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**MSBA Parental Leave Working Group
Report and Recommendation Regarding a Personal Leave Rule**

May 20, 2021

RESOLVED, that the MSBA petition the court for amendments to the Rules of General Practice, Rules of Civil Procedure, and Rules of Appellate Procedure, to facilitate personal leave requests by attorneys and adoption of related forms as outlined on pages 20-27 of this report.

REPORT

INTRODUCTION

The legal profession is already struggling. . . We are at a crossroads. . . . Change will require a wide-eyed and candid assessment of our members’ state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.¹

In 2017, the National Task Force on Lawyer Well-Being issued a report which included staggering and rather dismal statistics regarding the status of lawyer well-being. The report noted a myriad of issues impacting lawyer well-being including depression, anxiety, stress, and problem-drinking. Among the “parade of difficulties” impacting attorneys’ well-being, was a consistent complaint of “work-life conflict.” Discussions around “work-life conflict” are not new.

¹ABA *National Task Force on Lawyer Well-Being, Creating a Movement to Improve Well-Being in the Legal Profession*, August 14, 2017, Bree Buchanan, Esq. (Task Force Co-Chair), James C. Coyle, Esq. (Task Force Co-Chair), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf> (last visited on December 21, 2020).

Fortunately, these discussions have gained a renewed focus following the Lawyer Well-Being Report.

The conflict between an attorney's professional and personal life becomes even more profound when starting a family. Law firms and corporations have made significant steps towards addressing this issue by offering increasingly generous paid-leave policies for attorneys. But even with these parental leave policies in place, the negative stigma associated with taking parental leave persists.

A 2018 report prepared for the American Bar Association's Commission on Women in the Profession and the Minority Corporate Counsel Association, entitled "You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession" reported that 47% of men of color, 50% of women of color, 57% of white women, and 42% of white men say taking family leave would have a negative impact on their career. Simply put, the fear of potential fallout from taking advantage of parental leave exists equally across races and genders.

A recent Bench & Bar article authored by Michael Boulette summarized the conundrum, citing to Florida's parental leave examination analysis:

The attorney preparing to take leave must determine the best time to discuss the issue with partners, staff, and clients, and the timing of these discussions is impacted by many factors, including trial strategy, discovery conferences, deadlines, extensions, and continuances. Attorneys often must consider when to stop taking on new matters and may be forced to seek substitute counsel to monitor their caseload. In a profession in which success relies heavily on client service and caseload, attorneys forced to seek substitute counsel due to parental leave are put at a professional disadvantage that can hinder careers. Workers face tensions when trying to balance their roles as professionals and parents, especially when there are adverse professional consequences to prioritizing family over work.

Facing all these hurdles, it's no wonder that so many parents, particularly mothers, choose to leave traditional legal practice, while

many male attorneys simply forgo much of the leave they're offered. Frankly, it's a miracle lawyers have children at all.

Third child. First parental leave. What's wrong with this picture? Michael Boulette (February 2020, Bench & Bar).

In addition to the workplace pressures, predetermined court deadlines are often at odds with written parental leave policies. Currently, there is no rule or standard which permits an attorney any presumptive continuance or leave for any reason. Instead, if personal leave is required, the attorney is left to negotiate with opposing counsel to stipulate to an extension or move the court for leave to amend the scheduling deadlines. More often than not, attorneys opt to avoid these conflicts (and the increased expense to their client) and, instead, are forced to reassign their cases to other attorneys. The impact of case reassignments in private practice is detrimental to an attorney's career (especially a newer attorney) due to the pressure of client development, billable hour requirements, financial incentives, and managing internal and external relationships.

The result: Women's professional careers are negatively impacted when they take leave and men choose not to take leave for fear of its negative impact on their career (which further exacerbates the former).

But change is possible. Making court leave is possible. Other states have already implemented changes in courts to address and provide presumptive parental leave. It is time for Minnesota to join these states.

BACKGROUND

In the February 2020 issue of Bench & Bar, Michael Boulette authored an article entitled, *Third child. First parental leave. What's wrong with this picture? Why Minnesota should join the ranks of states making it easier for lawyers to take parental leave.* The article aptly sets out the disparity between the relative commonality of employer parental leave policies and the dearth of

court rules permitting a continuance or reprieve for parental leave. The article also acknowledged the unmistakable disparity of impact that this lack of flexibility has on women versus men in the legal community. From that article, the MSBA leadership created the Parental Leaving Working Group (“the working group”) and issued it a charge to study and make recommendations regarding parental leave and court rules.

The working group consists of the following members: Jessica Klander, Bassford Remele (Chair); Honorable Carolina Lamas, Fourth Judicial District; Honorable Sarah McBroom, Ninth Judicial District; John Zwier, U.S. District Court; Michael Boulette, Barnes & Thornburg, LLP; Christine Courtney, Courtney Law Office, PLLC; Amanda Schlitz, US Bank; Cally Kjellberg-Nelson, Quinlivan & Hughes PA; Sarah Soucie Eyberg, Soucie Eyberg Law, LLC.

The working group met for the first time on June 10, 2020 and thereafter met monthly. During these meetings, the working group analyzed other states’ rules, feedback from a survey of MSBA members, solicited feedback from other MSBA committees, sections, and stakeholders, and discussed at length the language of the proposed rule. Most significantly, the working group disseminated a survey in the Fall of 2020 to MSBA members, asking for attorneys’ experience with parental/family leave requests. The feedback and anecdotes from those attorneys who responded is included throughout this report and recommendation.

The following report and recommendation was drafted based on the working group’s careful analysis of the rules, survey results from MSBA members, and stakeholders who provided feedback.

JUSTIFICATION

Dual income households have comprised a majority of American households for the last two decades.² Because of the increased prevalence of women in the work force, the need for parental leave has also grown. Women currently account for more than one in three attorneys, according to the United States Census Bureau.³

A rule change promotes equity and diversity in our profession. If the pandemic has shown us anything, it has highlighted the deep inequities that exist in our societal norms and systems. When millions of children and their families had to suddenly transition to distance learning models, women left the work force in droves. “According to the U.S. Labor Department, 865,000 women—four times the number of men—dropped out of the workforce in September as families faced patchy school reopening plans.”⁴

Large firms are already making the shift to more generous, and equitable, parental leave policies. Some firms offer up to 12 weeks of paid leave for the birth, adoption or foster care placement of a child.⁵ Firms are seeing increased retention of employees with implementation of these policies and are extending the policies to their staff as well.⁶

The move away from maternity or paternity leave to “parental leave” is deliberate, aimed at reducing the disparity between men and women who become parents and return to work. Right now, there exists a “motherhood penalty,” where women see a decrease of approximately 4% in

² <https://www.bls.gov/opub/mlr/2020/article/comparing-characteristics-and-selected-expenditures-of-dual-and-single-income-households-with-children.htm>

³ <https://www.census.gov/library/stories/2018/05/women-lawyers.html>

⁴ “Work-Life Imbalance: Pandemic Stresses Places New Stresses on Women Lawyers” <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2021/december/worklife-imbalance-pandemic-disruption-places-new-stresses-women-lawyers/>

⁵ <https://abovethelaw.com/2019/12/biglaw-firm-wows-with-new-parental-leave-policy-for-all-employees/>

⁶ <https://www.thine.co/in-discovery/more-generous-gender-neutral-leave-policies-are-fast-becoming-the-new-norm-in-biglaw>

their earnings after they become parents, whereas men often see a 6% increase in pay after the same life event.⁷ A 2010 study in Sweden—where fathers are mandated to take at least some of the 16 months of paid parental leave—found “that for each month a father takes off, the mother’s earnings rise 6.7% (as measured four years later).⁸

The stigma of parental leave and the “motherhood penalty” persists among attorneys in private practice. As one MSBA survey respondent succinctly stated:

Right now, there is a stigma about requesting a continuance for reasons of personal or family health; many lawyers consider it a display of weakness or unprofessionalism, which they understandably do not wish to make.

Another MSBA survey respondent aptly commented:

“The pressure to avoid inconveniencing your client or the Court with a request to delay or accommodate a pregnancy/birth runs rampant. Women are forced to disclose the fact of their pregnancy early for fear that it will somehow negatively impact their client if they don't and to plan to have someone else take over the case in their absence should the Court decline the request (even if a request is ever made). The default is to just offload your cases on to someone else so no one is "inconvenienced" by the birth/pregnancy. The reality is that it takes an unbelievable toll on a women's practice and professional trajectory. It forces women to take a step back and I believe adds to the incredible attrition rates of women in private practice. It is one of the many obstacles women (in particular) face when choosing to stay in private practice.”

These experiences are not unique and have real consequences on an attorney’s professional career (especially women). Another MSBA survey respondent shared her experience when she requested an accommodation for a hearing (to have the matter heard in a different, closer location) due to a concern about traveling late (9 months) in her pregnancy. The request was denied, and she was told “to have someone else at the office cover it.” She stated “I was an associate at the time, and would have loved to have had the opportunity to cover the hearing. However, the partner had to cover it instead and I lost that opportunity.”

⁷ *Id.*

⁸ *Id.*

The American Bar Association passed a resolution at their 2019 midwinter meeting. The resolution reads as follows:

Resolved, that the American Bar Association urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter be granted if:

- a) Consented to by all parties
- b) Or if not consented to by all parties and the movant demonstrates:
 1. the motion is made within a reasonable time after the reason for the Continuance has been discovered;
 2. there is no substantial prejudice to another party;
 3. the criminal defendant's speedy trial rights are not prejudiced; and
 4. the judge finds that the request was not made in bad faith, including for purposes of undue delay.⁹

The rule changes proposed by this working group encompass more than just parental leave. Often attorneys face significant, unplanned adverse life events like a chronic illness or sudden death in the family. Under the proposed rule herein, these would also qualify for the presumptive continuance. This makes the rule even more equitable and accessible to all.

As we learned through the National Task Force on Lawyer Well-Being from 2017, “well-being is an indispensable part of a lawyer’s duty of competence.”¹⁰ That task force has charged bar associations—as major stakeholders in the profession—to “tak[e] small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the

⁹ ABA House of Delegates Resolution 101B (1/29/2019).

¹⁰ “National Task Force on Lawyer Well-Being Report” Aug 2017 <https://lawyerwellbeing.net/>

profession.”¹¹ The proposed rule changes endeavor to accomplish that task. After reading the working group’s proposed rule, one MSBA member commented:

The working group’s proposed rule “acknowledges that lawyers are human beings subject to the same limitations the rest of the world faces – and that the court can, simply by legitimatizing and routinizing continuances, help lawyers become better and healthier practitioners and people.”

RULES ENACTED IN OTHER JURISDICTIONS

In North Carolina, a parental leave rule was enacted in the fall of 2019.¹² The rule allows attorneys to be excused from court appearances for up to 12 weeks after the birth or adoption of a child.¹³

Florida also passed a parental leave continuance rule in January of 2020. Their rule provides for up to three months of parental leave, unless the opposing party can show substantial prejudice. The rule arose from the Florida Bar’s Diversity and Inclusion Committee, as well as a subcommittee of the Florida Bar’s Rules of Judicial Administration. A special committee was appointed by the Florida Bar President. In the Special Committee’s Final Report and Recommendation, they stated “Adopting and expanding policies that promote parental leave would serve as a meaningful step towards closing the gender gap as well as encourage more male attorneys’ participation in paternity leave. When fathers take leave, it increases the opportunity and ability of mothers to engage in paid work, with a positive effect on female labor force participation as well as women’s wages.”¹⁴

¹¹ *Id.*

¹² <https://www.abajournal.com/news/article/new-rules-in-this-state-give-break-from-court-appearances-to-lawyers-who-are-new-parents>

¹³ <https://news.bloomberglaw.com/business-and-practice/north-carolina-lawyers-get-parental-leave-from-litigation>

¹⁴ “The Parental Leave Rule: A Procedural Rule for Effecting Change” Palermo, Anthony *YLD Corporate Counsel Committee* Fall 2017.

THE WORKING GROUP'S PROPOSED RULE

To address the concerns and objectives discussed above, the working group proposes four specific rule changes, one to the Minnesota Rules of General Practice, two to the Rules of Civil Appellate Procedure, and one to the Rules of Civil Procedure. Each of these rule amendments is attached in the **Appendix** and discussed in turn below.

1. Rules of General Practice

The working group considered a variety of current and contemplated rules from Florida, North Carolina, and Texas to create a new, proposed Rule of General Practice 17 intended to facilitate attorneys taking personal leave. Ultimately, the working group did not adopt the approach of any one jurisdiction but, instead, adopted portions of each to create a rule intended to encourage equity, attorney well-being, and the effective administration of justice.

In drafting Proposed Rule 17, the working group first needed to decide placement of the rule. Ultimately, the working group rejected drafting a specialized rule for different case types (civil, criminal, juvenile, family, etc.) in favor of a broad-based rule which would apply to as many practices and practitioners as possible. As a result, the working group chose to craft the rule as one of general practice applicable to all district court proceedings.

In determining the scope of the rule, the working group began with a proposal intended to facilitate parental leave upon the birth or adoption of a child. However, it quickly became clear that presumptive leave only around the arrival of a child was insufficient to foster the goals of equity and well-being already discussed. While the period immediately after a new child arrives is undoubtedly challenging, so too are the care responsibilities that continue well after birth. Likewise, while childbirth undoubtedly creates real personal health concerns, these concerns may arise earlier in pregnancy, or well after a child is born. The working group also recognizes that

health conditions other than pregnancy and childbirth may necessitate a period of leave which should be accounted for in the rules. Finally, the working group recognizes that caring for a child is only one of the forms of caregiving for which an attorney may be responsible. A comprehensive leave rule also needs to account for care responsibilities for parents, spouses, and other dependents, as well as the loss of a family member.

Because of the nature of personal leave, it is impossible to set a hard-and-fast requirement for when a leave request must be submitted. Accordingly, the working group's judgment was that the rule should simply require the application to be made within a "reasonable period of time" where reasonableness should be a fairly lenient standard. It is not the working group's opinion that to secure a period of leave an attorney must make the request immediately upon learning of a pregnancy or illness. Rather, it is anticipated that attorneys will act with reasonable diligence while also respecting that the personal nature of these circumstances may make it undesirable, unreasonable, or impractical to seek a continuance immediately upon learning of the need.

Similarly, the length of a personal leave continuance will vary from case-to-case. However, attorneys are most likely to feel pressured to take less leave rather than more. As a result, rather than prescribing a maximum length of leave (or a minimum) the proposed rule provides for a presumptive continuance of 90 days, though the leave-taking attorney may request a different length based on individual circumstances. In this respect, the proposed rule breaks with counterparts in other states which specify a maximum leave duration, but no minimum or presumptive length. This places undue strain on attorneys to take the shortest possible leave and does not foster the basic goals for which the rule is intended.

In deciding upon the mechanics of how leave will be requested, the working group wanted to facilitate ease and confidentiality for the leave-seeking attorney. Thus, the proposed rule permits

an attorney to secure leave merely by submitting a declaration, which may be a simple form specifying the amount of leave requested and the basis. In crafting these requirements, the working group attempted to avoid requiring attorneys to divulge personal or sensitive information about their lives to secure leave or be subject to undue scrutiny. Attorneys decline to take personal leave out of embarrassment or fear and, thus, the rule is intentionally crafted to respect their privacy to the greatest extent possible. The working group also acknowledges that these requests would be publicly available documents which further supports minimal disclosure of personal information. Accordingly, the working group has attempted to craft an application capable of ensuring Courts have the necessary information to assess the continuance (and thus guard against prejudice or abuse) while respecting attorneys' privacy under sensitive and personal circumstances.

Ideally, personal leave continuances should be routinely granted and rarely objected to. For that reason, the proposed rule provides for the automatic grant of a continuance where it complies with the appropriate requirements and is not excluded. However, the working group also recognizes there will be limited instances in which a personal leave continuance cannot be accommodated because of prejudice to a party or extraordinary circumstances. By design the grounds to challenge a leave continuance are narrow and require more than mere inconvenience or expense. Additionally, the party challenging a personal leave continuance bears the burden of bringing a motion to contest the leave continuance within a relatively short period of time. These provisions are intended to discourage frivolous or tactical attempts to interfere with personal leave during what are necessarily sensitive and difficult times for the leave-taking attorney. In order to promote the expeditious resolution of leave challenges, the Court will provide a ruling on any objection within 21 days of receiving the opposing party's motion.

Relatedly, there are also instances in which a personal leave continuance simply cannot be accommodated because of prejudice to a substantial right in the proceeding. While it would be impractical to delineate every such right, they likely include the defendant's right to a speedy trial, permanency timelines in juvenile court matters, statutory deadlines which cannot be modified by the court, and emergency proceedings. In such instances personal leave would not be available.

Finally, while continuing a hearing or trial may remove one professional hurdle to personal leave, it is not the only one. Attorneys' obligations under discovery orders may make leave impractical or allow an opposing party to impose on a period of personal leave by other means. To protect these leave periods, the proposed rule also provides for an automatic suspension of discovery during a period of personal leave. This suspension not only applies to discovery served on the leave-taking attorney and their client, but discovery served by any party on any person or entity.

In crafting the proposed rule the working group received significant feedback from the bench and bar—much of which has been incorporated into the rule. The work group reviewed all comments, and that feedback was a topic of considerable discussion for the working group. The comments received share some commonality that can be summarized as follows: (1) commenters were appreciative of efforts to promulgate such a rule and echoed the need and positive impact such a rule would have on the legal profession as a whole; (2) commenters provided suggestions for how the rule might be better clarified or improved; (3) commenters expressed concerns that the proposed rule is ripe for abuse and worried attorneys would use it in such a manner; and (4) commenters expressed their view that such a rule is unnecessary because the courts and attorneys in Minnesota have, and will continue to accommodate leave requests.

Many stakeholders who reviewed the proposed rule, praised the initiative and proposed rule and provided personal anecdotes and comments further emphasizing its need. The comments demonstrated the demand for a rule that would support lawyers' well-being during difficult, private (and often unplanned) personal times by reducing unnecessary stress on lawyers in those situations. The comments also point out that the rule would discourage the waste of judicial and client resources, and ensure lawyers are not forced to compromise the quality or zealousness of representation to which their clients are entitled. The rule would also reassure lawyers that might otherwise be reluctant to seek leave out of fear that it would be viewed and reported as professional misconduct.

By way of further example, members of the bar offered the following comments:

- “What a huge relief it will be to have these new rules on the books. No attorney should need to ‘power through’ the death of a loved one, the birth of a child, as I and so many others have done.”
- “I can think of no better way to support solo and small firm lawyers (who are often women and people of color), and to secure their ability to competently represent their clients (who are often women and people of color), than by allowing attorneys time to manage personal and family health events. The rule has the potential to level the playing field between large firms (which have an easier time swapping in another lawyer when one gets sick or needs to act as caregiver) and small ones that can't. Even at bigger firms, the rule promotes better representation by eliminating the need for a different lawyer to swap in and come up to speed (often at cost to the client) when a continuance will solve the problem.”
- “I worried . . . that [a leave request would result] in a report to the Board that I had failed somehow in my duties or in my professional responsibility or such.”
- “I had only given birth days prior and . . . because I was exhausted from having so little sleep, I overslept for the morning hearing and was late.”
- “Even when planning months in advance our profession makes it difficult to have family time during the typical work week.”
- “There simply must be a reprieve so that both parents can assist and bond with their child/children in the critical first few months of life. If new mothers and fathers are not allowed leave, we are not bringing our best selves to work, and not giving 100% for our clients. Thus, the entire system suffers.”

- “I opted not to ask for the continuance as my partners expressed the view that I had been on ‘vacation.’”
- “In retrospect, if the court had clear language allowing a stay of proceedings, I think I would have taken advantage of it.”
- “This proposed rule plays an even more important role for attorneys in rural areas of our state[.]”
- “I did not request additional time to complete matters when my [family member] died, as I did not feel the court would approve my request or, at least, that the court would not look kindly upon the request. . . . I wish I had, because it was a very difficult time for me and it saddens me to think that I prioritized work and others' needs above my own grieving process following the relatively sudden death of my beloved [family member].”
- “An important settlement conference was scheduled during my maternity leave. I was concerned about [the client] missing out on the opportunity to resolve the case in advance of the trial ready date, . . . so I attended.”
- “[During very contentious litigation,] I didn't want to jeopardize my health or the health of my child, . . . [but] if the court had clear language allowing a stay of proceedings, I think I would have taken advantage of it.”
- “I took a call from the hospital [after the birth of a child] I also handled a telephonic discovery hearing for another matter while on leave. I did not even consider asking for leave. I don't think I would have felt comfortable doing so.”

Some commenters called for greater specificity or clarity, which the working group endeavored to provide while still crafting a rule broad enough to cover the variety of individuals and circumstances to whom it might apply. While the proposed rule is an important framework, it cannot anticipate every possible circumstance, and thus a certain amount of discretion must continue to be granted to courts to address each proposed leave on its own terms.

Other commenters questioned the need for a leave rule or raised concerns about its potential for abuse. The working group was unpersuaded by these comments. Significant experience in Minnesota and nationally demonstrates the importance of leave periods as both a matter of gender-equity and attorney well-being. While some attorneys are able to successfully navigate requests

for personal leave on their own; birth, sickness and death impact everyone. There should not be a need to reinvent the proverbial wheel each time an attorney is affected. There is also at least anecdotal evidence indicating that attorneys are more hesitant to request leave and more likely to take shorter leave without the structure of a formal rule.

With respect to potential abuse, the working group is mindful that any rule can be manipulated or abused for improper ends. However, the dangers of manipulation (which the working group contends are small) are far outweighed by the benefits to the profession of recognizing the important goals a leave rule advances. Moreover, the leave-seeking attorney is an officer of the court having not only a significant investment in their professional reputation, but specific ethical and professional responsibilities relative to the practice of law.¹⁵ The stigma surrounding personal leave creates a far greater danger that this rule will be underutilized rather than abused.

A number of commenters expressed the view that this rule is unnecessary because Minnesota courts and attorneys have, and will continue to, accommodate such leave requests. For example, one commenter stated “in my experience, judges and opposing counsel are generally accommodating of such requests. And I certainly always would be.” Another said “[i]n cases that I have had where opposing counsel has a health issue . . . , we have been able to work together and reset deadlines for discovery responses and (if necessary) ask for a modification of the scheduling order.” The working group was likewise unpersuaded by these (and similar) comments.

¹⁵ See, e.g., Minn. R. Prof. Conduct 1.3 (a lawyer “shall act with reasonable diligence and promptness”); Minn. R. Prof. Conduct 3.2 (a lawyer “shall make reasonable efforts to expedite litigation”); Minn. R. Prof. Conduct 3.3 (candor toward the tribunal). Comments to those rules further speak to this: “Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates.” Minn. R. Prof. Conduct 3.2, Comment [1].

The working group recognizes that counsel are frequently able to work together to manage case deadlines in a way that accommodates leave requests when possible, and does not anticipate this rule would disrupt that practice. However, commenters make clear the distinctive need for this rule in those situations where professional/judicial courtesies are lacking, or where the need for leave is urgent or immediate.

Moreover, the need for this rule was exemplified in the comments the working group received from the MSBA survey of its members:

- “I asked for a hearing to be postponed because I had . . . given birth . . . days prior and the request was denied.”
- “I had my opposing counsel inform the judge when [the court] set a trial date months down the road that the first day of trial was her due date. She asked that trial be pushed back . . . to allow her time to give birth and still try the case. I agreed. [The judge] refused and, as you might expect, she went in to labor while preparing at the office days before trial, and it was postponed anyway.”
- “I asked opposing counsel to stipulate to amend the scheduling order to move the trial date out a few months [to accommodate my maternity leave]. The opposing counsel refused, stating that we would need a court order and that counsel needed to protect the client's right to moving the case along quickly. Ultimately, I moved to amend the scheduling order and was forced to provide details of my pregnancy, due date, and leave plans to the Court. The Judge approved my request. The whole ordeal was humiliating, time consuming, and a waste of judicial (and client) resources.”
- “I felt [opposing counsel] would object to a delay, so tried to find a replacement attorney for the case.”
- “[I] asked for a trial continuance when my [family member] was dying, which was denied by the trial judge. . . . Felt like if I took [issue with that] . . . I'd get punished in the future by the trial judge.”
- “[During] scheduling . . . I told the court that I was pregnant and would likely be on maternity leave. Opposing counsel said ‘can't someone else in your office handle it in your absence.’ The Court asked me for my response and I said that I could do it.”
- “The court made it clear that . . . other attorneys at the firm could cover for me while on leave.”

- “Before my child was born I requested short continuances on a couple of cases which would require me to go to hearings and to do a significant amount of work to prepare for the hearings just before and just after my child was born. Opposing counsel objected in both cases. In one case the court granted the continuance. In another, the court denied the continuance, reasoning that I should not have taken on the case if I was unavailable for the hearing.”
- “I work in an office with other attorneys, so the court will likely just tell me to have one of my colleagues cover for me. But we are not fungible and each have knowledge of our own cases.”
- “[I did not seek leave out of] concern that because we are a ‘big firm’ there would be an assumption that someone else . . . could just step in. That didn't acknowledge staffing concerns from a client perspective (limiting billers for cost efficiency).”

2. Rules of Civil Appellate Procedure

Recognizing the distinctions between district and appellate court practice, more modest changes to the appellate rules can be made to provide the necessary framework for personal leave continuances. Specifically, the working group proposes that necessary extensions to briefing deadlines be addressed through the existing framework of Minn. R. Civ. App. P. 126.02, which provides for the extension of briefing deadlines upon motion by a party. Unlike other continuances, however, personal leave continuances based on any of the four qualifying events would be presumptively eligible for a 90-day extension. This provision differs from the more discretionary standard currently provided by the rule for other extensions, which would still remain in effect. These amendments do not impact jurisdictional deadline.

With respect to oral argument, the working group anticipates that counsel may continue to note their unavailability for oral argument prior to arguments being set to account for any anticipated leave periods. However, the working group also recognizes that events may change after oral argument is set which would require a continuance. While such continuances are not normally granted absent compelling circumstances, the rule amendment provides for a

postponement for up to 90 days based on one of the four qualifying events triggering a personal leave period. As with extensions to briefing deadlines, attorneys would obtain a postponement by way of a motion filed with the appellate court.

3. Rules of Civil Procedure

As discussed above, a personal leave continuance under proposed Minn. R. Gen. Prac. 17 would automatically suspend discovery for the duration of the continuance. However, there may be instances in which no continuance under Proposed Rule 17 is required (such as where no trial or court hearing is imminent) but a party still requires the suspension of discovery for a period of personal leave. By way of example, a party may be taking a period of leave following a medical procedure, but a case in which they are involved has no imminent hearings and thus no continuance is required. However, the attorney may nonetheless be unavailable to respond to discovery or participate in depositions, thus necessitating a suspension of discovery. To address these circumstances, the working group recommends an amendment to Minn. R. Civ. P. 26.04.

Under the proposed amendment, any attorney may seek a suspension of discovery for a period of personal leave which would be triggered by the same circumstances as those under which Proposed Rule 17 would permit a continuance. Just as with Proposed Rule 17 the suspension would last up to 90 days unless the leave-taking attorney specified a shorter period in their notice. Unlike a continuance however, the leave-taking attorney would not be required to seek permission from the Court. Instead, the suspension would be triggered simply by service of an appropriate notice on all parties. As with any other discovery dispute, the party objecting to the notice would then be required to seek court intervention if necessary.

As with the continuance rules, most commenters expressed their support for a rule which would facilitate attorney's taking leave in appropriate circumstances. Those few commenters who

raised concerns suggested either that a leave rule was unnecessary or (less commonly) that a leave rule would be abused to delay discovery. With respect to objections based on necessity, it is the working group's hope that attorneys in Minnesota all regularly facilitate their colleagues taking leave when appropriate and extending the same professional courtesy to their opposing counsel. However, experience cautions that while that may often be the case, personal leave is significantly facilitated by formal structure within the rules. A formal rule also discourages others from attempting to leverage an attorney's leave to their own advantage (or allowing their client to do so). With respect to concerns about abuse, the working group is not persuaded that the risks of abuse are substantial. The vast majority of feedback the working group received discussed the continuing stigma leave-taking attorneys face, and the corresponding hesitance attorneys have to take leave.

The working group believes attorneys, as officers of the court, will use periods of leave judiciously, reasonably, and for the purpose for which they were intended. To the extent there are outlier cases in which the rule is being abused, the working group is confident individual judicial officers will be in the best position to address and remedy those abuses.

CONCLUSION

The life of the lawyer must change to foster diversity, inclusion, equity, and overall lawyer well-being. One significant step that can and should be taken is to implement changes to court rules to provide presumptive personal leave. Specifically, the working group recommends proposing four specific rule changes, one to the Minnesota Rules of General Practice, two to the Rules of Civil Appellate Procedure, and one to the Rules of Civil Procedure.

[Proposed New] Minnesota Rule of General Practice 17 – Personal Leave Continuance

- (a) **Generally.** Subject to an exclusion under paragraph (g) or an objection under paragraph (e), a party's timely application for a continuance of a trial, evidentiary hearing, pretrial, or motion hearing is immediately and automatically granted in connection with any of the following by an attorney substantially involved in the party's representation:
- (1) A health condition which makes the attorney temporarily unable to represent the party;
 - (2) The birth or adoption of a child regardless of the gender of the attorney; or
 - (3) The need to care for a spouse, household member, dependent, or family member who has a serious health condition; or
 - (4) The death of a family or household member
- (b) **Time for Making Request.** An application for a personal leave continuance shall be made within a reasonable period of time after the attorney on whose circumstances the request is based learns of the need for a continuance.
- (c) **Presumptive length.** A personal leave continuance shall be for a presumptive length of 90 days absent a showing of good cause that a different time is appropriate.
- (d) **Form of Continuance Application.** A personal leave continuance may be granted without hearing upon application by an attorney for any party. An attorney applying for a personal leave continuance shall file a declaration with the court setting forth the following:
- (1) Affirming the applicant is an attorney substantially involved in the party's representation;
 - (2) That personal leave is required for one of the reasons set forth in paragraph (a)(1) – (4) above;
 - (3) That the application is timely under paragraph (b);
 - (4) The length of the continuance requested, if different from the presumptive length in paragraph (c);
 - (5) That the applicant will remain substantially involved in the party's representation following any personal leave continuance;
 - (6) That the client consents to the continuance; and
 - (7) That the continuance is sought in good faith and not merely for delay.
- (e) **Challenge to Continuance Request.** Upon proof of substantial prejudice or extraordinary circumstances, the court may deny or modify the application for a personal leave continuance. A party challenging an application for a personal leave continuance shall

bear the burden of demonstrating substantial prejudice or extraordinary circumstances which should preclude or limit the continuance. A challenge to a personal leave continuance shall be brought by motion within 14 days and shall be subject to the meet and confer requirement. The applicant shall be permitted a reply within 7 days of the service of objection. The court shall rule on the objection within 21 days of filing of the objection.

- (f) **Effect on Discovery.** Unless otherwise ordered by the court for good cause shown, all discovery, shall be suspended for the duration of any personal leave continuance, and deadlines for discovery served during any period of personal leave shall not begin to run until the conclusion of the leave period.
- (g) **Exclusions.** The court shall not grant an application for a personal leave continuance if it would impact a substantial right in the proceeding, and alternative arrangements can be made to ensure the party is represented in the attorney's absence.
- (h) **Settlement Efforts.** Although the parties are not required to comply with Minn. R. Gen. Prac. 115.10 prior to filing, this rule is not meant to preclude or discourage the parties from agreeing to a continuance or alternative arrangement. If an agreement is reached, the parties must file the agreement as a stipulation with reference to this rule.

[Proposed Amendments to] Minnesota Rule of Appellate Procedure 126.02 - Extension or Limitation of Time

- (a) The appellate court for good cause shown may by order extend or limit the time prescribed by these rules or by its order for doing any act, and may permit an act to be done after the expiration of that time if the failure to act was excusable under the circumstances.
- (b) The appellate court shall extend the deadline for filing a party's brief for a period of up to 90 days based on the any of the following circumstances impacting a party's attorney during the pendency of an appeal:
 - 1. A health condition which makes the attorney temporarily unable to represent the party;
 - 2. The birth or adoption of a child regardless of the gender of the attorney;
 - 3. The need to care for a spouse, household member, dependent, or family member who has a serious health condition; or
 - 4. The death of a family or household member.
- (c) The appellate court may not extend or limit the time for filing the notice of appeal or the time prescribed by law for securing review of a decision or an order of a court or an administrative agency, board, commission or officer, except as specifically authorized by law.

[Proposed Amendments to] Minnesota Rule of Appellate Procedure 134.02 - Notice of Hearing; Postponement

When filing the party's initial brief, counsel must provide written notice of any conflicts which limit counsel's availability for argument. Counsel are required to file written notice of updated conflict information as soon as that information is reasonably available to counsel and until the case is scheduled for argument. The clerk of the appellate courts shall notify all parties of the time and place of oral argument. A request for postponement of the hearing must be made by motion filed immediately upon receipt of the notice of the date of hearing, with the motion identifying the specific circumstances that support the requested postponement. A postponement shall be granted for a presumptive period of up to 90 days if the request is based on any of the following circumstances impacting a party's attorney:

1. A health condition which makes the attorney temporarily unable to represent the party;
2. The birth or adoption of a child regardless of the gender of the attorney;
3. The need to care for a spouse, household member, dependent, or family member who has a serious health condition; or
4. The death of a family or household member.

[Proposed Amendments to] Minnesota Rule of Civil Procedure 26.04 - Timing and Sequence of Discovery

(d) Suspension of Discovery for Personal Leave.

- (1) **In General.** Unless otherwise limited by order of the court, discovery shall be suspended during a period of personal leave designated by a party's attorney. During such suspension, neither party may seek discovery from any source, and deadlines for discovery served during any period of personal leave shall not begin to run until the conclusion of the leave period
- (2) **Triggering Events.** A period of personal leave shall be allowed following any of the following events impacting a party's attorney:
 - A. A health condition which makes the attorney temporarily unable to represent the party;
 - B. The birth or adoption of a child regardless of the gender of the attorney;
 - C. The need to care for a spouse, household member, dependent, or family member who has a serious health condition; or
 - D. The death of a family or household member.
- (3) **Length.** Unless otherwise agreed by the parties or ordered by the court for good cause shown, a period of personal leave shall extend for 90 days after any event in Rule 26.04(2)(A)-(C) unless a shorter time period is designated by the attorney.

(4) **How Designated.** A period of personal leave shall be designated by serving notice on all parties within a reasonable period of time after the attorney learns of the circumstances necessitating the leave. The notice shall include the date upon which the personal leave shall begin, a brief statement explaining the basis of the personal leave, and the length of leave designated if less than 90 days.

(5) **Disputes.** Upon motion by a party demonstrating substantial prejudice or extraordinary circumstances, the court may modify or deny a period of personal leave.

(d)(e) Expedited Litigation Track.

Expedited timing and modified content of certain disclosure and discovery obligations may be required by order of the supreme court adopting special rules for the pilot expedited civil litigation track.

STATE OF MINNESOTA
COUNTY OF [COUNTY]

DISTRICT COURT
[DISTRICT] JUDICIAL DISTRICT
[FAMILY COURT DIVISION]
CASE TYPE: [Case Type]

[Judicial Officer: [Judge or Referee Name]]

[PETITIONER NAME],

Petitioner,

and

[RESPONDENT NAME],

Respondent.

**DECLARATION IN SUPPORT OF REQUEST
FOR A PERSONAL LEAVE CONTINUANCE**

Court File No. [...]

STATE OF MINNESOTA
COUNTY OF [COUNTY NAME]

1. I am [identification of declarant].
2. I submit this declaration in support of and to request a continuance pursuant to Minnesota Rule of General Practice 17.
3. I am an attorney substantially involved in the above-entitled matter; I represent [identification of party].
4. Personal leave is required due to one of the following: a health condition that makes me temporarily unable to represent the party; the birth or adoption of a child; the need to care for a spouse, household member, dependent, or family member who has a serious health condition; or the death of a family or household member.
5. This declaration is within a reasonable period of time after I learned of the need for a continuance.
6. I request a continuance for:
 - the presumptive length of 90 days.
 - [number of] days.
7. I will remain substantially involved in [identification of party]'s representation following this continuance.

8. I have consulted with my client consistent with Minnesota Rule of Professional Conduct 1.4, and my client consents to the continuance.

9. This continuance is sought in good faith and not merely for delay.

[FIRM NAME]

Dated: _____

[Attorney Name]
MN# [Attorney ID]
[Attorney Address]
Telephone: [Attorney Telephone]
Facsimile: [Attorney Facsimile]

ATTORNEY FOR [PARTY TITLE]

STATE OF MINNESOTA
COUNTY OF [COUNTY]

DISTRICT COURT
[DISTRICT] JUDICIAL DISTRICT
CASE TYPE: MISCELLANEOUS

Court File No. [Court File No.]
Assigned Judge: [Judge Name]

[PLAINTIFF NAME],
Plaintiff,

vs.

[DEFENDANT NAME],
Defendant

**NOTICE OF SUSPENSION OF
DISCOVERY**

TO: [OPPOSING PARTY OR COUNSEL AND ADDRESS]

NOTICE OF SUSPENSION OF DISCOVERY

PLEASE TAKE NOTICE that, [name of Attorney] is providing notice of suspension of discovery in the above-captioned case, pursuant to Minnesota Rule of Civil Procedure 26.04(d). During this suspension, neither party may seek discovery from any source, and deadlines for discovery served during any period of personal leave shall not begin to run until the conclusion of the leave period.

The suspension of discovery shall begin on [date] for [the presumptive length of 90 days] [*number of days*].

The Declaration in Support of Request for a Personal Leave Continuance is attached to this Notice.

[FIRM NAME]

Dated: _____

[Attorney Name]
MN# [Attorney ID]
[Attorney Address]

Telephone: [Attorney Telephone]
Facsimile: [Attorney Facsimile]

ATTORNEY FOR [PARTY TITLE]