored ways to change the current selection system to minimize future judicial politicization.²² In March 2007, the Quie Commission published its final report and recommendations.²³ The final report contained both a Majority Report and a concurring in part and dissenting in part Minority Report.²⁴ Both reports called for dramatic statutory and constitutional changes to the state judicial selection process.²⁵

The Majority Report

The Majority Report recommends adoption of a hybrid judicial retention election system that consists of three basic elements. First, the Governor would be *required* to fill all judicial vacancies by appointing candidates

nominated by a merit selection commission.²⁶ Second, a performance evaluation commission would be established to evaluate judicial performance. Performance evaluations would occur mid-term and again no less than nine months prior to judicial elections.²⁷ Third, judges would stand for a retention election after an eight-year term.²⁸ A retention election is an election where judges run unopposed.²⁹ Voters only decide whether or not to retain the incumbent judge for another eight-year term.³⁰ Judges not "retained" by voters would vacate office. The Governor would fill the vacancy utilizing the merit selection process. The Majority Report recommends the state judicial ballot read as follows:

Shall [name of judge] of the [district, appeals, or supreme] court be retained in office? Yes/ No. The performance review commission has rated this judge qualified/not qualified.³¹

The Minority Report

The Minority Report, authored by Brian Melendez, would abolish Minnesota's judicial election system and establish a hybrid judicial appointment system. Under this system, the Governor would utilize the merit selection system described above and appoint judges to fill vacancies.³² Each judge would serve an initial three- to four-year term.³³ A judicial evaluation commission would then decide whether to reappoint judges to a nine-year term.³⁴

Politics and The Quie Commission Recommendations

Understanding how politics impacts the Quie Commission recommendations is critical to determining whether the proposed changes are right for Minnesota.

Recognizing that no judicial selection process is perfect, this section will take a critical look at how politics would impact judicial selection if the Quie Commission's recommendations were adopted.

The Politics of Retention Elections

White ensures politics will play an important role in any judicial election. Politics will impact retention elections in two main ways. First, partisan endorsement of judicial candidates would continue. Regardless of the type of election, judicial candidates can solicit, receive and accept partisan endorsement in a post-*White* world.³⁵

Second, *White* ensures special interest groups and political groups could mount expensive "anti-retention" campaigns against judicial candidates.³⁶ *White* also ensures that judges, in response to such attacks, could solicit campaign contributions and discuss legal and political topics previously prohibited.

The Politics of Appointment

Politics would also impact an appointment process. The Quie Commission recommendations make the Governor, a partisan elected state officer, the sole gatekeeper to the Minnesota bench.³⁷ Some argue these systems will prevent eminently qualified judicial candidates who are not "friends" of the Governor from attaining the bench for political reasons.³⁸

The politics of appointment will also impact judicial diversity. Contested judicial elections and judicial appointment are different political processes that often produce different types of judges. The current judicial election process, to some degree, encourages participation by

younger attorneys, community leaders, issue-oriented candidates, and candidates with diverse backgrounds. On the other hand, merit selection processes are bureaucratic, professional processes that carefully weigh applicant integrity, maturity, health (if job related), judicial temperament, diligence, legal knowledge, ability and experience, and community service.³⁹ Merit selection processes tend to pick establishment applicants.⁴⁰

If the Quie Commission recommendations are adopted, candidates who rise and flourish under the current election process, like Justice Alan Page,⁴¹ may be effectively shut out of the judiciary in the future. Consider Justice Page's career: He is the only African-American state Supreme Court Justice. He became famous playing football with the Minnesota Vikings. Justice Page is one of 10% of judges initially elected to the bench. While Justice Page is now widely recognized as an excellent jurist and motivational figure, there is a strong argument that Justice Page's background and unique professional experience would have prevented him from attaining the bench under an appointment system.⁴² Adoption of the Quie Commission recommendations could effectively foreclose upon the judicial ambitions of candidates with diverse backgrounds.⁴³

Knowing the Players

Nearly everyone agrees: Having an impartial, nonpartisan judiciary is a state objective. However, the legal community is divided on how to achieve this objective. Some groups have more at stake than others.

Supreme court justices and court of appeals judges have the most to lose if

the current system is retained. Other contested judicial election states, like Wisconsin, are seeing multi-million dollar appellate judicial campaigns. Minnesota could be next. Adoption of the Quie Commission recommendations would fortify current appellate positions⁴⁴ and reduce the risk of expensive campaigns. Chief Justice Russell A. Anderson recently endorsed the Majority Report.⁴⁵

District court judges, who compose a majority of the judiciary,⁴⁶ face the most uncertainty moving forward. Their large numbers largely insulate them from high-priced partisan attacks. These judges may also have the most at risk if oversight authority⁴⁷ is surrendered to a third-party evaluation commission. The Minnesota District Judges Association has opposed retention elections for over a decade, and its President, Hennepin County Judge Charles Porter,⁴⁸ recently testified in opposition to the Quie Commission recommendations.⁴⁹

The Minnesota State Bar Association (“MSBA”) may have the most to gain if the Quie Commission recommendations are adopted. The MSBA could gain more influence over judicial selection and retention by participating in the merit selection and evaluation commission processes. MSBA President Melendez recently testified that 55% of the MSBA’s Assembly voted for the Minority Report; the Bar also favored the Majority Report over no change.⁵⁰

Finally, a bi-partisan group of political elders from Minnesota’s past recently testified in favor of the Majority Report.⁵¹ In addition to former Republican Governor Quie, these include former Democratic Vice President Walter Mondale and former Republican Governor Arne Carlson.⁵²

Conclusion

State legislators may soon consider amending the state constitution and fundamentally altering our judicial selection system. Should we preemptively trade in our 150 year-old judicial selection system, which allows ordinary attorneys to attain the bench through election, for a retention election or appointment system in order to preserve judicial independence? You be the judge.



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Notes

¹ 536 U.S. 765 (2002).

² *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005).

³ Minn. Const. art. VI, § 7; Minn. Stat. § 204D.08, subd. 6. Judicial selection processes differ from state to state. Depending on the criteria used, approximately 21 states elect judges on a partisan or non-partisan basis. American Judicature Society, *Judicial Selection in the States, Appellate and General Jurisdiction Courts, Summary of Initial Selection Methods*, <http://www.ajs.org/js/SummaryInitialSelection.pdf> (last visited Jan. 26, 2008).

⁴ Minn. Const. art. VI, § 5; Minn. Stat. § 204B.06, subs. 1, 8.

⁵ Minn. Stat. § 490.121, subd. 21d (state judges must retire at age 70).

⁶ See Minn. Const. art. VI, § 5; Minn. Stat. § 204B.06, subs. 1, 8.

⁷ Minn. Const. art. VI, § 7.

⁸ Minn. Stat. § 204B.36, subd. 5.

⁹ Minn. Const. art. VI, § 8.

¹⁰ The appointment system for district and appellate judges are different. However, in practice, the Governor regularly utilizes non-binding merit selection commission systems for all judges. Minn.

Stat. § 480B.01; Citizens Commission for the Preservation of an Impartial Judiciary, *Final Report and Recommendations*, at 8 (Mar. 26, 2007), <http://www.keeppmnjusticeimpartial.org/FinalReportAndRecommendation.pdf> (hereinafter “Quie Commission Report”).

¹¹ Approximately 90% of state judges are appointed prior to being elected. John Hultquist, Director of the Minnesota Commission on Judicial Selection, CLE Presentation, *You Can Be a Judge* (Minneapolis, Minn., Jan. 9, 2008) (CLE sponsored by Minnesota Women Lawyers and Minnesota Hispanic Bar Association). Minority Report advocates often argue that Minnesota’s current judicial selection system, in practice, is an appointment system. They point to the fact that the Governor currently appoints most state judges and nearly all appointed judges, listed as “incumbents” on the ballot, win subsequent elections.

¹² Passage of a state constitutional amendment requires a simple majority in the House and Senate. The amendment is then on the ballot as a ballot question. If a simple majority of Minnesota voters favor the change, the constitution is amended. The Governor does not have veto power over constitutional amendments.

¹³ During the 1997-98 session, a state Senate proposal for judicial retention elections stalled in the Judiciary Committee. Between 1997 and 2007, eight judicial appointment-based bills were introduced. All stalled in the legislature. Even limited statutory changes to the judicial election process, such as the establishment of contribution limits for judicial candidates, have stalled. Minn. Sen. Jud. Comm. & Minn. Sen. St. & Local Govt. Operations & Oversight Comm., *The Quie Commission and Judicial Selection*, 85th Leg. (Feb. 4, 2008).

¹⁴ See *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999), *aff’d*, 247 F.3d 854 (8th Cir. 2001); see also Minn. Code of Jud. Conduct Canon 5 (A)(3)(d)(i) (2002).

¹⁵ *White*, 536 U.S. 765; *White*, 416 F.3d 738; *Kelly*, 247 F.3d 854; *Kelly*, 63 F. Supp. 2d 967.

¹⁶ *White*, 536 U.S. at 788.

¹⁷ *White*, 416 F.3d at 754-66. Complicating the issue: judicial candidates are currently the only state candidates not subject to any contribution limits.

¹⁸ In 2006, the Republican Party endorsed several judicial candidates, yielding mixed results. Former Republican State Representative Scott Newman sought and received the Republican endorsement for his unsuccessful challenge of Judge Mike Savre, an appointee of Republican Governor Pawlenty. Senate District 40, *Republican Party of Minnesota Endorsed Candidates for Senate District 40*, <http://www.sd40mngop.org/endorsed.html> (last visited Feb.

9, 2008). Newly appointed Minnesota Supreme Court Justice Christopher J. Dietzen and Judge Gordon Schumaker both successfully ran as incumbents on the court of appeals in 2006. The Republican Party endorsed both and both refused the endorsement. Justice G. Barry Anderson explicitly rebuffed Republican Party endorsement. The Republican Party objected to, or “unendorsed,” court of appeals Judge Jill Flaskamp Halbrooks because she held Minnesota’s “Conceal and Carry” law unconstitutional. Judicial Election Committee, *Republican Party of Minnesota 2006 Statewide Judicial Elections Voter Guide*, <http://joanongovernment.homestead.com/files/JudicialElectionsVoterGuide.rtf> (last visited Feb. 9, 2008). Former DFL St. Paul City Council Member Jay Benanav ran for district court judge against incumbent Judge Elena Ostby, but did not seek DFL endorsement. The DFL Party did not endorse judicial candidates in 2006. Paul Demko, *Courting Trouble*, City Pages (Sept. 6, 2006), <http://www.citypages.com/databank/27/1344/article14677.asp>; Justice Jackie Crosby, *Parties Tackle the New Politics of Judge’s Races*, Star Tribune, June 18, 2006.

¹⁹ See Danya Hooker & Ed Treleven, *Zeigler Wins Bitter Race; Clifford Dominates Dane County*, Wis. St. J. (Apr. 5, 2007), <http://www.madison.com/ws/home/vote/index.php?ntid=127733>.

²⁰ Quie Commission Report, *supra* note 10.

²¹ *Id.*

²² *Id.* at 1.

²³ *Id.*

²⁴ *Id.* at 1-33.

²⁵ *Id.*

²⁶ *Id.* at 11-16.

²⁷ *Id.* at 16-20.

²⁸ Newly appointed judges would stand for retention election within four years of appointment. Subsequent terms would be eight years in length. *Id.* at 20-23.

²⁹ *Id.* at 21.

³⁰ *Id.* at 21, 23-25. Currently, 20 states use some form of retention elections for some or all judicial races.

³¹ *Id.* at 23.

³² *Id.* at 30-31.

³³ *Id.*

³⁴ *Id.* at 31. The composition of the merit selection and evaluation commissions proposed in both the Majority and Minority Reports is the subject of negotiation.

³⁵ The Republican Party endorsed judicial candidates in 2006 and is currently organizing within judicial districts, presumably to endorse future judicial candidates. These practices could continue under a retention election system. Barbara L. Jones, Minn. Lawyer, *State Republican Party Already Readying of ’08 Judicial Races* (Oct. 15, 2007), <http://www.minnlawyer.com/article.cfm?recid=75743>.

³⁶ There is no evidence of such attacks in other retention election states. However, these attacks seem inevitable in a post-*White* world.

³⁷ The Majority Report system is not an appointment system, per se. However, the only way to attain the bench under the Majority Report system is by gubernatorial appointment. The Majority Report would eliminate all other means of becoming a judge.

³⁸ Requiring the Governor to appoint judges from a slate of candidates proposed by a merit selection commission is generally seen as an improvement to the current system. Even this change would require a constitutional amendment.

³⁹ Minn. Stat. § 480B.01, subd. 8.

⁴⁰ Eric Magnuson, Chair, Minnesota Commission on Judicial Selection, CLE Presentation, *You Can Be a Judge* (Minneapolis, Minn., Jan. 9, 2008) (stating candidates with more than 10 years of legal experience are more likely to be selected by the commission); see also Raymond A. Sobocinski, *Adumbrations on Judicial Campaign Speech*, 43 Idaho L. Rev. 199, 215 (2006); Michael DeBow et. al., *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, The Federalist Society (Nov. 27, 2004), [http://www.fed.soc.org/Publications/White%20papers/judicial election.htm](http://www.fed.soc.org/Publications/White%20papers/judicial%20election.htm) (Judicial elections reduces the effect of the “subterranean process of bar and bench politics, in which there is little popular control.”).

⁴¹ Justice Page has endorsed the Majority Report.

⁴² As a Majority Report supporter, Justice Page is advocating for a large, diverse, and representative merit selection commission that can offset the negative impact the judicial selection system could have on judicial diversity.

⁴³ Several minority and women district court judges have voiced similar concerns in arguing against the Quie Commission recommendations.

⁴⁴ It seems unlikely that an evaluation commission, which the judiciary may have a hand in selecting, could pose a serious threat to appellate positions. It seems unlikely an appellate judge would be found unqualified.

⁴⁵ Justices G. Barry Anderson and Alan Page, and court of appeals Judge Thomas Kalitowski, support the Quie Commission recommendations. Chief Justices Russell A. Anderson and Alan Page recently endorsed the Majority Report specifically. Minn. Sen. Jud. Comm. & Minn. Sen. St. & Local Govt. Operations & Oversight Comm., *The Quie Commission and Judicial Selection*, 85th Leg. (Feb. 4, 2008).

⁴⁶ There are 281 district court judges in the state. There are seven supreme court justices and sixteen court of appeals judges.

⁴⁷ Currently, judicial oversight is generally undertaken privately within the judicial districts.

⁴⁸ Ironically, Judge Porter was a Governor Quie appointee.

⁴⁹ Minn. Sen. Jud. Comm. & Minn. Sen. St. & Local Govt. Operations & Oversight Comm., *The Quie Commission and Judicial Selection*, 85th Leg. (Feb. 4, 2008).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Quie, Mondale, and Carlson are also part of a group currently advocating for a state redistricting commission made up of a nonpartisan group of retired judges.

⁵³ The views expressed in this article are those of the author and are not intended to represent the views of the House of Representatives or DFL House Caucus.

Filing a Lawsuit Against Yourself: An Illogical Step in Removal to Federal Court in Minnesota

Michael Carey

In Minnesota we commence civil lawsuits by serving the complaint. See Minn. R. Civ. P. 3.01. In the large majority of jurisdictions, however, in addition to serving the defendant or its registered agent, a plaintiff must file its summons and complaint with the court. There are at least two rationales underlying Minnesota’s unique procedural approach in this regard.

First, it helps litigants avoid filing fees, which can be up to \$252.00 in some counties. Second, it helps to lower the burden on court resources by reducing the number of lawsuits that require court supervision. Indeed, many lawsuits commenced by service alone are resolved through alternative dispute resolution mechanisms or otherwise without ever

formally filing with the court.

For new practitioners with little or no experience removing cases outside of Minnesota, it might not come as a surprise that in order to remove a case to federal court, in addition to service, the lawsuit must be filed with the state court where it is pending. This means, in effect, that a defendant must take the summons and complaint that was served on it, and file it in state court. For defendants from a service *and filing* jurisdiction, however, this requirement may seem illogical. If the lawsuit is already pending, why would they have to take the step of formally filing it with the court?

Indeed, 28 U.S.C. § 1441(a) seems to contemplate only the pendency of the lawsuit as a prerequisite to removal:

Except as otherwise expressly provided by Act of Congress, ***any civil action brought in a State court*** of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place ***where such action is pending***.

(emphasis added). And, under Minnesota's pleading rules, service of the summons and complaint is effective to commence a lawsuit. Accordingly, as local counsel assisting lead counsel from a service and filing jurisdiction, or if your client is from one of those jurisdictions, you might be asked: "why would we pay a filing fee, we don't want to file the case against ourselves, is all this necessary?" True, generally speaking, a defendant does not want to file a lawsuit against itself.

Procedurally, however, in order to remove a case to federal court, the defendant must notify the state court. According to 28 U.S.C. § 1446(d):

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and ***shall file a copy of the notice with the clerk of such State court***, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(emphasis added). However, you cannot notify the court about the removal of a case that has not been filed with the court. Upon service alone, the court has no notice of the pending lawsuit. Thus, in Minnesota, in order to remove a case from state court one of the parties must open the matter, which requires filing the summons and complaint and payment of the appropriate filing fee. Whether you characterize this as merely opening the matter, or actually filing the case, in the end it is just a matter of semantics.

As a recap, below is a checklist for removal to federal court of a Minnesota state court action. In addition to a cover letter to the court, you should provide:

For state court:

1. Notice of Filing Notice of Removal (with Exhibit: Notice of Removal);
2. Certificate of Representation;
3. Copy of Summons and Complaint; and
4. State filing fee (amount varies by district).

For federal court:

1. Civil Cover Sheet;
2. Notice of Removal (with Exhibit: Summons and Complaint);
3. Rule 7.1 Corporate Disclosure Statement;
4. Certificate of Service for federal court; and
5. Federal filing fee (\$350.00).

Some attorneys insist you do not necessarily have to file the summons and complaint, per se. Instead, they advise attaching the summons and complaint as an exhibit to the state court Notice of Filing of Notice of Removal. Then, in the corresponding cover letter, indicate that the defendant is merely opening the matter for the limited purpose of removing to federal court. This tactic, as discussed above, is merely formulaic and more likely an accommodation of the client's concerns about filing a lawsuit against itself than a preservation of any rights or appeals. Moreover, it can confuse court administrators, who in most cases, simply want a separate copy of the summons and complaint in order to process the file.

Because Minnesota allows parties to commence lawsuits by service alone, it can create an awkward moment when you inform your client that it must file a lawsuit against itself in order to remove the case to federal court. Although there is no specific rule or case on point for this procedural irregularity, this article provides you with some authority if you ever find yourself in this position. If your client is dead-set opposed to filing the state court action, another option is to simply wait for the plaintiff to do so and risk forgoing the ability to remove the case to federal court. I recommend the former approach, no matter how unsettling the logic.

Michael R. Carey is a first-year associate in the Minneapolis office of Bowman and Brooke LLP. Mike focuses his practice on complex commercial litigation including products liability and toxic torts defense. In his first six months of practice, Mike has worked on cases in thirteen states and has been admitted pro hac vice in three states.



Five Simple Steps to a Successful Deposition

Jessica Theisen

For a new associate, a deposition assignment presents an exciting opportunity to put your practical skills into action. At the same time, without much experience, you may feel nervous and overwhelmed about what you may face in the deposition room. While not intending to be comprehensive, the following discussion provides five points to keep in mind to assist you during your deposition preparation and during the course of your deposition.

1. Identify the purpose. As a new associate it is easy to focus on the trees instead of the forest. This analogy is especially applicable to depositions. We can spend so much time worrying about asking background questions that we forget why we are taking the deposition in the first place. The purpose of your deposition will differ based on the type of case. For example, depositions are often used to assess credibility, to obtain admissions, or to create

a record of facts that will support a future motion for summary judgment. Always keep in mind the purpose of your deposition throughout your preparation and the deposition.

Once identified, tailor your preparation to the purpose of your deposition. The amount of necessary preparation will depend on the case, but at a minimum, it usually requires a thorough review of the pleadings, discovery responses and documents produced by your client and/or other parties. From this review prepare an outline of your areas of inquiry for the deposition. While at first it may be tempting to write out your questions, limiting yourself to an outline will allow you to have a greater flexibility to explore areas of inquiry that arise during the deposition. Your outline will also provide a roadmap to help you get back on track if you take a detour during your questioning. In addition to using your outline, make sure to follow up the deponent's responses with questions such as who, what, where, when and why.

2. Consult the applicable rules. As with everything in the practice of law, do not forget to review the applicable rules of civil procedure. Know when a deposition may be taken and of whom.¹ Confirm the content of the deposition notice and make sure it is complete, including the place of the deposition, the name and address of each person to be examined and, if the name of the person is unknown, a general description sufficient to identify the person.² Make sure the notice indicates how the deposition is to be recorded, whether it is by sound, sound and visual, and/or stenographic means.³ Understand how and when to use a subpoena *duces tecum* to obtain documents.⁴ Observe the length requirements for depositions.⁵ In general, most questions about the logistics

of a deposition can be determined from a careful reading of the applicable rules of civil procedure.

3. Learn to recognize and make appropriate objections. One of the most nerve-racking parts of a deposition can be determining when it is appropriate to make an objection. Objections are governed by Fed. R. Civ. P. 30(c)(2) and Minn. R. Civ. P. 30.04(a). Under these rules, objections must be stated concisely and in a non-argumentative and non-suggestive manner.⁶ Further, an attorney may give an instruction not to answer a question only when necessary to protect a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for sanctions.⁷ Also, remember that testimony during depositions proceeds subject to objections except in the case of instructions not to answer.⁸ While there is no quick and easy way to identify objectionable questions, your ability to handle them will improve with experience.

4. Take care of administrative matters. Finalizing administrative matters before the deposition can really set your mind at ease. Make sure you know what time the deposition is to start, where the deposition will be taken, and if outside of your office, directions to the location. If you noted the deposition (in other words, you served the deposition notice), make sure you have a court reporter and/or other recording method. Inquire in advance of the deposition if you should order a transcript and, if so, what type and how many. After the deposition, prepare a summary of the deposition testimony while it is still fresh in your mind and you are still able to read your notes.

5. Have confidence in yourself. Even though you may be nervous, do not underestimate yourself. To calm your

nerve, use your outline and practice questions before the deposition. Anticipate in advance how you may handle certain answers or objections by counsel. Research opposing counsel online or ask around your office to find out if that attorney has a reputation of being difficult at depositions. While you may not be able to anticipate every possible situation, having confidence in yourself will go a long way towards a successful deposition.

Taking a deposition presents a great opportunity to practice law. Keep these tips in mind and you should be better prepared to handle any challenges you face during your deposition. Good luck!

Notes

- ¹ Fed. R. Civ. P. 30(a); Minn. R. Civ. P. 30.01.
- ² Fed. R. Civ. P. 30(b)(1); Minn. R. Civ. P. 30.02(a).
- ³ Fed. R. Civ. P. 30(b)(3)(A); Minn. R. Civ. P. 30.02(b).
- ⁴ Fed. R. Civ. P. 30(b)(2); Minn. R. Civ. P. 30.02(e).
- ⁵ Fed. R. Civ. P. 30(d)(1); Minn. R. Civ. P. 30.04(b).
- ⁶ Fed. R. Civ. P. 30(c)(2); Minn. R. Civ. P. 30.04(a).
- ⁷ Fed. R. Civ. P. 30(c)(2); Minn. R. Civ. P. 30.04(a).
- ⁸ Fed. R. Civ. P. 30(c)(2); Minn. R. Civ. P. 30.03.



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Playing with a Stacked Deck?

A Minnesota Federal Judge Refuses to “Rubber Stamp” Record UnitedHealth Settlement

John Remakel

For securities and corporate law attorneys, one of the most high profile cases in recent years has been playing out in Minnesota federal and state court and will soon come before the Minnesota Supreme Court. The case, *In re UnitedHealth Group Incorporated PSLRA Litigation*, pits the California Public Employees’ Retirement System (“CalPERS”) against UnitedHealth Group (“UNH”), UNH’s former-CEO William McGuire and UNH’s Special Litigation Committee, which is comprised of two former Minnesota Supreme Court Justices. The case arises from the stock option scandal that has mired UNH over the past two years. This article analyzes the UNH stock option scandal and examines the

important corporate law question that Federal Judge Rosenbaum recently certified to the Minnesota Supreme Court.

What is stock option “backdating?”

Before examining the UnitedHealth litigation, it is important to understand the basic problems associated with stock option backdating. First, a stock option is a contractual right granted by a company that allows the holder to purchase the company’s stock at a fixed price (the “exercise” or “strike” price) within a specified period of time (the “vesting period”). Stock options are a popular form of executive compensation because, if a company performs well and its stock price

increases, both shareholders and executives reap in the benefits.

Backdating arises when a company sets an “artificial” grant date that occurs before the actual date the stock option was granted. Thus, if the company’s stock was worth less on the artificial grant date, the holder receives a stock option that already has gain built in (“in the money”). While backdating is not illegal per se, problems occur when companies fail to disclose or account for backdating in their financials and securities filings. In addition, backdating may contravene a company’s charter and stock option plans, which often require that stock option grants be approved by a compensation committee comprised of independent directors.

What went wrong at UNH?

When Dr. William McGuire took over as the Chief Executive Officer of UNH in 1989, the company was struggling as a regional Health Maintenance Organization (“HMO”) (\$400 million in revenues).¹ McGuire instituted an aggressive acquisition strategy, which led UNH to acquire numerous HMOs and become the nation’s largest health insurance provider (\$75.4 billion in revenues in 2007).² UNH’s rapid growth and massive earnings led to incredible gains in the company’s stock prices.³

To compensate McGuire and other executives for this rapid turnaround, UNH’s board of directors (which included McGuire as Chairman) granted its executive officers billions of dollars in stock options. As of December 31, 2005, McGuire had exercised a total of \$420 million in stock options, and he held more than \$1.6 billion in unexercised options.⁴ However, many of these stock options were

backdated and not properly accounted for in UNH’s financials and securities disclosures.⁵ In addition, since 1996, McGuire had set the grant dates for his own stock options, often at the lowest closing share price for the year. This violated the company’s governing stock option plans, which required independent directors to administer the plans. In March 2006, the *Wall Street Journal* published an article that uncovered disturbing practices among publicly traded companies, in which executive stock options were backdated or timed to precisely coincide with their lowest annual share price.⁶ The article reported statistical data that showed the odds were 1 in 200 million that UNH’s stock options had not been backdated.

Litigation: Lawsuits filed in federal and state courts

Shortly after the *Wall Street Journal* article was published, over 12 shareholder lawsuits were filed against UNH and McGuire in both federal and state courts in Minnesota. The state derivative suits were consolidated in Hennepin County and were based primarily on breach of fiduciary duties and *ultra vires* (acting outside corporate authority). The federal lawsuits were consolidated into two cases, a shareholder derivative suit and a PSLRA class action, before Judge James Rosenbaum in Minnesota federal district court. Activist pension fund CalPERS was the lead plaintiff in the PSLRA class action. The federal cases alleged securities fraud and the filing of false proxy statements. In addition to the shareholder derivative suits and the PSLRA class action, the Securities Exchange Commission (“SEC”) filed suit against McGuire.

UNH's response

In response to the shareholder derivative suits, UNH's board of directors formed an independent Special Litigation Committee ("SLC") to evaluate the merits of the derivative lawsuits and determine whether UNH should pursue legal recourse against McGuire and other company executives.⁷ Former Minnesota Supreme Court Justices Kathleen Blatz and Edward Stringer headed the committee. As part of its investigation, the SLC retained the law firm of WilmerHale to review over 26 million documents. In October 2006, UNH released the WilmerHale Report, which raised serious questions regarding UNH's stock option practices and corporate governance.⁸ Shortly after the WilmerHale Report, UNH announced the resignation of McGuire, which became effective on November 30, 2006. Also, in November 2006, outgoing McGuire and UNH's succeeding CEO Stephen Hemsley forfeited \$390 million in gains from previously exercised stock options and agreed to reprice their remaining unexercised options.

After McGuire's resignation and upon the motion of CalPERS, Judge Rosenbaum froze McGuire's unexercised stock options and his retirement benefits to ensure that CalPERS would be able to collect a judgment if it prevailed in the PSLRA litigation.⁹ In his order, Judge Rosenbaum likened the allegations against McGuire (if found to be true) to "playing a game with a stacked deck" and "betting on horse races after the results are known."¹⁰

On December 6, 2007, UNH's SLC reached an agreement with McGuire in which he would surrender \$420 million in stock options and benefits to settle

both the state and federal derivative suits. In conjunction with those settlements, McGuire agreed to pay a record civil fine of \$7 million to settle the SEC's suit.¹¹

Judge Rosenbaum fires back: Are SLCs an "impenetrable black box?"

To complete the settlement in the derivative cases, UNH and McGuire sought to have the injunction lifted on McGuire's assets in the PSLRA litigation. In response, CalPERS brought a motion to maintain the freeze while its suit proceeded. To the surprise of many observers, Judge Rosenbaum agreed with CalPERS and entered an injunction to maintain the freeze on McGuire's assets.¹² In his order, Judge Rosenbaum focused heavily on the fact that McGuire's settlement with the SEC barred him from ever denying that he made materially false and misleading statements in UNH's securities filings. To Judge Rosenbaum this equated to an "admission" in the derivative suit because McGuire would be unable to deny the company's claims against him. Although Judge Rosenbaum was not formally asked to approve the settlement with McGuire, he questioned the SLC's logic in allowing McGuire to walk away with a "pelf approaching \$800,000,000" (the amount of unexercised stock options untouched by the settlement), when the company had so much leverage in the case. Additionally, Judge Rosenbaum criticized the SLC's decision-making process by writing "its lack of any findings leaves no tracks showing why or how its business judgment can be considered reasonable."

While Judge Rosenbaum's injunction raises some interesting corporate governance and public policy concerns, he may be forced to approve the SLC's

settlement in the derivative case and release McGuire's assets in the PSLRA litigation depending upon how much deference is given to an SLC under Minnesota law. There are essentially two lines of cases that courts have followed in making this determination. The New York approach¹³ holds that an SLC's decision is "essentially unreviewable," while the Delaware line of cases¹⁴ allows courts to review the SLC's "business judgment." To date, the Minnesota Court of Appeals has sided with the New York cases.¹⁵

With no binding authority, Judge Rosenbaum has asked the Minnesota Supreme Court to decide whether an SLC is an "impenetrable black box" in which case he must merely "rubber stamp" the SLC's decision, or whether he can actually review the sufficiency of the settlement. It will be fascinating to see how the Minnesota Supreme Court resolves this question, in a case that has captured the attention of lawyers, executives and commentators nationwide.

Notes

¹ *About UnitedHealth Group, History & Innovation*, <http://www.unitedhealthgroup.com/about/inn.htm>.

² UnitedHealth Group, Periodic Report (Form 8-K), (Jan. 22, 2008). UNH reports that the company now serves about 70 million Americans.

³ *UnitedHealth CEO Resigns Among Options Scandal*, USA Today, Oct. 16, 2006. UnitedHealth shares rose from about 30 cents a share in 1990 to a peak of \$62.14 in December 2005. With adjustments for stock splits, a person who invested \$10,000 in UNH in 1990 would have stock worth more than \$2 million at its peak.

⁴ Lead Plaintiffs' Amended and Consolidated Verified Derivative and Class Action Complaint, *In re UnitedHealth Group Inc. Shareholder Derivative Litig.*, No. 06-CV-1216, at 14 (D. Minn. filed Sept. 21, 2006).

⁵ UnitedHealth Group, Periodic Report (Form 8-K), (Mar. 6, 2007). In March 2007, UnitedHealth

Group restated its earnings by \$1.5 billion over a 12-year period.

⁶ *The Perfect Payday*, The Wall Street Journal, Mar. 18, 2006.

⁷ Special Litigation Committees may be formed under Minn. Stat. § 302A.241.

⁸ WilmerHale Report, available at www.unitedhealthgroup.com/assets/shared/Wilmer_Hale_Report.pdf.

⁹ Order Granting Injunction, *In re United Health Group Inc. Shareholder Derivative Litig.*, No. 06-CV-1216 and *In re UnitedHealth Group Inc. PSLRA Litig.*, No. 06-CV-1691 (D. Minn. Nov. 29, 2006). It is important to note that the reason for freezing McGuire's assets was that his employment agreement provided that he could begin receiving a guaranteed \$5.1 million annual pension upon termination, and, more importantly, that his stock options (the remaining \$800 million) would immediately vest.

¹⁰ Order Denying Defendant's Motion to Dismiss, *In re UnitedHealth Group PSLRA Litig.*, No. 06-CV-1691 (D. Minn. June 4, 2007).

¹¹ UnitedHealth Group, Periodic Report (Form 8-K), (Dec. 5, 2007).

¹² Order Granting Injunction, *In re United Health Group Inc. Shareholder Derivative Litig.*, No. 06-CV-1216 and *In re UnitedHealth Group Inc. PSLRA Litig.*, No. 06-CV-1691 (D. Minn. Dec. 26, 2007).

¹³ *Auerbach v. Bennett*, 393 N.E.2d 994, 996 (N.Y. 1979).

¹⁴ *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981).

¹⁵ *Drilling v. Berman*, 589 N.W.2d 503, 507 (Minn. Ct. App. 1999); *Skogland v. Brady*, 541 N.W.2d 17, 20-21 (Minn. Ct. App. 1996); *Black v. NuAire, Inc.*, 426 N.W.2d 203, 208 (Minn. Ct. App. 1988).

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Recent Changes to Minnesota's Prevailing Wage Law

Corie Tarara

Regardless of the type of law you are currently practicing, chances are you have dabbled in labor and employment law, if nothing else but to answer a client's "quick" question regarding its employees (or their own employment) while handling another matter. While the Minnesota Fair Labor Standards Act is not a mystery to most (*i.e.* providing for minimum wages and overtime), the Minnesota prevailing wage law likely is.¹ However, given the recent attention to the I-35W bridge collapse and the cost of construction (including the over \$157,000 staircase that is already partially dismantled), the impact of prevailing wages certainly is in the spotlight, although you likely did not recognize the law behind it.² Prevailing wage laws handle, in essence, minimum wages and overtime for federal or state construction projects.

Prevailing Wage Law

In 1931 during the Great Depression, Congress passed the Davis-Bacon Act to prohibit contractors working on federal construction projects over \$2,000 from importing "cheap labor" to cut costs. The Act requires the payment of wages no less than the locally prevailing wages and fringe benefits paid on similar projects in the same city, town, village, or other civil subdivision of the state in which work is to be performed.³ In order to determine and set the prevailing wages, the Secretary of Labor uses two approaches: if more than half of the workers in a survey are paid the same wage, then that wage is used; if no majority emerges, then an average is used.

Minnesota's prevailing wage law (sometimes referred to as the "Little Davis-Bacon Act") provides that contractors performing state-funded construction projects must pay workers wages that "prevail" in the geographic area for the type of work performed. The prevailing wage law was passed in 1973 with the intent that state construction projects be performed "by the best means and highest quality of labor reasonably available" and the workers paid "according to the real value of the services they perform."⁴ Minnesota state policy is that "wages of laborers, workers, and mechanics on projects financed in whole or part by state funds should be comparable to wages paid for similar work in the community as a whole."⁵

Problems with Minnesota's Prevailing Wage Law

While enacted with seemingly good intentions, Minnesota failed to maintain regulation of its prevailing wage law. For almost over thirty-five years, the Minnesota Department of Labor and Industry (DOLI) has set the prevailing wage rates and been responsible for enforcing the law. However, it is well known in the industry that DOLI has problems setting the rates, and monitoring compliance with and enforcing the law.⁶ In fact, the Legislative Auditor's office has conclusively stated that "we do not think research has convincingly demonstrated the benefits claimed for these laws" and it is "clear" that the prevailing wage law "is not being effectively enforced."

Even though neither DOLI nor the law is achieving its goals, the legislature has not repealed the law. Instead, the legislature amended the prevailing wage law in 2007 to allow employees to sue their employers if they believe there have been violations.⁷ This amendment does nothing to resolve DOLI's rate setting, which has been found to be "unrepresentative of the rates" reported in the Occupational Employment Survey conducted by the Department of Employment and Economic Development. This inaccurate rate setting occurs, in part, because Minnesota (unlike virtually all other states and the federal government) uses the mode – not median – to set prevailing wages. The mode is simply the rate that occurs "most often" (not the average).

ILLUSTRATION: Rate Setting

4 employees make \$10 per hour
1 employee makes \$10.50 per hour
2 employees make \$11 per hour
4 employees make \$20 per hour

1. Minnesota - Mode Calculation:

There are two rates that occur "most often," \$10 and \$20. Therefore, the highest mode is used in Minnesota and prevailing wage is set at \$20 per hour.

2. Federal – Two Approach Calculation:

Since not more than half of workers are paid the same wage, the average is used. $((10 \times 4) + 10.50 + (11 \times 2) + (20 \times 4)) / 11 = \13.86 . Under the Davis-Bacon Act, the federal prevailing wage is set at \$13.86 per hour.

As a further illustration to the above calculations, if an electrician is working on a federal project in Minnesota for 4 hours he will make \$13.86 per hour. If the same electrician then goes to another site and

works for 2 hours on a state-funded project in the same city in Minnesota, he will make \$20 per hour. If he spends 1 hour on the same day in the same city working on neither a federal or state project, he will make his regular rate with his company. In the above example, that could be anywhere from \$10 to \$20 per hour depending on his employer.

The majority of DOLI's "prevailing wage" rates are aligned with union rates as it is the unions that most frequently respond to the DOLI surveys requesting wage rates. Considering that only approximately twenty-seven percent (27%) of construction workers are covered by a collective bargaining agreement, non-union contractors argue the mode is not a good measure of prevailing wages because they actually are set artificially high based on the minority wages. DOLI also has problems setting the prevailing wage rates due to its computer program, staff errors in updating union rates, and inconsistencies in which fringe benefits it includes in prevailing wage rates.

New Private Right of Action

Now that workers may sue on their own behalf for violations of the Minnesota prevailing wage law, contractors will find that these lawsuits will be as common as other wage and hour violation lawsuits. In fact, on December 26, 2007, three current/former employees sued Cole's Electric, Inc., a non-union electrical contracting firm located in Owatonna, in the first lawsuit of its kind.⁸ The Plaintiffs allege they were not paid properly pursuant to the prevailing wage law because they were misclassified as "skilled laborers" instead of "electricians." For each employee working on a prevailing wage project, a contractor must classify the employee's labor class using the possible 147 master job classifications provided for by the State of Minnesota. Wage determinations are

made based on the employee's classification.⁹ The more skilled an employee is classified, the higher the prevailing wage the employee will be owed. However, the State of Minnesota has not provided definitions of each of the job classifications. Therefore while a union employer may classify anyone working on a roofing job (including clean-up) as a "roofer," a merit shop (non-union) contractor may classify the person cleaning up as a "helper" and thus the rate of pay will be less.

Although it is clear that there is union-merit contractor tension with respect to the enforcement of this law since union rates are largely prevailing wages and thus not an issue to union contractors, both union and merit shop contractors are subject to prevailing wage lawsuits. Therefore, all contractors performing public works for the State of Minnesota must take caution to apply the proper prevailing wage for the job classification that corresponds with the employee's actual work. This means that more than one job classification may be applicable to one employee (*i.e.* performing electrical work for 5 hours and operating power equipment for 2 hours are different rates) and therefore the prevailing wage rate applicable to the employee will fluctuate as well.

What Should Contractors Do?

Although an employer may believe that its business practices comply with the prevailing wage law, a disgruntled and unemployed worker at the end of the construction season may see things differently. While prior to 2007 there was a mechanism to weed out baseless claims, now any employee can sue on his own behalf and the employer must defend its actions in a court of law. Accordingly, a contractor performing public works projects should take some simple measures to ensure compliance,

and to be able to quickly and efficiently defend its actions. Specifically, the following actions should be considered:

- ü Train management and all employees working on public works how different job classifications apply to different work performed by the same employee.
- ü Educate employees as to how they will be classified. Involve them in the process and encourage them to immediately notify a supervisor if they believe they are performing a different class of work.
- ü Educate supervisors on proper reporting and overseeing of work performed, as well as ensuring an employee stays within a classification or is re-classified.
- ü Document the work performed by the employee each day under each classification, and the time spent on each job.
- ü Pay the employee the proper prevailing wage for each job classification worked and corresponding hours.
- ü Encourage workers to immediately come forward to dispute any hours and/or classifications while the job is fresh in all minds. This could be in the form of a weekly report that they sign and acknowledge as having read with a space for "discrepancies" or "disputed wages."
- ü Train and educate supervisors and management not to retaliate against employees disputing wage rates.
- ü Retain documentation of the above in an organized manner.
- ü Get any comments or clarifications from MnDOLI or MNDOT regarding prevailing wages in writing, preferably prior to the commencement of the work.

Although these steps will not necessarily prevent a lawsuit, they will act as a shield to show that there is no “willful” violation, that the employee concerned has agreed as to the work performed and the applicable classification, and that the intention was to follow the prevailing wage law to the best of the contractor’s ability. Certainly, a contractor should err on the side of retaining proper documentation; good business practice and documentation may cause a potential plaintiff or “private action” counsel to hesitate prior to filing a lawsuit.

Conclusion

The 2007 Minnesota prevailing wage law amendments subject employers to lawsuits based on ambiguous and hard to enforce statutes. Contractors can be found liable for damages, penalties, and payment of plaintiff’s attorneys’ fees and costs, in addition to the costs of defense.¹⁰ Contractors who have come to expect very limited enforcement of this law must be made aware that while the state may continue to not enforce its prevailing wages, individual employees may sue directly in district court. It is also very likely that all eyes will be on the Cole’s Electric case to see how the court will interpret this new amendment. For those of you who are asked to answer a “quick” wage and hour question by one of your clients in the construction, electrical or mechanical trade, you now know the first question you should ask is whether there is a federal or state contract involved.

Notes

¹ Minn. Stat. § 177.21-.35 (2007) (Minnesota Fair Labor Standards Act); Minn. Stat. § 177.41-44 (2007) (Prevailing Wages).

² See <http://wcco.com/bridgecollapse/staircase.bridge.site.2.628429.html> (last visited 1/16/08).

³ 40 U.S.C. 276a-276a-7.

⁴ Minn. Stat. § 177.41 (2007).

⁵ *Id.*

⁶ See *Prevailing Wages Evaluation Report*, Office of the Legislative Auditor, State of Minnesota (Feb. 2007).

⁷ 2007 ch. 135, art 3, §§ 4-8.

⁸ *Krienke v. Cole’s Electric, Inc.*, Blue Earth County District Court, File No. 07-CV-07-4186.

⁹ Minn. Rules 5200.1100 (2007).

¹⁰ Minn. Stat. § 177.27 (2007).



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The Tentative Man

Chris Bradley

My first job after law school was in sales. Perhaps I earned some credibility with colleagues as a sales representative and a lawyer, and I surmise, is why one of my first clients came to me with a problem regarding unpaid sales commissions. At the time I took the case, I was building our website (still a work in progress) and my law partner Jeremiah Neville was filing papers with the Secretary of State for Bradley Neville Law Firm, LLC. I had always wanted to start a business and practice law with my name on the letterhead, and now it began: my first employment and contract law case.

It started with a soft knock on the door (figuratively speaking). The man who would later be my client approached me with a problem I had never encountered before. I was tentative at first. I did not want to take on this man's problem. I was not sure I could do it. So I turned him down. When he asked me again, a pending birth and a wife's bed rest forced my hand: I needed to practice law. When we sat down to sign the contingent fee agreement, I was mute on the fact that as a new lawyer I had not encountered most problems. As it goes, competence follows experience.

I went home that night with an honest-to-God case and flesh-and-blood client. I had a stack of manila folders in my desk drawer for the occasion. I went downstairs to my makeshift (basement) office and pulled one out, scrawled my client's last name in felt-tip black on the cover. I did a quick conflicts check just to be sure: yes, the other folder had a different last name.

I opened the new file, put the executed agreement inside, closed the cover and closed my eyes. What next? My client had already sent numerous emails. I opened my Google account and began running through them. Much of it was the extraneous gristle that sharp legal minds cut away, leaving enough for fact patterns and precedent. I cut off what I could and discovered that my client had been shorted thousands of dollars in commissions.

My client told a passionate story on grievance, unfair treatment, and Lady Justice. At the outset, the deal appeared quite large and outside his assigned business segment. Management encouraged him to pursue the deal anyway. He spent enormous time and energy on his work and closed the deal. It was worth thousands of dollars to the company (and thousands of dollars in earned commissions). Suddenly, the payout set in the compensation agreement looked too high and the company decided to pay my client much less than his due. The company cited a provision in the agreement stating that its internal review board had final say as to how much he would ultimately be paid, on the basis that the deal was over a certain dollar-value threshold.

Sales representatives have a job that often requires as much "right place right time" circumstances as preparation and hard work. Employers reward sales representatives handsomely for exceeding quota and driving growth for the company. But "right place right time" circumstances are not

contemplated under many agreements when signed – and thus not worthy of full commissions payment.

I asked experienced sales representative and friend, Chad McDonald, for insight and he explained that sales is the life-blood of any organization, but it is very easy to decrease earned commission payments by 1% and add more to the bottom line. A company must attract high-caliber sales representatives with lucrative pay but not so much that the company can't turn a profit. My client closed the deal and expected his due but the company disagreed and a dispute was born.

*Brozo v. Oracle Corp.*¹ represents the issue well. On appeal, the majority stated that employers can determine (to a point) how much employees are paid, even if the amount of commissions paid differs from the agreement.² In his dissent, Judge Lay wrote that any contract granting an employer sole discretion to determine how much to pay employees – after the deal has closed and the work is finished – is an illusory contract.³ The tension lies between allowing companies discretion in awarding compensation and granting to sales representatives the benefit of the bargain originally struck in the agreement.

A company that wants more control over commission payments should include a provision in the agreement allowing for sole discretion to retroactively change commissions in prescribed circumstances. Make sure the provision contains express language to this effect. When “Joe Closer” really “kills it” (greatly exceeds quota in sales parlance), the company can prevent paying sales representatives too much money and minimize disputes.

Joe Closer should keep an open line of communication with management. Great deals are usually closed through plain hard work. Occasionally, companies will attempt to characterize the deal as windfall, or some other untoward business event, thereby warranting retroactive discretion to alter commissions. Joe Closer should confirm with the boss that he will be paid properly under the agreement as he works to close the deal.

This I learned after thorough legal research, demand letters, and negotiation. Fast-forward several months later. I drove to the bank in Uptown and let my thoughts wander. I recalled scrawling my client's last name on the manila folder in felt-tip black, drinking coffee at 11 in the evening, scratching the tension off my head, and thanking my wife for her sympathy. I reached the bank and parked the car. No longer the tentative man, I strolled inside, retrieved my law firm's tax identification number, and sent it to opposing counsel so he could cut the settlement check.

I suppose I did just fine.

Notes

¹ 324 F.3d 661 (8th Cir. 2003).

² *Id.* at 667.

³ *Id.* at 672.

Chris Bradley is an attorney editor and project manager in law firm Web site development at Thomson FindLaw and maintains a growing practice at Bradley|Neville Law Firm, LLC. He can be reached at (651) 808-0791 or chris@bradleyneville.com.



Hennepin County Affiliate News

By: Cyrenthia Jordan

Thanks to the commitment of the HCBA New Lawyers Board of Officers and Directors there have been many lives touched in both the legal arena and within the surrounding community. The HCBA NLS had a successful Nuts and Bolts CLE for new attorneys, which was well presented with good attendance. The NLS continues to provide monthly professionalism CLEs at which new lawyers can hear directly from judges in a small setting on topics such as those presented on the “ABCs of Settlement” and “Inside the Juvenile Court.”

The HCBA NLS social director diligently worked on the Toys for Tots event in a joint effort with the MSBA NLS. The event took place on December 6th and raised hundreds of toys and about \$4,500 in funds.

New lawyers had an opportunity to gather together to network on February 21st at The Local. There is also a Tri-Bar Spring Social in the works for April 24th at Solera as a combined effort with MSBA NLS and Ramsey County NLS, which will include a fundraiser for a food shelf.

Community service projects in which the HCBA NLS has been involved include serving meals at the People Serving People homeless shelter, and preparing a meal at The Jeremiah Project, which provides residential housing and schooling for single mothers and their children. The HCBA NLS also donated items for the holidays to the Homefree Shelter and prepared middle school students for a mock trial experience through the Law Explorers program. The next community service project involves collecting legal books to donate to Books for Africa.

Stay tuned for more details on the upcoming community service events and social gatherings through your biweekly email updates from the HCBA, or visit the website at www.hcba.org. All new lawyers are welcome to attend a meeting on the second Wednesday of each month and get a free lunch at the HCBA office.

Cyrenthia Jordan is the Chair of the Hennepin County Bar Association New Lawyers Section. She can be reached at jorda382@umn.edu or (612) 624-8511.

Ramsey County Affiliate News

By: Elyssa Weber

The RCBA sponsored a job shadow program for William Mitchell College of Law students during the school's spring break, March 3rd through 7th, 2008. Participants had a law student "shadow" them for a few hours working in the office, going to court, or talking with colleagues.

RCBA New Lawyer Happy Hours were moved to the first Thursday of each month for the 2007-2008 year. We hope you will join us soon. April's happy hour is scheduled for Thursday, April 3, 2008, at Axel's Bonfire on Grand Ave in St. Paul from 5 to 7 p.m. The happy hour will take place in Axel's back room. All attendees will receive a free drink ticket for the beverage of their choice, and free appetizers. This will include plenty of wood-fire pizzas! The New Lawyer Committee meeting will begin at 4 p.m. in the same location.

Finally, the RCBA and Hamline University School of Law sponsored a Forum at Hamline University on February 25, 2008. Phil Carruthers from the Ramsey County Attorney's Office, Mark Gehan, an attorney with Collins, Buckley, Sauntry & Haugh, and David Schultz, a professor in the Graduate School of Management at Hamline University, served as moderators. Topics discussed included the current system of judicial selection in Minnesota, alternatives being proposed at the legislature, and the advantages and disadvantages of alternative proposals. In follow up to the Forum, Quie Commission positions were discussed at the New Lawyer Committee Meeting on March 6th. The decisions regarding judicial selection will affect new lawyers in the coming years, so we encourage everyone to learn more about the positions.

Elyssa Weber and Mark Priore are co-chairs of the Ramsey County New Lawyers Committee. They can be reached at eweber@lmnc.org and mark_priore@yahoo.com.

11th District Affiliate News

By: Stephanie Balmer

The 11th District New Lawyers Section has had the opportunity to take part in events important to the community. On December 18, 2007, the 11th District New Lawyers Section hosted its Second Annual Holiday Party for the children and women at Safe Haven Shelter for Battered Women in Duluth. The party was held at the Great Lakes Aquarium in Duluth. Mark Rubin, an Assistant County Attorney for St. Louis County, his wife Nancy, and his son Tony, provided holiday music and "sing-alongs" for the guests, and a visit from Santa Claus provided gifts to all of the children. The New Lawyers Section spent several weeks raising funds from the local legal community to purchase the gifts for the children and care packages for the adult residents at Safe Haven.

In addition to the Safe Haven project, the 11th District New Lawyers Section sponsored their annual "Santa Brings a Law-Suit" clothing drive to benefit the Damiano Center "Clothes That Work" program.

Stephanie Balmer is the Chair of the 11th District New Lawyers Section. She can be reached at smbalmer@duluthtriallawyers.com.

Rochester Area Affiliate News

By: Kenton Marino

The New Lawyers Group of the Olmsted County Bar Association is presenting a Trial Techniques CLE (3 credit hours) on Friday, March 28th. The CLE features experienced local attorneys as presenters on numerous topics. The presenters are donating their time and the proceeds from the CLE will be donated to Legal Assistance of Olmsted County. The cost is \$35. The CLE will be held in a courtroom at the Olmsted County Government Center from 1:00 to 4:30 p.m. Register by sending a check for \$35 to the Olmsted County Bar Association, P.O. Box 541, Rochester, MN 55903. Please make the checks payable to OCBA and write Attn: Trial Techniques CLE, in the memo line. All attorneys are welcome to attend this exciting event.

The Rochester Area New Lawyers Section will also continue to meet on a monthly basis for an enjoyable lunch. If you are interested in attending, please call Kenton Marino.

Finally, we are planning for Law Day on May 1st. This event will involve the volunteer efforts of numerous local attorneys sharing their knowledge and experience with local students. We are looking forward to a great event this year.

Kenton Marino is the Chair of the Rochester Area New Lawyers Section. He can be reached at (507) 529-4406 or kenton.marino@smithbarney.com.

6th District Affiliate News

No report submitted.

2007-2008 NLS Liaisons

Administrative Law Section

Mike Wietrecki

Alternative Dispute Resolution (ADR) Section

Chris Bradley

Animal Law Section

Jennifer Lewis Kannegieter

Antitrust Law Section

Grant Fairbairn

Appellate Practice Section

Jon Schmidt

Art & Entertainment Section

Allison Gonzalez

Bankruptcy

Sarah Doerr

Jacob Sellers

Business Law Section

Mike Espenson

Emily Finger

Kelly Larmon

Construction Law Section

Chanel Melin

Angela Burton

Civil Litigation Section

Sharon Horozaniecki

Criminal Law Section

Paul Edlund

Elder Law Section

Kristine Mullmann

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Labor & Employment Law Section

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Kyle Brehm

Real Property Law Section

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Tax Law Section

Ann Westerlund Peterson

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Women in the Legal Profession Committee

Lacey Anderson

2007-2008 NLS Open Liaison Positions

Committees

- «Convention Committee
- «Diversity Committee
- «Fair Response Committee
- «Human Rights Committee
- «Insurance for Members Committee
- «Judiciary Committee
- «Legal Assistance to the Disadvantaged Committee
- «Life and the Law Committee
- «Membership Committee
- «Paralegal Committee
- «Professionalism Committee
- «Pro Se Implementation Committee
- «Publications Committee
- «Rules of Professional Conduct Committee

Sections

- «Children and the Law Section
- «Communications Law Section
- «Computer Law Section
- «Employee Benefits Section
- «Food & Drug Law Section
- «General Practice, Solo & Small Firm Section
- «Immigration Law Section
- «Practice Management & Marketing Technology Section

New Lawyers can become liaisons to various committees and sections in the MSBA. This is a great opportunity to get involved with a substantive or procedural area of law. If you are interested in becoming a liaison, please contact Erika Donner, the New Lawyers Vice Chair, at erikadonner@yahoo.com.

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