

# Hearsay

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

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MSBA



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# Greetings from the Chair

By: Joan M. Schulkers

The Executive Council of the ABA Young Lawyer's Division is a governing body comprised of representatives from various districts throughout the country. Minnesota and Wisconsin share a representative for District 17. Tami Schroeder was our representative, but she recently resigned due to relocation to California. Thus, the representative position is currently vacant. If anyone is interested in this position, please contact me. There is partial funding for the remaining two conferences. The only requirements are that the individual be a current ABA member and qualify as an ABA young lawyer. I will appoint the interested individual as soon as possible so that they may attend the Memphis conference.

There are other ways in which to get involved in bar associations, including the MSBA. You can join one of many committees or sections. In fact, most bar leaders first be-



come involved in the smaller groups. I invite you to read the recent volume of the Bench & Bar, as well as peruse the MSBA's website for opportunities to become involved.

Lastly, I want to challenge each of you to become involved in a public service project. One such project is the ABA YLD's "One Child One Lawyer" child advocacy based initiative this year. Other public service areas include adoptions, guardianships, legal clinics, or a number of other organizations that desperately need your help in the face of the budget constraints. As lawyers we have a unique opportunity to significantly improve someone's life with only a few hours of legal assistance. Please consider offering your assistance in whatever way you can, and together we can make a difference.

## **Minnesota State Bar Association Annual Convention**

This year the MSBA convention is being held in Duluth, on June 9 – 11, 2004. Mark your calendars! If any of you already know you plan to attend, please contact Joan Schulkers. If the new lawyers can get affirmative responses from at least 75 of its members, the MSBA may be willing to give the new lawyers a price break on the registration.

# ABA Mid-Year Meeting in San Antonio

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This year's ABA mid-year convention was held in San Antonio, Texas. We had nine representatives from Minnesota attend the convention: Dan Gilchrist, Sonia Miller Van Oort, Teresa Jones, Julia Morgan, Kirsten Stewart, Jason Kohlmeyer, Jamal Falceel, Becky Rhoda Fisher, and Joan Schulkers. An addition to our group photo was Gina Lombardo, a former Minnesota lawyer who moved to Illinois.

The convention provided a number of informative CLEs on a variety of topics. For example, there were CLEs on

marketing, technology, adoption, becoming a *guardian ad litem*, corporate investigations, damages, and changes in the ADA (the latter CLE being presented by Minnesotan Sonia Miller Van Oort).

In addition, there were two resolutions placed on the agenda for debate relating to Intellectual Property and Marriage. After being asked by the ABA to present the con argument for debate, Minnesotan Becky Rhoda Fisher, rose to the challenge and presented well thought-out arguments before the assembly.



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## Update: Rules of Professional Conduct

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As some of you are aware – no doubt by personal experience, that Rule 1.10(b) of the Minnesota Rules of Professional Conduct can prevent you from obtaining that perfect job. Checking for conflicts, obtaining waivers, or setting up ethics walls can be a daunting task – but one that is required by the rules.

As most of you may be unaware, the Minnesota Supreme Court recently changed the conflicts of interest standards in its decision Lennartson v. Anoka-Hennepin Sch. Dist.

No. 11, 662 N.W.2d 125 (Minn. 2003). In that decision, the Court found that the law firm's ethics wall was insufficient to avoid a violation of the conflicts rule.

A committee has been formed to study this issue and make a recommendation to the Minnesota Supreme Court regarding revisions to Rule 1.10(b). The committee is seeking anecdotal evidence from primarily new lawyers who have experienced first hand the application of the conflicts rule. If you have any input, please feel free to contact Dwight Wagenius ([Dwight.Wagenius@state.mn.us](mailto:Dwight.Wagenius@state.mn.us)).

# Behind The Scenes At KSTP Lawline

*By: Rebecca Rhoda Fisher, The Law Offices of Rebecca Rhoda Fisher PLLC*

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It is 5:00 p.m. on the fourth Tuesday of the month. Several attorneys are seated at a table in a makeshift law firm conference room in a studio at KSTP Channel 5. They casually talk and catch up with each other. They see the live broadcast of the 5 o'clock news on a television off in the corner. The attorneys hear one of the newscasters announce, "The Lawlines are now open" and see the Lawline telephone number scroll across the bottom of the screen. In an instant, all of the telephones start ringing and do not stop until 7:00 p.m. when the phones are unplugged.

Those who have participated in Lawline know that the types of callers can vary. Some people have exhausted every possible remedy and just need to hear from an attorney that it is time to hire one. Others are not sure where to start and are unsure of what, if anything, they can do about their situation. Callers may ask questions in the areas of criminal, family, personal injury, real estate or estate planning, just to name a few.

The attorneys at Lawline try to answer general questions the callers might have and provide them with resources to resolve their issues, such as phone numbers for attorney referral services. Attorneys are provided with a booklet that includes several referral telephone numbers for state and local organizations. Occasionally, a caller will retain an attorney from the Lawline call. However, most of the time the attorneys either simply refer the caller to an appropriate agency, or discuss with the callers their available options.

Ask any attorney what the best thing about participating in Lawline and they will tell you it is the outright appreciation and thankfulness most of the callers express.

A special thank you to all who have volunteered for the KSTP Lawline. Your time is greatly appreciated. Anyone interested is welcome to join us the fourth Tuesday of every month at the KSTP station. For more information, please contact Rebecca Rhoda Fisher.



*Rebecca Rhoda Fisher*

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## Annual Spring Social

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The Annual Spring Social will be held at Solera, in Minneapolis on April 15, 2004 from 5:30 – 8:00 p.m. This is a joint event of the New Lawyer Sections of the Minnesota State Bar Association, the Ramsey County Bar Association, and the Hennepin County Bar Association. The social commit-

tee has secured a very generous private sponsor, National Discount Realtors, and plan to give away almost \$1,000.00 in prizes. All new lawyers in the state are invited to attend.

# Estate Planning 101

By: Jill Pearson, Faegre & Benson LLP

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All of us, even if we currently have more liabilities than assets, can benefit from some basic estate planning. That's because estate planning encompasses more than the distribution of assets—it also includes planning for illness and incapacity with documents such as a health care directive and a power of attorney. This article will summarize the documents that should be executed as part of any basic estate plan and provide an overview of relevant Minnesota law. Of course, each individual situation is unique, therefore you should consult with an estate planning attorney before acting on this information.

## 1. Will

A will is an instrument by which you dispose of real and personal property that is not otherwise distributed by operation of law (e.g., property held jointly with rights of survivorship). A will also provides an opportunity to designate guardians for minor children. Minnesota Statutes §§ 524.2-501 and 524.2-502 provide that a will may be made by any person 18 years or older who is of sound mind, that a will must be in writing and signed by the testator (i.e., the maker), and that a will must be signed by at least two witnesses. Thus, a holographic will—one handwritten, dated, and signed by the testator—is not recognized as valid under Minnesota law unless it is properly witnessed. The will may become “self-proved” (i.e., presumptively valid) by attaching an affidavit signed by the testator and the witnesses acknowledging compliance with the formalities required by statute (see Minn. Stat. § 524.2-504). If the will references a separate list as allowed under Minn. Stat. § 524.2-513 however, certain items of tangible personal property may be devised to various beneficiaries without the need for these formalities. For instance, the will could provide that all property should be distributed to a spouse except as provided in a separate writing; this writing, in turn, could gift a baseball card collection to an enthusiastic nephew, or a special piece of jewelry to a grandchild. Such a list provides flexibility for a testator as it may be revised at any time with no need for witnesses or a notary.

## 2. Health Care Directive

The Minnesota Health Care Directive, introduced in 1998 to replace the Living Will, allows you to (a) appoint an agent and an alternate agent to make health care decisions on your behalf in the event you are unable to make or to

communicate such decisions on your own, and (b) provide guidance to your doctors, health care agents and others as to the types of treatment you would like to receive or not receive under various conditions. You may also choose to express your preferences with respect to organ donation and cremation or burial on this form. The form must be executed in the presence of a notary public or two witnesses, and once completed, should be distributed to persons you deem appropriate; for example, your agents, health care providers and/or clergyperson. Chapter 145C of the Minnesota Statutes provides more information on Health Care Directives, and a suggested form is available at <http://fsos.che.umn.edu/stum/pdf/mss110-d.pdf>.

## 3. Power of Attorney

The Minnesota Statutory Power of Attorney, addressed in Chapter 523 of the Minnesota Statutes, allows you (the “principal”) to appoint another person (your “attorney-in-fact”) to act on your behalf with respect to financial matters. The power of attorney is immediately effective and the powers conveyed to your attorney-in-fact, unless expressly limited, are very broad. The statutory short form is set forth at Minn. Stat. § 523.23 and the content of the form must be duplicated exactly to ensure statutory protection. The principal must execute the form in the presence of a notary public, however no witnesses are required.

## 4. Final Reminder

As you address your particular estate planning situation, don't forget to revisit the beneficiary designations on your retirement plans and insurance policies. Often these are our greatest assets but we may not even recall who we have listed to receive them at our deaths. In most cases, these types of assets pass outside of your will, so the named beneficiary will receive the property regardless of the dispositive provisions in your will. As with all estate planning documents, your beneficiary designations should be reviewed at least every few years and in conjunction with major life changes (e.g., marriage, divorce, birth or adoption of a child, etc.).

# Making The Uncivil Divorce Civil

*By: Jason Kohlmeyer, Manahan, Bluth & Kohlmeyer Law Office Chtd.*

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Every attorney who practices in family law has been involved in the uncivil divorce, meaning the divorce where your client is utterly unreasonable, the opposing client is utterly unreasonable or the opposing attorney is utterly unreasonable and sometimes all three.

## **I. Opposing Attorney**

Sometimes the problem with an uncivil divorce is exacerbated by the opposing attorney. Some attorneys feel the duty for zealous advocating extends to winning by any means necessary, including underhanded tactics, belittling your client, pounding the table, “forgetting” agreements, and similar tactics.

I have found one way to overcome this type behavior from opposing counsel is by modeling or leading by example. This can work absolute wonders when dealing with difficult attorneys. If you tell your client, from the outset, that you intend to take the high road and will not engage in needless mudslinging or posturing in front of the other attorney, you will find that the client will feel more involved (and usually more satisfied) with the case. As the old saying goes “it takes two to tango,” and if you do not allow yourself to engage in the tactics of the other side, you will find that all the puffery and table pounding will make the opposing attorney look silly. Also, in affidavit battles when the opposing counsel is slinging mud, take the high road and address only the relevant problem. Also, identify that there is no need to respond to such mudslinging and that you hope this case will not go down that road. It will make the other side look ridiculous and hopefully convince the judge that you are staying focused on the issues, which should help your client’s credibility.

One final tip is to be sure that everything and I mean absolutely everything is in writing with opposing attorneys. Unfortunately, some attorneys (we all know who they are) will say one thing and then “remember” something else, which is exactly why you need the written document. Now, to be clear I am not saying that in every case, with every discussion with the opposing attorney you need to document what is agreed upon, but in the case where the opposing attorney is known to be less than reliable, be sure to confirm everything in writing.

## **II. Your Client**

The danger with your client in an uncivil divorce is that no matter what you do, you run the risk of having either an out of control or an unhappy client. Several common themes develop in the uncivil divorce:

### **a) Your Client Can’t Make A Decision Or He Constantly Changes His Mind.**

Indecision is particularly unpleasant because your client may indicate that he needs time to think about the decision and will call you back tomorrow. While this alone is usually not a problem, it is when your client will not return your calls and is instead using it as an excuse because he doesn’t want to make a decision or worse yet, he doesn’t want the divorce to end; he is enjoying the conflict! One possible solution when your client will not give you an answer on the agreed upon day, is to present the client with the decision and then indicate that if no response is heard the answer will be X, it doesn’t matter what X is, but usually this will provide sufficient motivation for the client to return your call and make the decision.

What is even worse is when the client makes a decision but then the next day reverses his decision or even says that he never gave that authorization. Either case can be very difficult because this makes settlement difficult if not impossible. What I find helpful is to require every decision be given to you in writing via email, fax or even a quick note dropped off. The first instance your client either says “I didn’t say that” or that he is changing his mind, you need to then tell him that all future decisions and instructions will be in writing and the reason is to ensure that you are both on the same page and in order to do this written instruction will be required for everything from here on. Do not require this for only “the important questions,” but also for every simple question. You will find that the client thinks more about the answer (which will help facilitate settlement), and with it written he will not claim that “he never said that” and will not change his mind.

### **b) Out Of Control (And Uncollectible) Fees**

I think it is fair to say that all attorneys want to earn a fair wage for the hard work they do. However, in the uncivil

divorce the fees can quickly escalate so that the client will feel that the fees are unreasonable and worse yet, clients will refuse to pay. Now I know the current conventional wisdom seems to be that there is no problem with suing your client; but suing your client is a miserable experience. You will never receive a referral again from him/her, then you will have to go through the unpleasant experience of testifying about your billing, and finally even if you win you then have to become a collection attorney to collect the bill.

I've found that the best way to ensure your bills are paid and to keep costs reasonable is to absolutely charge for every contact you have with the client; if he/she calls for a "quick question" you charge a minimum of .2 of an hour *and remind the client of this* when it is a call he/she did not need to make. Another tactic is when the client "just drops by for a quick question." Make the client wait 15 minutes, of course don't charge the client for this time, but after he/she has waited, you then meet with him/her. If the client believes you are accessible anytime he/she wants you, the fees will quickly escalate to such a degree you will never be paid.

Another tactic for dealing with the recurrent nuisance calls is to give "homework" or projects for the client to do, such as organizing retirement accounts and check ledgers, starting to compile a detailed witness list with telephone numbers and addresses. Tasks such as this focus the client's mind and make him/her realize that he/she may not need to call you every day to ask "what is new with the case." Another tactic is to make it clear in your retainer that your hourly rate is doubled if you receive a call at after business hours. You will be amazed how this will eliminate calls to your house or cell phone after hours.

One final tactic which has worked for me in the past is to get a very large sum, say \$10,000, over and above your retainer and put it into trust for estimated attorney's fees. The theory being that if the client knows you have that much of his money ready to spend he will be much less likely to engage you in frivolous telephone calls.

### c) **The Client Who Will Not Listen**

There are some clients who simply will not listen to your advice and despite the fact they are paying several hundred dollars an hour for your advice. I believe one of the best changes I have made in my practice is that I began reading about the different psychological problems which are fairly common in the United States today. For example, if after several meetings your client only focuses on himself, the kids are secondary, his job is the most important

thing, the neighbors are all talking about him, etc. etc., you may have a client who is exhibiting narcissistic tendencies. Once this is identified you can tailor your approach to him accordingly.

A similar problem is the client who simply wants to argue with you. This can be tricky, when a client is arguing about your analysis of a legal problem and then states the accompanying "where are my rights" statement which always follows. You need to not engage with the client in their desired argument. Instead, simply lay out your response, explain the basic legal analysis behind it and end the discussion. If the client makes a veiled threat about finding a new attorney, **CALL HIS/HER BLUFF!** Tell the client, "absolutely, perhaps you want to find a new lawyer" and that you will have his/her file ready to pickup by the end of the day. And then ask the client if that is what he/she would like to do? You will be amazed to find that there are very few clients who will take you up on your offer, and those clients who do leave to find a new lawyer, well they just made your week.

### **III. Conclusion**

These are only a few tips and tricks that work for me when I encounter the uncivil divorce. I'm not claiming that they work in every case, or even if they will work for your particular practice style, but hopefully this will get you pointed in the right direction. Good luck and remember one thing; you really can make a difference and turn that uncivil divorce civil.

# General Practice, Solo & Small Firm Liaison Report

*By: Teresa Fariss McClain, NLS Liaison to GPSSF Section*

As the new liaison to the General Practice, Solo & Small Firm section, my first involvement with this section was to attend the council's strategic planning retreat in St. Cloud on January 30-31. The council discussed the results of a section membership survey, the attorney referral project, the upcoming annual meeting, "Grand Rounds," and the section newsletter.

Although this section includes members who are in general practice, it also encompasses many specialty practitioners who are in small or solo practice. Because the section involves such a diverse group of practitioners, the meetings tend to focus on addressing concerns common to a majority of members in the section, such as practice administration, profession responsibility, and technology issues.

Recently, the section sent surveys to each member to obtain demographic information, as well as to determine the needs of the members. The results of the membership survey were as follows:

- 1) 70% of respondents were solo practitioners;
- 2) 80% were from a city with a population of 60,000 or greater;
- 3) 60% have over 12 years in practice;
- 4) 80% attend the MSBA convention regularly;
- 5) 70% read the section's newsletter;
- 6) 50% were not aware of the section's Attorney Referral Deskbook;
- 7) 100% agreed the annual membership meeting should include CLE offerings.

The section has compiled an Attorney Referral Deskbook Co-Counsel Exchange. The purpose of the referral network is two-fold. First, it provides an on-line directory of section members, including biographical information and areas of practice. This serves as a resource for attorneys, as well as a potential source of referrals. Second, this database serves as a co-counsel network database. The idea is that attorneys who have limited experience in an area can find a more experienced attorney to act as co-counsel in a particular case. This service is limited to section members. The referral directory is updated quarterly.

The section's annual meeting "Small Firm Success Conference" will be held on Friday afternoon, April 23, through Saturday morning, April 24. It will be held at the Hilton hotel in Brooklyn Park. The agenda on Friday afternoon includes a speaker from MLM Prolegia on preventing malpractice; 60 technology tips for lawyers in 60 minutes; and, a reception and dinner with Justice Paul Anderson as keynote speaker. Saturday morning will include a continental breakfast followed by elimination of bias CLE's and a roundtable discussion by experienced solo & small firm practitioners regarding small firm practice issues.

The Council is very motivated to share their experience with new lawyers, in general small or solo practices. They are interested in exploring the feasibility of offering a type of CLE, i.e. "Grand Rounds" combined with a social gathering with the NLS once or twice a year. The idea is that an experienced practitioner would give a presentation regarding an interesting case or issue that they've handled, followed by a discussion focusing on handling specific situations that occur in small law practices. I would be interested in receiving feedback from NLS section members, particularly those in general, small or solo practices regarding whether they would be interested in this type of presentation/event.

If you have any comments or questions, please feel free to email me: [tmccclain@hallberglaw.com](mailto:tmccclain@hallberglaw.com) or call (651) 255-6810.

## Rochester Affiliate News

*By: Jaime Girgenti, Rochester Affiliate NLS Chair*

2004 is off to a good start for the Rochester New Lawyers. In January, we held a one hour Ethics CLE. Betty Shaw from the Minnesota Professional Responsibility Board came down to Rochester from St. Paul to speak to us. She was very informative and very interesting. The group was very grateful that she traveled to speak with us.

In February, the RNL gathered for an after-work happy hour. On Friday March 26, the RNL will be meeting for lunch at Michael's with the 6 Olmsted County Judges. It promises to be a very informative and entertaining lunch.

The current chair of the RNL is moving to Florida in the middle of May and is interested in speaking with anyone who would be interested in taking over as Chair. If interested, please contact Jaime Girgenti. (W)507-285-8629.

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*Jaime Girgenti is a Judicial Clerk for the Honorable Joseph F. Wieners in Rochester and can be reached at [Jaime.Girgenti@courts.state.mn.us](mailto:Jaime.Girgenti@courts.state.mn.us)*

## Ramsey County Affiliate News

Ramsey County Bar Association (RCBA) New Lawyers continue to hold monthly meetings at various local establishments, and look forward to the upcoming events:

RCBA New Lawyers and RCBA Membership Committee will once again participate in hosting a Breakfast with the Judges this spring (date to be announced).

The 2004 RCBA Judge's Dinner will be held at Bandana Square at 5:00 p.m. on Thursday, March 25, 2004. This is a great opportunity for New Lawyers to network and to meet Ramsey County judges.

The next monthly New Lawyers Happy Hour will be held at The Lexington on Grand Avenue from 5 – 7 p.m. on Thursday, April 8, 2004.

## Mankato Affiliate News

Mankato has had a busy few months with several social events at area establishments. Unfortunately the president-elect has moved out of the area and currently we

are seeking interested persons to take over his position. If you have an interest please contact Phillip Elbert at 507-345-1020 or [pje@elbertlaw.com](mailto:pje@elbertlaw.com)

## News From Duluth

The Duluth New Lawyers meet the first Thursday of the month for lunch and the third Tuesday of the month for happy hour. We encourage any new lawyers in Duluth to

join us. To be added to the email list, please send a message to Emily John at [ekj@hanflaw.com](mailto:ekj@hanflaw.com).



## **Bench and Bar**

Hamline University School of Law  
Hamline Law/Grad Building, Room 106  
Wednesday, April 21, 2004  
6:00pm – 8:30pm

### **About the program:**

The debate over whether state and national tort laws should be ‘deformed or reformed’ is one of the most hotly contested issues within the legal community today. Plaintiff’s attorneys say that changes in the civil trial system would deprive seriously injured clients of fair compensation. Conversely, healthcare professionals and insurance companies contend that the civil trial system needs to be revamped as awards have become unreasonable to the point that healthcare and insurance costs have been pushed sky high. Attorneys, new and old alike, inevitably must grapple with the issue in order to serve their clients and fulfill their professional responsibilities as lawyers. What is the appropriate solution, and how should we go about implementing it? This evening’s discussion will address this very issue, and feature a stellar four-speaker panel addressing the arguments for and against Tort ‘Deform/Reform’. **Chris Messerly** and **Rich Thomas** will explore how this issue affects the health care industry, and the clients and professionals involved on both sides of the issue. **Paul Peterson** and **Steve Kirsch** will consider how this issue affects clients and professionals involved in products liability and personal injury cases. The event will be moderated by *The Honorable Justice Sam Hanson - Minnesota Supreme Court*.

### **Bench and Bar Schedule:**

- |               |  |
|---------------|--|
| 5:40-6:00pm   | Check-in outside of Law/Grad Building Room 106   |
| 6:00pm-6:50pm | Social Hour with drinks and appetizers for all attendees   |
| 6:50pm-7:00pm | Opening remarks by Jon Garon, Dean, Hamline University School of Law   |
| 7:00pm-8:30pm | Panel Discussion: “ <i>The Tort ‘Deform/Reform’ Debate</i> ”<br><br>Preserve: Chris Messerly on medical malpractice and institutional liability<br>Reform: Rich Thomas on medical malpractice and institutional liability<br><br>Preserve: Paul Peterson on products liability and personal injury<br>Reform: Steve Kirsch on products liability and personal injury |
| 8:30-8:45pm   | Panel Q & A with attendees   |

### **Contact Information:**

*To RSVP or for any questions please contact...*

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*Please indicate whether you intend to apply for CLE credits through this event (certification pending).*

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