Hearsay

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Greetings From The Chair

By: S. Jamal Faleel

Welcome. As many of you already know, the New Lawyers Section provides a great way to meet and network with attorneys, educate the community about our profession, and provide valuable services to the communities where we live and work. Although I realize that the demands of our work and personal lives leave us with very little time to spare, staying connected with our peers and the community around us can be an invaluable tool as we move forward in our careers. Therefore, I urge each of you to participate in the New Lawyers Section this year, by attending our monthly meetings, volunteering, serving on a committee, assisting with a community service project, or attending one of the free CLEs offered by the Section. You can visit the Section's website to stay apprised of upcoming programs, projects, and events. As always, the Section wishes to provide its members with services that are relevant to their professional needs. To this end, please contact me, or any of the other officers of the Section if you have any ideas for programming, CLEs, or with any other questions or comments. Our meetings are held every third Thursday of the month at 5:30 p.m. at the MSBA offices in Minneapolis. Our first meeting will be held on September 21, 2006. Hope to see you all there!

Jamal Faleel is the chair of the MSBA New Lawyers Section. He can be reached at JFaleel@fredlaw.com.

Eighth Circuit Nixes Emotional Distress Damages Under the FMLA

By: Kelly A. Moffitt

Introduction

The FMLA. Known for its dense text and copious date calculation requirements, some new lawyers understandably cringe when FMLA issues cross their desks. However, this year the Eighth Circuit Court of Appeals simplified one aspect of the FMLA by holding that emotional distress damages are not recoverable under the Act. That holding will not only reduce the number of FMLA-related calculations, but could also alter the way Eighth Circuit practitioners approach FMLA cases.

FMLA Basics

Congress passed the Family and Medical Leave Act ("FMLA")[1] in 1993 in furtherance of two stated and related goals: (1) to balance workplace demands with family needs; and (2) to allow employees to take reasonable medical leave.[2] Under the FMLA, a qualified employee may take up to 12 weeks of unpaid leave in any 12-month period due to his or her own serious health condition, the serious health condition of a family member, or the birth or adoption of a child.[3] Upon returning from leave, the employee is entitled to return to his or her previous position or to an equivalent position with the same pay, benefits, terms, and conditions.[4]

Both employers and employees often find the FMLA and its counterpart federal regulations[5] complicated and difficult to navigate. But, the stakes are high. If an employer fails to comply with the Act or interferes with an employee's exercise of rights under the Act, the employer may face civil liability.[6] Specifically, the FMLA provides for monetary damages plus interest.[7] Such monetary damages include lost wages and benefits, as well as other actual monetary losses caused by the violation such as the cost of providing care.[8] In addition, the court may award the employee liquidated damages in an amount equal to the monetary damages, thus potentially doubling the total award.[9] The FMLA also provides for equitable relief, including employment, reinstatement, and promotion.[10] And, courts may award a prevailing plaintiff costs and attorney's fees.[11]

Until recently, Eighth Circuit practitioners litigating within this framework were left contemplating an important question – are emotional distress damages also available under the FMLA? The Eighth Circuit Court of Appeals definitively answered that question in January of 2006 with an unequivocal "no."

Rodgers v. City of Des Moines

In *Rodgers v. City of Des Moines*,[12] the Eighth Circuit held that emotional distress damages are not available under the FMLA.[13] The plaintiff in that case, Barbara Rodgers,

worked for the Des Moines fire department as an administrative analyst.[14] She suffered from fibromyalgia, diabetes, hypertension, and hypothyroidism.[15] In 2000, Ms. Rodgers began taking intermittent FMLA leave due to her medical conditions, and in 2001 she was absent for part or all of 115 of the year's 249 work days.[16] At the beginning of 2002, her supervisor warned her "to take whatever steps are necessary to demonstrate significant and sustained improvement in attendance."[17] Nine days later, Ms. Rodgers applied for future FMLA leave to address periodic follow-up medical treatment.[18] The City denied her request for vagueness, because it did not specify the period of anticipated leave.[19] After Ms. Rodgers submitted numerous other requests, the City eventually granted her request for FMLA leave.[20]

Several months later, in response to a reduction in force, the City transferred Ms. Rodgers to a new position with the same pay and benefits.[21] Thereafter, she sued the City under – among other statutes – the FMLA. Although the City never denied Ms. Rodgers any medical-related time off, she claimed that the City made her "feel [she] should not have taken that time off."[22]

The district court granted the City's motion for summary judgment. Ms. Rodgers appealed that decision only as to her FMLA claim, arguing, in part, that the court erred in holding that emotional distress damages are not recoverable under the FMLA.[23] On appeal, Ms. Rodgers relied on the Eighth Circuit's holding in *Duty v. Norton-Alcoa Proppants*,[24] which affirmed an award of compensatory damages under the FMLA including "mental anguish, loss of dignity, and other intangible injuries."[25]

Not persuaded, the Eighth Circuit stated that "the reference to emotional distress damages in *Duty* is probably mistaken and not sound law"[26] considering the 2003 United States Supreme Court decision in *Nevada Department of Human Resources v. Hibbs*.[27] In *Hibbs*, the Supreme Court held that damages available under the FMLA "are strictly defined and measured by actual monetary losses."[28] The Eighth Circuit also noted that its "sister circuits" that have addressed this issue, including the Fourth, Fifth, Tenth, and Eleventh Circuits, all decided that the FMLA does not provide for emotional distress damages.[29] Because the FMLA and its corresponding federal regulations do not expressly include emotional distress damages, and because the Act only provides for recovery of actual monetary damages, the Eighth Circuit concluded that "emotional distress damages are not available under the FMLA."[30]

The Impact of *Rodgers*

Undoubtedly, the *Rodgers* decision will impact FMLA litigation within the Eighth Circuit. Plaintiffs will no longer be allowed to seek emotional distress damages under the Act.[31] Employers will breathe a sigh of relief because their exposure in FMLA cases will be limited to relatively quantifiable figures, with no chance of the emotional distress "x-factor" giving way to unforeseen jury verdicts. These more clearly-defined available damages may even lead to earlier settlement discussions in some cases. And, litigation costs may decrease for both sides, as there will likely be no need for emotional distress experts in pure FMLA cases.

Although many commentators view the *Rodgers* decision as a significant victory for employers, others caution that the victory will be short-lived, as plaintiffs' attorneys begin "crafting . . . hybrid suits combining FMLA claims with other claims in which emotional distress damages and punitive damages are available."[32] In the end, only one thing is certain – this new decision will change the way both plaintiffs' and defense counsel approach and litigate FMLA cases.

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Notes

1 29 U.S.C.A. §§ 2601 *et seq*. For an overview of the FMLA, *see* 1 Gary Phelan and Janet Bond Arterton, *Overview of FMLA*, Disability Discrim. Workplace § 17:2 (2006).
2 29 U.S.C.A. § 2601(b)(1)-(2).
3 29 U.S.C.A. § 2612(a). 29 U.S.C.A. § 2611(2) defines "eligible employee."
4 29 U.S.C.A. § 2614(a). This provision does not apply to certain high-level employees under certain circumstances. *See* 29 U.S.C.A. § 2614(b).
5 29 C.F.R. §§ 825.100 *et seq*.
6 29 U.S.C.A. § 2615; *see generally* Deborah F. Buckman, *Award of Damages Under Family and Medical Leave Act*, 176 A.L.R. Fed. 591 (2002).
7 29 U.S.C.A. § 2617(a)(1)(A).
8 *Id*. The FMLA does not provide for punitive damages.
9 29 U.S.C.A. § 2617(a)(1)(A)(iii).
10 29 U.S.C.A. § 2617(a)(1)(B).
11 29 U.S.C.A. § 2617(a)(3).
12 435 F.3d 904 (8th Cir. 2006).
13 *Id*. at 909.
14 *Id*. at 905.
15 *Id*.
16 *Id*. at 905-06.
17 *Id*. at 906.
18 *Rodgers*, 435 F.3d at 906.
19 *Id*.
20 *Id*. at 906-07.
21 *Id*. at 907.
22 *Id*.

[23] *Id.*
[24] 293 F.3d 481, 496 (8th Cir. 2002).
[25] *Rodgers*, 435 F.3d at 908.
[26] *Id.*
[27] 538 U.S. 721, 739-40 (2003).
[28] *Rodgers*, 435 F.3d at 909 (citation omitted).
[29] *Id.*
[30] *Id.*; *see also* Maria Greco Danaher, *FMLA Specifically Delineates Damages Available to Aggrieved Employee*, 8 No. 5 Lawyers J. 3 (2006) (discussing *Rodgers* and stating "the city's administration of the Act was a textbook model that supported a dismissal of Rodgers' claim for damages.").
[31] *See Canterbury v. Federal-Mogul Ignition Co.*, 418 F. Supp. 2d 1112, 1119 (S.D. Iowa 2006) (citing *Rodgers* and stating "the Eighth Circuit Court of Appeals has squarely held that emotional distress damages are not recoverable under the FMLA.").
[32] Robin R. Cockey, *The Family Medical Leave Act: What You See and What You Get*, 12 Am. U.J. Gender Soc. Pol'y & L. 1, 2 (2004).

The Basics of Title VII Employment Retaliation Claims and the Impact of *Burlington Northern and Santa Fe Railway Co. v. White*

By: Jessica J. Clay

In the Equal Employment Opportunity Commission's (EEOC's) fiscal year 2005, retaliation charges of discrimination accounted for almost 30% of all the charges filed, exceeded only by charges of race and sex discrimination.[1] EEOC charges of retaliation have steadily increased for the past ten years, and are up almost 2.5% in the past five years.[2] Charges of retaliation under Title VII account for the majority of retaliation charges filed with the EEOC; 25.8% of all charges filed and 87.4% of retaliation charges generally.[3]

Recently, the Supreme Court expanded the protections for employees who complain about harassment or discrimination under Title VII.[4] The Court broadened and clarified the definition of what constitutes an adverse action under Title VII. While in recent years the Supreme Court has often narrowed the protections for employees, this enlargement of the law under Title VII will likely lead to an increase in causes of action for retaliation.

As with causes of action for discrimination under Title VII, if a plaintiff lacks direct evidence of retaliation, courts follow the three-part burden shifting analysis of *McDonnell Douglas* to resolve retaliation cases.[5] Under this framework, a plaintiff must first establish a prima facie case, after which the burden shifts to the defendant to produce a legitimate, non-retaliatory reason for the adverse employment action. Finally, the burden returns to the plaintiff who must prove the employer's reason for the adverse action is pretextual in nature.[6]

In order to establish a prima facie case of retaliation under Title VII, a plaintiff must show: (1) the employee engaged in conduct protected by Title VII; (2) an adverse employment action; and (3) a causal connection between the two.[7] There are three types of conduct protected by Title VII. An employee can satisfy the first element of the prima facie case if he or she has: (1) opposed discrimination or any practice made unlawful by Title VII; (2) brought a charge of discrimination against his or her employer; or (3) testified, assisted, or participated in an investigation, proceeding, or hearing under Title VII.[8] Thus, if an employee reports harassment to his or her employer's human resources department, files a charge of discrimination with the EEOC, or provides information for an EEOC investigation of a charge of discrimination, the employee has engaged in conduct protected by Title VII. If an employee brings a cause of action for discrimination or harassment as well as retaliation, the employee does not need to succeed on the underlying discrimination or harassment claim in order to be successful on the retaliation claim.[9] Essentially, a court will analyze the retaliation claim separately from the discrimination claim.

Once the employee has established that he or she engaged in protected activity under Title VII, the employee must then establish that he or she suffered an adverse action by the employer. In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court made clear that the anti-retaliation provisions of Title VII protect an employee from any retaliation "that produces injury or harm."[10] Prior to *Burlington Northern*, the various circuit courts used differing language to describe whether the challenged action had to rise to a certain level or seriousness of harm to

be considered an adverse action under Title VII and differed as to whether the action had to be employment-related. The Eighth Circuit had defined an adverse action as an action that results in "a material employment disadvantage" that reflects a "tangible change in duties or working conditions."[11] Under that standard, it was clear that a termination constituted an adverse action, but it was unclear whether changes to an employee's duties or a transfer to another position were adverse actions.[12]

In *Burlington Northern*, the Court rejected the proposition that a retaliatory adverse action was limited to actions that would tangibly alter employment status.[13] The Court contrasted the language of the substantive provision of Title VII, which specifically prohibits discrimination that would "adversely affect his status as an employee," with the language of the retaliation provision of Title VII, which does not contain words limiting the retaliation to employment-related actions.[14] Noting that an "employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace," the court rejected a definition of adverse action for Title VII retaliation cases that would limit the law to only "workplace-related or employment-related retaliatory acts and harm."[15]

The Court in *Burlington Northern* also considered the level of harm to which an action must rise to be considered an adverse action. The Court adopted the objective standard utilized by the Seventh and District of Colombia Circuits. The Court held that to establish the adverse action prong of a prima facie retaliation case, the plaintiff must show that "a reasonable employee would have found the challenged action materially adverse . . . [and the action] might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."[16] The Court emphasized that the context of the action was essential, stating that "the significance of any given act of retaliation will often depend on the particular circumstances. Context matters."[17] For example, the court noted that a schedule change may not make a large difference to most employees, but might matter enormously to a young mother with school-aged children.[18] Similarly, a supervisor's refusal to invite an employee to lunch might normally be trivial, but excluding an employee from a weekly training lunch that contributes to the employee's professional development might deter an employee from complaining about discrimination.[19] Under this definition, an employer will no longer be able to rely on broad standards to assert that an action is not adverse and instead, courts will have to look at the individualized context of the occurrence at issue to determine if the employee can satisfy the prima facie case.

The final prong of the employee's prima facie case of Title VII retaliation is to establish a causal connection between the employee's protected conduct and the adverse action. A causal connection can be established through either direct or circumstantial evidence of retaliatory animus.[20] A causal connection may be indirectly established "by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity, and the adverse employment action follows closely in time."[21] A court may draw an inference of a causal connection between a charge of discrimination and an adverse action based on the temporal proximity of the two events, however, courts generally require more.[22] Obviously, the closer the timing between the two events, the easier it will be for the employee to establish a causal connection for the prima facie case.[23] An employee may satisfy the causal connection with other evidence of retaliatory animus, such as evidence that the employer called the employee a "complainer," or evidence that the decision-maker was angry or upset at the employee's complaint of discrimination.[24] An employer can defeat the causal connection element by establishing that the decision-maker was unaware of the employee's protected conduct under Title VII at the time of the adverse action.[25]

Once the employee satisfies the prima facie case, the burden then shifts to the employer to articulate a legitimate non-retaliatory reason for the adverse action.[26] If the employer meets that burden, the presumption of retaliation raised by the employee's prima facie case disappears.[27] The burden shifts back to the employee to demonstrate that the employer's alleged legitimate reason for the adverse action is pretexual. An employee may prove the employer's proffered reason for the adverse action was pretext for discrimination either directly, by demonstrating that a retaliatory motive more than likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence.[28] Even if the employer proffers a legitimate reason for the adverse action against the employee, the employee can prevail if a retaliatory reason more likely than not motivated the employer's decision.[29]

Because the Supreme Court broadened the types of acts that will constitute retaliation under Title VII in *Burlington Northern*, it will be easier for a plaintiff to prove retaliation. Many commentaries on the case have concluded that the new decision is an "employee-friendly" standard and it will likely increase the growing number of retaliation claims arising in the workplace. Plaintiffs' lawyers will have more tools to address illegal retaliation, and will find it easier to survive summary judgment and get their case before a jury. As a result of this decision, em-

ployers should be careful to review their non-retaliation policies to ensure they address the expanded definition of adverse action.

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Notes

[1] Equal Employment Opportunity Charge Statistics FY 1992 through FY 2005, available at http://www.eeoc.gov/stats/charges.html.
[2] *Id.*
[3] *Id.*
[4] See *Burlington Northern & Santa Fe Ry. Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405 (2006).
[5] *Eliserio v. United Steelworkers of Am. Local 310*, 398 F.3d 1071, 1078 (8th Cir. 2005) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)); *Turner v. Gonzales*, 421 F.3d 688, 695 (8th Cir. 2005); *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 830 (8th Cir. 2002).
[6] *McDonnell Douglas*, 411 U.S. at 792.
[7] *Id.*
[8] 42 U.S.C. § 2000e-3(a) (2005).
[9] *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999).
[10] *Burlington Northern*, 126 S. Ct. at 2414.
[11] *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1079 (8th Cir. 2006).
[12] See, e.g., *Saulsberry v. St. Mary's Univ. of Minn.*, 318 F.3d 862, 868 (8th Cir.2003) (determining the employee suffered no adverse action when his supervisor changed his hours and job duties); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 n.2 (8th Cir. 1997) (noting that an employer, "can not insulate itself from liability for discrimination merely by offering a transfer at the same salary and benefits."); *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (8th Cir. 1997) (holding a transfer to a higher paying position can nevertheless be considered a retaliatory adverse action if the position includes a reduction in responsibility and fewer opportunities for advancement or salary increases); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997) (finding transfer to a position in another city not actionable because the transfer did not change the employee's salary or benefits).
[13] *Burlington Northern*, 126 S. Ct. at 2414.
[14] *Id.* at 2411-12 (citing 42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e-3(a)).
[15] *Id.* at 2412, 2414 (citing *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006) (retaliation against FBI agent in the form of the FBI's refusal to investigate death threats made against the agent)); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984 (10th Cir. 1996) (finding actionable retaliation where employer filed false criminal charges against employee)).
[16] *Burlington Northern*, 126 S. Ct. at 2415.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Cram v. Lamson & Sessions Co.,* 49 F.3d 466, 471 (8th Cir. 1995).
[21] *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 859 (8th Cir. 1998).
[22] *Peterson v. Scott County,* 406 F.3d 515, 524 (8th Cir. 2005) cited in *Wallace v. DTG Operations, Inc.,* 442 F.3d 1112, 1119-20 (8th Cir. 2006).
[23] See *Peterson,* 406 F.3d at 524 (concluding two weeks can establish prima facie case); *Turner v. Gonzales*, 421 F.3d 688, 697 (8th Cir. 2005) (finding unscheduled adverse performance review five days after protected conduct created causal connection); *Bainbridge v. Loffredo Gardens, Inc.*, 378 F.3d 756, 761 (8th Cir. 2004) (noting employee established causal connection when terminated six days after protected conduct). Cf. *Pope v. ESA Servs., Inc.,* 406 F.3d 1001, 1011 (8th Cir. 2005) (finding four month time period between protected activity and adverse action insufficient for prima facie case); *Kipp v. Missouri Highway & Transp. Comm'n,* 280 F.3d 893, 897 (8th Cir. 2002) (holding two month time-gap "diluted" inference of causal connection).
[24] *E.E.O.C. v. Kohler Co.*, 335 F.3d 766 (8th Cir. 2003); *Thompson v. Campbell*, 845 F. Supp. 665, 675 (D. Minn. 1994).
[25] *Marzec v. Marsh*, 990 F.2d 393, 397 (8th Cir. 1993).
[26] *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1028 (8th Cir. 2004).
[27] *Jackson v. Delta Special Sch. Dist. No. 2*, 86 F.3d 1489, 1494 (8th Cir. 1996).
[28] *Id.*
[29] *Crossley v. Georgia-Pacific Corp.*, 355 F.3d 1112, 1113 (8th Cir. 2004)

The Criminal Defense Trilemma

By: Kevin G. Waddick

Problem: How should an attorney deal with a defendant charged with a crime who has admitted having committed the act with which he or she is charged, but still insists upon taking the stand to deny committing the crime during a bench trial in which the judge is the trier of fact?[1]

This scenario is fraught with legal, ethical and practical considerations based upon what Monroe H. Freedman encapsulated as the "trilemma" facing a conscientious attorney.[2] The lawyer is expected to get all the pertinent facts in order to formulate the most effective defense strategy, and assure the client these facts will be kept confidential, while simultaneously having a duty not to mislead the tribunal regarding the facts and to disclose otherwise confidential information if it is contrary to what the lawyer *knows* to be true and is asserted on the stand by his client or a supporting witness. While the first two elements of the trilemma are commonly known, candor toward the tribunal is largely unknown to the general populace. Because of this ignorance, conflicts can arise between attorney and client when the client has revealed to the attorney criminal acts committed based on the expectation of a "zealous advocate" who the client believes would not only be duty-bound to keep such information confidential, but also to assist a defendant in presenting contrary information to the trier of fact, in this situation by allowing the defendant to attempt to convince the judge using false but exculpatory information. The ABA rules[3] relating to the problem presented are both numerous and complex; however, it is unfortunately necessary to assume the reader's understanding of them to limit this article to a reasonable length.[4]

From the lawyer's standpoint, the most desirable solution is to convince the client not to take the stand. The defendant has a constitutional right to take the stand in his own defense and the ABA Model Rules of Professional Conduct[5] as applied in Minnesota leave the ultimate decision whether to do so up to him. A Supreme Court decision[6] makes it clear that the lawyer is entitled to explain the lawyer's duty not to assist in presenting false evidence. The lawyer can threaten to withdraw from the case or to disclose to the tribunal the falsity of the testimony, should the defendant actually present it, without violating the defendant's 6th Amendment right to counsel. The lawyer would hope that making his duties of candor to the tribunal clear to the client would convince him that it would be in his best interest not to take the stand. Mentioning the potential of being prosecuted for perjury may also convince the client. A practical problem with this strategy is that the client may feel betrayed by his attorney and thereafter be uncooperative and uncommunicative. Furthermore, the defendant may choose to testify anyway.

The client may insist on giving perjured testimony despite the lawyer's best effort to dissuade, perhaps confident in his or her ability to persuade the court combined with disbelief that the lawyer would actually disclose, which Freedman in essence says that less than 5% of lawyers in the District of Columbia would do.[7] The lawyer has several options that would prevent assisting in presentation of testimony known to be false while also avoiding disclosure of confidential information to the tribunal.

The lawyer could try to remove himself from the situation by withdrawing from representing the client. This would require the lawyer to approach a judge in the jurisdiction in which the case is to be tried – preferably not the judge who will actually decide the defendant's case based on the evidence – and request removal based on irreconcilable differences with the client. Although the judge may request further information to support such a decision, ABA Rule 1.6 would preclude the lawyer from providing it in this situation.[8] Based on this, a judge should have a general understanding of the problem and may allow the lawyer to withdraw. However, a number of circumstances might make this impracticable, for instance, if the lawyer is a public defender. If the lawyer is not allowed to withdraw, he or she must continue representing the defendant as effectively as possible.

If the lawyer *were* allowed to withdraw, the client would likely learn a lesson and not reveal his guilt to his next attorney so that representation would not become limited by this knowledge. The first lawyer could describe to the second one the general problem that caused the succession in representation, the goal being to prevent its recurrence. Although not a rules violation, an ethical issue underlying this maneuver is that the first lawyer is facilitating the client's desire to present perjured testimony supposedly unknown to the second lawyer.

Assuming the lawyer did not cease representing the client, a way to allow the defendant to tell fabricated testimony without violating the rules is to get permission from the court allowing the defendant to present his story as a "narrative." Not being an active proponent of such false testimony does not require the lawyer to be a passive listener. The lawyer can participate by keeping the client's narra-

tive focused on the charge that is being refuted. In Minnesota, the rules do not require the lawyer to contradict false testimony given in this manner.

An alternative means of allowing the defendant to testify would be through an agreement made prior to trial making the defendant understand that questions from his lawyer would be limited to topics evoking truthful responses and avoiding areas in which the client intends to testify falsely. The client's lies would be limited to responses to cross-examination by the prosecution. Although this would technically be a violation of candor to the tribunal, it would probably be allowed in Minnesota for the same reasons narrative testimony is.

There are several practical problems with the means just described for allowing the defendant to offer perjured testimony. Foremost is that the judge and the prosecution would recognize such tactics as a way for the defense lawyer to dissociate himself from upcoming lies by the defendant. This would sabotage any foreseeable likelihood of a "not guilty" verdict by the judge, assuming no overriding weaknesses in the prosecution's case. In addition, this can be a dangerous strategy because the prosecution almost always finds inconsistencies in fabricated stories that undermine the defendant's credibility. Additionally, any false statements made by the defendant could not be used in the defense attorney's closing argument and their absence would be conspicuous to the judge as trier of fact.

Obviously, obeying a defendant's demand to take the stand in order to commit perjury is almost certain to result in a guilty verdict if the lawyer otherwise attempts to obey the rules. As previously stated, the path that most strictly adheres to the rules, is least ethically troubling, and can most effectively work toward the client's desired ends, is to convince the defendant not to take the stand. Paradoxically, the difficulty with the defendant taking the stand could have been avoided if the defendant had not been completely honest with his or her lawyer.

Paul G. Haskell[9] presents one solution to this Gordian knot by stating the purpose of confidentiality is to help the lawyer achieve what the law entitles the client. A criminal defendant has the right to testify in his or her own defense; however, if the lawyer knows such testimony will be false, the lawyer must inform the court despite acquiring the knowledge confidentially. This disclosure would be consistent with the purpose of confidentiality because presenting perjurious testimony is contrary to the objective of providing the defendant the end allowed by law. Thus, the lawyer should disclose such information to the court, as the current rules require.

The promise of confidentiality encourages the defendant to reveal everything so that the lawyer may represent him adequately. If the defendant reveals his guilt, however, the lawyer cannot present favorable testimony from any witness that contradicts that admission. Learning of guilt prevents the lawyer from presenting the "best possible case" because the lawyer is precluded from presenting evidence/testimony establishing the defendant's innocence and is required to contradict false testimony. Haskell says that this is proper from one point of view; the client is only entitled to what the law allows, which in this circumstance would be an attempt to undermine the required elements of the prosecution's case.[10]

While this stance is laudatory from the justice system's viewpoint, the defendant is effectively penalized for confiding in his lawyer, so from his viewpoint, being dishonest may be preferable. Some lawyers employ tactics precluding probing too deeply so as not to impede the strength of their case presentation. Both of these means of circumventing defense strategy limitations imposed by admission of guilt, and the possible requirement for disclosure, severely restrict the attorney's knowledge base and greatly hinder preparation for prosecutorial evidence, testimony and strategies. Some commentators maintain that disclosure is incompatible with the purpose of confidentiality and that a lawyer should be permitted to present evidence/testimony favorable to the case known to be false *via* confidential information, especially in a criminal case.

Even moral philosophers skeptical of the role-morality justification for lawyer behavior make an exception for those representing a criminal defendant known to be guilty. For example, Richard Wasserstrom stated:[11]

> [A]moral behavior of the *criminal* defense lawyer is justifiable . . . [b]ecause a deprivation of liberty is so serious, . . . the prosecutorial resources of the state are so vast, and because . . . of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the . . . defense counsel . . . making the best possible case for the accused – without regard . . . for the merits.

David Luban[12] justifies the best possible criminal defense in all circumstances:

> [C]riminal defense is a very special case in which the zealous advocate serves atypical social goals. . . . The goal . . . in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us. . . . The argument . . . does not claim that the adversary system is the best way of obtaining justice. It claims just the opposite, that it is the best way of impeding justice in the

name of more fundamental political ends, namely keeping the government's hands off people. . . . [C]riminal defense is an exceptional part of the legal system, one that aims at protection rather than justice.

Following Luban's logic, because the criminal justice system is inherently unfair, keeping a defendant's admission of guilt confidential, and presenting the best possible defense as if it never happened, is always right and moral.

As described by Haskell,[13] the criminal defendant has the constitutional right to refuse to testify because human dignity takes precedence over the pursuit of truth. If the criminal defendant's confession to his lawyer could be disclosed, this privilege would be undermined. Because of the stigma of criminal conviction and possible imprisonment, extraordinary protections are conferred by the legal system to criminal defendants based on the moral tenet that it is better that a guilty person be acquitted than for an innocent person to be convicted. According to Haskell, conventional restrictions should not be applied when they conflict with such a fundamental moral principle. Consequently, when a person is facing criminal conviction and possible imprisonment, any disclosure of confidential incriminating evidence by the representing lawyer can be seen as a betrayal that is possibly even immoral.

Quoting Freedman:[14]

> [I]n my opinion, the attorney's obligation . . . would be to advise the client that the proposed testimony is unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the [judge] if the client makes the decision to go forward. Any other course would be a betrayal of the assurances of confidentiality given by the attorney to induce the client to reveal everything, however damaging it might appear.
>
> * * *
>
> I continue to stand with those lawyers who hold that the lawyer's obligation of confidentiality does not permit him to disclose the facts he has learned from his client [when the client] intends to perjure himself. . . . [T]he criminal defense attorney . . . has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the [judge], as evidence in the case, the testimony presented by the defendant.

It is difficult for me to choose between the argument supporting the Rules of Professional Conduct as they currently exist and the contrary arguments of Wasserstrom, Luban, Haskell, and Freedman because each side has its own conceptual and moral merits. What sways me to support the latter arguments is that when asked what they would do if a client indicated intent to commit perjury, 95% of the lawyers surveyed in the District of Columbia stated they would call the defendant to the stand and 90% stated they would question the defendant in the usual way.[15] If the rules were somehow strictly enforced, it could cause huge turmoil among the criminal defense fraternity, both as a result of disruption of typical defense strategies and possibly huge numbers of lawyers being sanctioned. On the other hand, leaving the situation as is and allowing defense attorneys to ignore one part of the rules may decrease their respect for them all. Perhaps such an overwhelming disregard for the existent rules by practicing attorneys strongly merits their revision, at least with regard to criminal defense, because of the discontinuity between actual practice and those rules.

Kevin G. Waddick is a registered patent attorney and associate with Brooks & Cameron, PLLC. Kevin earned a B.A. in Microbiology, an M.S. in Immunology, and a Ph.D. in Biophsyics from the University of Minnesota. He received his Juris Doctorate degree as a member of the first graduating class of the University of St. Thomas School of Law in 2004.

Notes

1. This article was originally written by Mr. Waddick as an essay for the Professional Responsibility course taught by Professor Neil Hamilton at St. Thomas School of Law in Minneapolis, Minnesota. An earlier version of the first half of this article was published in Tommie Law News, the University of St. Thomas law school student newspaper.
2. Monroe H. Freedman, *Perjury: The Lawyer's Trilemma*, 1 Litigation 26 (No. 1, Winter 1975), as *reprinted in* Thomas A. Morgan & Ronald D. Rotunda, *Professional Responsibility: Problems and Materials, Seventh Edition* 426 (Foundation Press 2000).
3. Thomas D. Morgan & Ronald D. Rotunda, *Model Rules of Professional Conduct and Other Selected Standards – Including California and New York Rules – on Professional Responsibility* (Foundation Press 2003).
4. The author gratefully acknowledges Michael O'Connor, a criminal defense attorney formerly holding an appointment as Associate Professor teaching Criminal Law, among other subjects, and Scott G. Swanson, formerly a public defender and currently Director of Academic Development holding an appointment as Adjunct Professor teaching Criminal Procedure, both at St. Thomas School of Law, for assistance in learning of practical means of handling this problem. Comments provided by them have been incorporated into the following analysis.
5. Morgan DS & Rotunda RD, *supra* note 3.
6. *Nix v. Whiteside*, 475 U.S. 157 (1986).
7. Freedman MH, *supra* note 2.
8. Morgan DS & Rotunda RD, *supra* note 3.

9. Paul G. Haskell, *Why Lawyers Behave as They Do* (Westview Press 1998).
10. *Id.*
11. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, Human Rights Quarterly, 5(1): 105-28 (Feb. 1988).
12. David Luban, *Lawyers and Justice: An Ethical Study*, 58-66 (Princeton University Press 1988).
13. Haskell PG, *supra* note 9.
14. Freedman MN, *supra* note 2.
15. *Id.*

The Impact of U.S. Tax Rules on U.S. Companies Expanding Into Foreign Markets

By: Jonathan Hobbs

Introduction

When multinational taxpayers initiate international activity, such activity often evolves from minimal involvement and exposure to a continuous presence in a foreign country. The impact of such activity on the taxpayer's overall U.S. tax position can be significant. This article illustrates some of the issues that arise as a U.S. corporate taxpayer expands its operations from a domestic to a multinational company.

A. Exporting Goods to Foreign Markets

A U.S. company often first enters an international market by shipping its goods from a U.S. manufacturing site to foreign customers. Such activity will not likely trigger taxation in a foreign country because the U.S. company will not have a sufficient establishment, such as a fixed place of business, in that country. The income from such export sales will be fully taxable in the U.S., though the U.S. taxpayer may be able to take advantage of certain manufacturing and export incentives available in the Internal Revenue Code (the "Code"). Such incentives include the domestic manufacturing deduction ("DMD")[1], extraterritorial income exclusion ("ETI")[2] and/or the interest charge domestic international sales corporation ("IC-DISC").[3]

When a U.S. company sells goods directly, any income or loss from such sales is included in its U.S. taxable income. If the U.S. company incurs a foreign income tax, it may be able to obtain a foreign tax credit to offset its U.S. tax liability.

B. Establishing a Representative Office

If a U.S. company determines that a specific foreign market has potential, it may hire an employee or an independent contractor to focus on further development of the foreign market. This representative would focus on the local market and provide on-site presence to develop the market. This representative would be able to engage in limited activities, including meeting potential customers, showcasing the company's product, researching potential competition, processing sales orders and working with existing customers.[4]

It is important to limit the activities to be performed by the representative to avoid creating a situation in which the company will have a taxable presence (also known as a "permanent establishment" ("PE")) in the local country due to the representative's presence. A taxable presence by a U.S. company in a foreign country where no tax treaty exists is caused by the physical presence of people or assets. If a treaty exists, the treaty's provision(s) addressing what factors create a taxable presence should be considered, and will often raise the bar on what constitutes a taxable presence.

C. Formation of Foreign Branch or Controlled Foreign Corporation

If a U.S. company determines a greater presence in a foreign country is required, it may consider the formation of a local entity, commonly classified for U.S. tax purposes as either a foreign disregarded entity (e.g. branch) or a controlled foreign corporation, to solicit sales and coordinate distribution activity in the local country.[5] These are not the only choices available to a U.S. company, but are two commonly used. Some of the primary tax considerations in deciding which of these two choices is preferable in a given situation are discussed below.

1. Foreign Branch Office

a. Definition of a Branch Office

A U.S. company may either create a natural foreign branch or an entity under local law that is eligible to be treated as a branch for U.S. tax purposes via a "check-the-box election," as described below. Either way, a branch acts as an operating division of the U.S. company. A branch enables a U.S. company to expand its operations to a foreign market and to build business presence with

foreign customers. The U.S. company may have office space staffed by local or U.S. employees. The branch can be in registered or unregistered form depending on the local country laws. The branch is also an extension of the U.S. company for U.S. tax purposes as discussed below.

b. Establishing a Branch Office

In forming a branch office, the U.S. company should identify what business arrangement it seeks with the branch. The U.S. company must decide what respective functions and services the U.S. company and the branch will perform. Will the branch have access to various product and marketing intangibles (manufacturing processes, trademarks, the U.S. company name, etc.)? What currency will the branch use? Which party will collect payment for the branch's sales and services? How frequently will the branch remit payments to the U.S. company? How will the U.S. company finance the operations of the foreign branch? Will the employees of the branch focus on one country or a region of the world?[6] The issues should be addressed in a legal agreement for purposes of documenting the relationship for transfer price considerations.

c. U.S. Tax Advantages of Operating Branches

Current Recognition of Branch Income or Losses

The taxable income (or loss) of a branch is cluded in the U.S. company's income tax return in the same year the income is earned (or loss is incurred), just as though it were a U.S. division of the company.[7] The branch may also be taxable in the foreign country, depending on local country tax laws. To the extent the foreign branch has paid foreign income taxes, the U.S. company may claim foreign tax credits generated by the branch's income taxes paid to offset the company's U.S. tax liability and mitigate the double taxation on the branch income.[8]

Contrast this with the deferral treatment of income earned or losses incurred in a CFC, which is discussed further below. Note that if a branch with losses later becomes a subsidiary, those branch losses may be recaptured into income.

Use of Branches to Avoid Indirect Foreign Tax Credit

U.S. S corporations, partnerships and other U.S. entities, which are not included in the definition of "corporations" for purposes of the foreign tax credit rules and are thus referred to here as "non-corporate" entities, do not benefit from foreign taxes paid by a foreign subsidiary. In other words, the partners and shareholders of such non-corporate entities may not include the foreign taxes paid by foreign subsidiaries in their foreign tax credit calculations as creditable taxes. Only Subchapter C corporations may claim foreign tax credits for foreign taxes paid by a foreign subsidiary.[9] These credits are referred to as "indirect tax credits" under Code section 902.[10]

Therefore, a common planning technique of U.S. taxpayers operating in non-corporate form is to elect to treat the foreign subsidiary corporations as disregarded entities (e.g., branches). The shareholders or partners of a non-corporate U.S. entity that owns a foreign disregarded entity may claim their proportionate share of the foreign income taxes paid or accrued during the taxable year by the branch as foreign tax credits.[11] The foreign tax credits may be claimed in the year that the foreign earnings (that generated those foreign income taxes) are included in the U.S. parent company's taxable income and passed through to its shareholders or partners.[12] Alternatively, these foreign tax credits may be first carried back one year and then carried forward ten years.[13]

If a foreign branch incurs losses, the U.S. company must be aware of the dual consolidated loss rules, which may prohibit the use of such losses.[14] If the branch of a U.S. company incurs losses, the U.S. company may use such losses to offset its income only if it represents, in an annual certification on its tax return, that the loss does not offset the income of any foreign corporation outside of the U.S. affiliated group. This dual consolidated loss agreement with the Internal Revenue Service states that the taxpayer agrees that any such loss will not be applied against foreign income now or in the future.[15] If a foreign branch has incurred losses, these complex dual consolidated rules should be carefully examined.

d. Filing Requirements

The tax owner (most often, the U.S. company) of a foreign disregarded entity has an annual filing requirement for U.S. tax purposes. Form 8858, Information Return of U.S. Persons with Respect to Foreign Disregarded Entities, must be filed for the tax owner's year, and is included with the tax owner's U.S. tax return. This return reports the branch's book and taxable income, its balance sheet, and any remittances it made during the year

to its tax owner. The U.S. taxpayer also must report on Form 8858, and include in U.S. taxable income, any foreign exchange gain or loss recognized on the remittance.[16] There is a $10,000 penalty for failing to file Form 8858, with an additional $10,000 penalty for each 30 days starting 90 days after notice is sent by the IRS.[17] Cumulative penalties can reach $50,000.[18]

2. Controlled Foreign Corporation ("CFC")

a. Establishing a CFC

A U.S. corporation with a presence in a foreign market may decide to initially incorporate or to convert an existing foreign branch into a CFC. The foreign entity will likely hire a foreign attorney to assist in incorporating in the foreign country. The incorporation will be similar to incorporation in the U.S., requiring selection of a corporate name and drafting of the necessary articles, bylaws, board resolutions and subscription agreements, subject to local corporate law and procedures.

There are a number of factors to consider when incorporating a foreign subsidiary. The U.S. company and local country operations must develop their business objectives. As an example, the U.S. company must determine if the foreign subsidiary will engage in manufacturing, distribution, research and development, and/or support services. Many of the business decisions highlighted above with respect to foreign branches also apply to foreign corporations. The U.S. company and its foreign subsidiary must determine the services to be provided to or by the foreign subsidiary, the terms of payment, the currency to be used in the subsidiary's business, the use of the U.S. company's trademarks, logos and other intangible rights, territorial restrictions, the resolution of disputes (including what country's law will apply), the payment of income and other taxes, and the terms of the agreement. The foreign subsidiary also should account for the various local country taxes to which it will be subject, including income, value added, customs, withholding and other local taxes.[19]

b. Definition of a CFC

Under Code section 957(a), a foreign corporation is a CFC if more than 50 percent of either the total combined voting power of its stock entitled to vote or the total value of its stock is owned (or treated as owned) by "United States shareholders" on any day during the corporation's taxable year. Code section 7701 defines the terms "corporation" and "foreign" to clarify whether an entity organized under foreign law would be considered a corporation for U.S. tax purposes. Code section 951(b) defines "United States shareholder" with respect to a foreign corporation as a U.S. person who owns or is treated as owning 10 percent or more of the total voting power of the foreign corporation's voting stock. Thus, a U.S. person who owns less than 10 percent of the voting stock is not a U.S. shareholder and is not included in the calculation of the 50 percent test outlined in Code section 957(a). In calculating these ownership percentages, Code section 958 applies complex constructive stock ownership rules that are beyond the scope of this discussion.

c. U.S. Tax Considerations

A U.S. parent corporation that owns a CFC does not include a CFC's income in its U.S. taxable income until the CFC declares a dividend to the U.S. parent (absent certain "anti-deferral regimes" that trigger "deemed" dividends from the CFC to the U.S. parent, as provided in Code sections 951-965).[20] Losses incurred by a CFC cannot be utilized by the U.S. parent, even if the U.S. parent has significant taxable income.

As discussed above, when a CFC pays a dividend out of its earnings (computed under U.S. rules for "earnings and profits"), the U.S. company (if it is a C corporation) includes that income in its U.S. taxable income. In addition, the U.S. company receives an "indirect" foreign tax credit that it may use to credit U.S. tax liability generated by the dividend income it receives from the CFC.[21] This indirect foreign tax credit is computed by aggregating the foreign income taxes paid by the CFC and computing its total earnings and profits. When a dividend is distributed, a portion of these aggregated (or pooled) taxes are attributed to the dividend and pass to the U.S. parent, in the same ratio as the dividend has to the total earnings.

For example, if a CFC has existed for three years and its total earnings in that time are 100,000 Euros, its total taxes paid on those earnings is US$50,000, and its dividend paid at the end of year 3 is 40,000 Euros, the U.S. parent includes 40,000 Euros (translated at the foreign exchange rate of Euros to U.S. dollars as of the date of the dividend) in its income. However, the U.S. parent is eligible for an indirect foreign tax credit of (40,000/100,000) x $50,000, or $20,000 to offset U.S.

tax resulting from this foreign dividend. The $20,000 also is included in taxable income of the U.S. parent.[22]

d. Filing Requirements

A U.S. parent company with a CFC has an annual U.S. tax filing requirement, Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations. Form 5471 requires that the U.S. parent company report the foreign corporation's income statement and balance sheet, calculate the entity's current year earnings and profits ("E&P"), provide foreign taxes paid in the current year, report any dividends paid to the U.S. shareholders, and provide a summary of payments to or receipts from related parties. If there has been a change in ownership interest of the CFC during the tax year, the U.S. company also must report certain details of the transaction(s) trigger ing a change in ownership. There is a penalty for failing to file Form 5471 of $10,000, with an additional $10,000 penalty for each 30 days starting 90 days after notice is sent by the IRS.[23] Cumulative penalties can reach $50,000.[24]

e. Check-the-Box Election

Given the tax advantages of a branch a foreign subsidiary may elect to be treated as a branch for U.S. tax purposes, though the Treasury Regulations list specific foreign "per se corporate" entities that are not eligible for the election and cannot be treated as any type of entity other than a corporation.[25] In other words, in most cases, a foreign entity may choose its entity classification for U.S. tax purposes through a check-the-box election.

The Treasury Regulations have certain default rules that, absent a check-the-box election, detemine the classification of entities that are not per se corporations. Under Treasury Regulation section 301.7701-2, a U.S. entity with a single owner is classified as either a corporation or as a disregarded entity (branch). A U.S. entity with multiple owners is classified as either a corporation or a partnership. A foreign eligible entity that does not make a check-the-box election shall be considered a corporation if all members have limited liability, a partnership if it has two or more members and at least one member has unlimited liability, or a disregarded entity if it has a single member that does not have limited liability.[26] Limited liability is defined under Treasury Regulation section 301.7701-3(b)(2)(ii).

A check-the-box election is made by filing Form 8832, Entity Classification Election, that is effective the date it is filed unless the taxpayer states an alternative effective date on the form. The effective date stated on the form cannot be more than 75 days prior to or more than 12 months after the date on which the election is filed.[27] This election must be signed by any person who is an owner of the entity on the effective date and by any officer, manager or member of the electing entity who is authorized to make the election.[28] An entity that makes an election cannot make another such change in classification within 60 months, unless the election is an "initial" election.[29] The election does not require consent of the foreign country's tax authorities and has no impact on the foreign country's tax treatment of the entity.

An existing foreign corporation also may elect to be treated as a foreign disregarded entity, or branch, for U.S. tax purposes. If a foreign corporation makes this election, it is deemed to distribute all of its assets and liabilities to its owner in liquidation.[30] If the existing foreign corporation has any accumulated earnings and profits ("E&P"), the U.S. shareholder must recognize into income the foreign corporation's E&P.[31] In addition, the U.S. shareholder must file several statements with its U.S. tax return for the year in which the deemed liquidation occurs, including (1) Section 332 statement, if the liquidation qualifies under Section 332 and the foreign corporation is solvent;[32] (2) a Section 367(b) notice of exchange;[33] (3) Form 966, Corporate Liquidation or Dissolution; and (4) Form 5471 Schedule O, Organization or Reorganization of Foreign Corporation and Acquisition and Disposition of its Stock.[34]

Summary

A U.S. company that would like to expand its operations must consider a myriad of U.S. and foreign business and legal considerations, among which are the tax consequences of its involvement in a foreign country. This article has identified some major U.S. tax considerations a U.S. company should consider. The above discussion is by no means exhaustive, and the U.S. company should engage a global tax adviser before commencing any foreign endeavor to ensure that the proper strategies and structure are in place to minimize the U.S. company's worldwide tax burden. A U.S. company inexperienced in global trade may determine that a cautious approach beginning with exporting and eventually escalating into foreign country pres-

ence is an effective means of exploring new markets, enabling the U.S. company to gradually penetrate its products into the local country while learning about the local business and marketing climate. When the U.S. company decides to establish a physical presence in a foreign country, one of the primary planning considerations should be to determine the type of entity to be used that will provide not only the right fit from a business standpoint, but also the proper tax attributes that will enable the U.S. company to minimize its worldwide tax position.

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Notes

[1] I.R.C. § 199 (2004).

[2] *Id.* §§ 941-943 (repealed Dec. 31, 2004). Taxpayers may claim 80 percent of the exclusion on income attributable to calendar year 2005 export sales and 60 percent of the exclusion on income attributable to calendar year 2006 export sales. After December 31, 2006, no exclusion is available for export sales.

[3] *Id.* §§ 991-997 (1971).

[4] *See* MICHAEL DONOHUE ET AL, U.S. INTERNATIONAL TAXATION: AGREEMENTS, CHECKLISTS & COMMENTARY § 3.01[2] (RIA Thomson ed. 2006).

[5] *See id.* § 3.01[3].

[6] *See id.*

[7] *See* Treas. Reg. § 301.7701-2(a).

[8] *See* I.R.C. § 901(a) (as amended in 2004).

[9] *See id.* § 902(a) (as amended in 2004).

[10] *Id.*

[11] *See id.* § 901(a).

[12] *See id.* §§ 901(b)(1), 901(b)(5).

[13] *See* I.R.C. § 904(c) (as amended in 2004).

[14] *See* Treas. Reg. § 1.1503-2(b)(1) (1986).

[15] Treas. Reg. § 1.1503-2(g)(2) (1992).

[16] *See* I.R.C. § 987 (as amended in 1988).

[17] *See* I.R.C. § 6038(b) (1962).

[18] *See id.*

[19] *See* DONOHUE, *supra* note 4, § 3.04.

[20] I.R.C. §§ 951-959 (as amended in 2004).

[21] *Id.* § 902(a).

[22] *Id.* § 78 (1962).

[23] *See* § 6038(b).

[24] *See id.*

[25] *See* Treas. Reg. § 301.7701-2(b)(8) (1996).

[26] *See id.* § 301.7701-3(b)(2) (1996).

[27] *See id.* § 301.7701-3(c)(1)(iii) (1996).

[28] *See id.* § 301.7701-3(c)(1), (2) (1996).

[29] *See id.* § 301.7701-3(c)(1)(iv).

[30] *See* Treas. Reg. § 301.7701-3(g) (1999).

[31] *See id.* § 1.367(b)-3(b)(3).

[32] *See* Treas. Reg. § 1.332-6(b) (1955).

[33] *See* Treas. Reg. § 1.367(b)-1(c) (2000).

[34] *See also* Treas. Reg. 1.6046-1. Upon the date of the deemed liquidation, the foreign company's status as a CFC ceases. As a result, the U.S. taxpayer files a Form 5471 for the annual period ending on the date of liquidation to reflect this § 332 liquidation. The Form 5471, Schedule O, will reflect the deemed liquidation of the CFC.

Hennepin County Affiliate News

By: Elizabeth Larsen

The 2006-2007 bar year is upon us and the Hennepin County Bar Association New Lawyers are already off to an aggressive start! The New Lawyers started by electing new leadership in June. This year's officers and directors are:

Chair: Elizabeth A. Larsen, 612-335-1861
Vice-Chair: Cyrenthia Jordan, 612-339-3161
Secretary: Patty Wisecup, 612-339-3500
Treasurer: Sarah Dunn, 612-337-9645
CLE Directors: Kelly Moffitt, 612-333-9500
Jeff Timmerman, 612-343-4964
Professionalism Director: Tiffany Quick, 612-376-1663
Community Service Director: Jon Sigelman, 952-738-0191
Social Director: Nick Furia, 612-492-7335
ABA/MSBA Liaison: Robert Hankoff, 805-698-9394

These individuals are already working hard to plan an exciting year of social events and networking opportunities, as well as new CLE and professional development programming and community service events. In fact, the HCBA NLS has already participated in a school supply drive and has planned its first lunchtime CLE and Recess with Judges event. The first Recess with Judges occured on September 6, 2006, at noon in the HCBA offices. Hennepin County

Judge Francis Connolly spoke on professionalism in the practice. On September 19, 2006, the first lunchtime CLE will take place in the HCBA offices. Rachhana T. Srey of Nichols, Kaster & Anderson, will be presenting on issue-spotting – what new lawyers need to know about the Fair Labor Standards Act. If you are interested in attending the CLE, just contact the HCBA offices to sign up!

The HCBA NLS is also sponsoring The Attractive Nuisance Tour ("ANT"), a fabulous event that raises money for the Minnesota Justice Foundation and the Hennepin County Bar Foundation. ANT presents a concert of several local bands, all of which have at least one attorney as a member. This is ANT's fourth year and it continues to meet with great success. This year's event will take place at the Fine Line Music Café on October 20, 2006. It promises to be a fun event and benefits two great organizations. For more information and tickets, contact Craig Sandok, at craig@esquiregroup.com or 612-335-3746.

One more event that must be mentioned is this year's New Lawyers Nuts & Bolts CLE. It is scheduled for December 5, 2006, and, as always, will present great programming geared towards new attorneys.

Members are invited to attend our monthly meetings (the second Wednesday of every month, at noon at the HCBA offices) and are always welcome to contact any of the officers or directors with questions, ideas, or to volunteer. Right now, we are recruiting members to participate in one of our committees, including:

- Community Service Committee
- CLE Planning Committee
- Professionalism Committee
- Social Events Committee

Please contact one of the directors listed above to help out!

Keep an eye open for upcoming events, announced in our bi-weekly e-mails, or check out our website at http:/www.hcba.org/programs/newlawyers. It promises to be an exciting year in the HCBA NLS with great activities and opportunities for all. We hope to see you at a committee meeting, happy hour, CLE or community service event soon!

Elizabeth A. Larsen is the Chair of the Hennepin County Bar Association New Lawyers Section. She can be reached at elizabeth.larsen@leonard.com or 612-335 1861.

Ramsey County Affiliate News

By: Sarah Wescott Bashiri

Derk Schwieger has completed his two-year term as co-chair of the RCBA New Lawyers Council. The council greatly appreciates Derk's commitment, enthusiasm and hard work over the last two years. This term, returning senior co-chair, Sarah Westcott Bashiri, is joined by co-chair Mark Priore, a member of the 2005 council. Elyssa Weber will return as Community Outreach Chair. The council is looking for new members to chair the Continuing Legal Education and Social Networking positions on the council. Anyone who is interested in joining the 2006 council is welcome and should contact Sarah or Mark.

Social Networking

The New Lawyers Section will continue their monthly socials, held at locations in and around the downtown St. Paul area. Monthly socials are held from 5:00 to 7:00 p.m. on the second Thursday of each month. Monthly socials are well attended and are sponsored by a wide variety of businesses from court reporters to investment management groups. New attorneys and experienced attorneys alike are encouraged to attend. This is an invaluable networking opportunity.

Anyone interested in sponsoring a future monthly social is encouraged to contact the Ramsey County Bar Association or either of the co-chairs.

The RCBA New Lawyers Section is co-sponsoring a fall Oktoberfest social event with the HCBA New Lawyers Section and MSBA New Lawyers Section. The event will be held at Summit Brewery.

Continuing Legal Education

The New Lawyers will continue to present CLEs throughout the next year. CLEs are held over the lunch hour at the office of the Ramsey County Bar Association. The CLEs are publicized through emails and can be found online at www.ramseybar.org. All new and seasoned attorneys are welcome to attend.

Interested lecturers on all topics are welcome and should contact either co-chair for more information.

Community Outreach

The New Lawyers continue to plan and participate in vari-

ous volunteer projects, led by Elyssa Weber. The New Lawyers organized and sponsored "Rake a Difference" providing yard care for the elderly and disabled. New Lawyers also participated in "Kids Clothes at the Courthouse" and "Santa Brings a Lawsuit."

We are looking to add more community outreach opportunities for new lawyers. If you have ideas or would like to be involved in an outreach program, please contact Elyssa, Sarah or Mark.

Sarah Wescott Bashiri is a RCBA New Lawyers Section Co-Chair. She can be reached at sbashiri@mnfamilylaw.com. Co-Chair Mark Priore can be reached at mark_priore@yahoo.com.

Duluth Affiliate News

By: Anna Mickelson

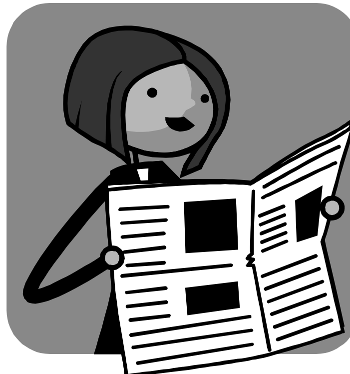
The Duluth New Lawyers Group bid farewell to its President, Kim Maki, in May. Kim will be sorely missed. We would like to thank her for her service and wish her the best of luck in her new endeavors! Anna Mickelson of Hanft Fride, P.A., was elected to take over the position.

In July, the Duluth New Lawyers made their way to Wade Stadium to cheer on the Duluth Huskies, Duluth's Northwoods League baseball team. It was a perfect day to be outside, enjoying great camaraderie and a great game, not to mention a few beers and brats! The Duluth New Lawyers also sponsored the New Lawyers' scramble golf tournament at the Duluth/Iron Range Bar Picnic at Northland Country Club in Duluth on August 25, 2006.

The group continues to feature a series of presentations at our monthly lunch meetings. In May, Jacob Baker of Hanft Fride, P.A., spoke to the group about his experiences in private practice. We were pleased to hear Bill Thompson of Falsani, Balmer, Peterson, Quinn & Beyer, speak about his family law practice and involvement with the Volunteer Attorney Program in June. The July lunch featured a behind-the-scenes look at the life of a judicial law clerk, presented by Brian Fischer, Law Clerk to the Honorable Gerald C. Martin.

In the fall, we are looking forward to hosting more interesting lunch speakers and our fall community service event, serving at the Damiano Center soup kitchen in Duluth.

Anna Mickelson is the President of the Duluth New Lawyers Section. She can be reached at acm@hanftlaw.com.



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NLS Open Liaison Positions

COMMITTEES
Convention
Diversity Committee
Fair Response Committee
Insurance for Members Committee
Judicial Elections Committee
Life and the Law Committee
Membership Committee
Multijurisdictional Practice Committee
Paralegal Committee
Pro Se Implementation Committee
Publications Committee
Rules of Professional Conduct Committee

SECTIONS
Administrative Law Section
Appellate Practice Section
Art & Entertainment Section
Business Law Section
Children and the Law Section
Communications Law Section
Computer Law Section
Employee Benefits Section
Family Law Section
Food and Drug Law Section
Outstate Practice Section
Public Utilities Section

As the list indicates there are a number of openings for New Lawyers to become liaisons to various sections in the MSBA. This is a great opportunity to get involved with a substantive or procedural area of law. If you are a new lawyer and interested in becoming a liaison you should contact the New Lawyers Section Chair, Jamal Faleel at JFaleel@fredlaw.com for more information.

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St. Cloud:	Inactive
Willmar:	Inactive