

Hearsay

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In This Issue

Greetings From The Chair <i>Jamal Faleel</i>	1
The ABA's Call for Clarity: Proposed Protection From Discovery for Drafts of Expert Reports and Attorney-Expert Communications Pertaining to Their Development <i>David Classen</i>	2
Does Your Client Really Need a Non-Compete Agreement? <i>Jodi F. Colton</i>	4
Protecting Military Service Members and Their Families: Three Laws all Minnesota Employers Must Know <i>Rebecca J. Bernhard</i>	5
Shifting the Risk of Loss - Exculpatory Clauses and Contractual Indemnity Agreements <i>Nancy J. Berry</i>	7
Hennepin County Affiliate News <i>Elizabeth Larsen</i>	11
Duluth Affiliate News <i>Anna Mickelson</i>	12
Sixth District Affiliate News <i>Mark Betters</i>	12
2006-2007 NLS Liaisons	13
NLS Open Liaison Positions	13
2006-2007 NLS Contacts	14

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

MSBA



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Greetings From The Chair

By: S. Jamal Faleel

This spring's big event is our annual spring social. Hope to see you there!



JOIN OTHER NEW LAWYERS AT OUR SPRING SOCIAL!

**THURSDAY, APRIL 12, 2007
5:30 pm to 9:00 p.m.**

**NAMI RESTAURANT
251 First Avenue North**

We will be awarding door prizes to those attending the event.

THIS EVENT IS BROUGHT TO YOU BY
THE NEW LAWYERS SECTIONS OF
THE MINNESOTA STATE, HENNEPIN COUNTY
AND RAMSEY COUNTY BAR ASSOCIATIONS

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The ABA's Call for Clarity: Proposed Protection From Discovery for Drafts of Expert Reports and Attorney-Expert Communications Pertaining to Their Development

By: David Classen

The House of Delegates of the American Bar Association (ABA) voted 207-137 at its August 2006 annual meeting to recommend adding to Federal Rule of Civil Procedure 26(a)(2) a privilege for draft reports and communications between attorneys and their expert witnesses regarding the preparation of expert reports.¹ The vote was the closest of the entire six-day session.² If enacted, these proposed amendments could dramatically alter the landscape of expert witness discovery and, consequently, resolve an area of uncertainty for many litigators.

The Expert Witness Discovery Rules in their Current State (of Confusion)

The proposed rule changes were prompted by varying judicial interpretations of the 1993 amendments to Fed. R. Civ. P. 26(a)(2), as well as changes to analogous state rules, that expanded expert discovery from the materials *relied on* by an expert to any “data or other information” that was *considered* by experts in forming their opinion.³ Some courts have interpreted “other information considered” by the expert to include not just the facts and data that were provided to the expert, but also to require production of all draft expert reports, the expert’s handwritten notes, and all of an attorney’s communications with an expert.⁴ The ABA Report notes that some judges even issue early case management orders to mandate the preservation of all expert drafts and other work product in order to prevent experts from avoiding generating draft reports or destroying them.⁵ A minority of federal courts, however, have continued to protect draft expert reports, attorney-expert communications, and the like as attorney work product pursuant to Rule 26(b)(3).⁶ The ABA Report notes other judges have implemented “local local” rules

that set forth different requirements.⁷ Among state courts, even those that adopt federal procedural rules, practices pertaining to expert drafts and communications are widely varied.⁸

The Proposed Revisions

If adopted, the proposed revisions would give clarity and consistency to the discovery requirements relating to expert reports. The ABA Recommendation urges amendment to the federal, state, and local rules and statutes governing civil procedure such that an expert’s draft reports would not be required to be produced to an opposing party.⁹ Communications between an attorney and an expert witness, and notes reflecting such communications, would not be discoverable, except upon a showing of “exceptional circumstances.”¹⁰ Additionally, the Resolution states that opposing counsel should not be precluded from obtaining any information the expert is relying on in forming their opinion, including that coming from counsel, or from “otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert’s opinions.”¹¹

Impetus for Change

The proposed changes are modeled after a 2003 rule change in New Jersey that created an exemption from discovery for report drafts and attorney-expert communications.¹² A New Jersey delegate enthusiastically observed that since the rules were amended, “practitioners are no longer con-

Continued on page 3

¹ Lisa Brennan, *ABA Delegates Pass Measure to Shield Experts’ Drafts from Discovery*, N.J.L.J. (Aug. 15, 2006), available at <http://www.law.com/jsp/llf/index.jsp>; Marguerite L. Carr, *Meeting Round-Up*, TortSource (Fall 2006), available at <http://www.abanet.org/tips/tortsource/tsfall06.pdf>.

² *Id.*

³ ABA Report 120A, at 2, <http://abanet.org/crimjust/policy/am06120a.pdf>.

⁴ See, e.g., *B.C.F. Oil Ref. v. Consol. Edison Co.*, 171 F.R.D. 57, 60-61 (S.D.N.Y. 1997); *Musselman v. Phillips*, 176 F.R.D. 194, 202 (D. Md. 1997).

⁵ ABA Report 120A, *supra* note 3, at 1.

Continued from page 2

sumed with the costs of producing draft expert witness discovery based on issues that are red herrings[.]”¹³

The ABA Report notes that the “uncertainty and varied requirements among different courts are themselves problematic,”¹⁴ and sets forth seven reasons why the rule should be amended to protect expert reports and attorney-expert communications.¹⁵ In essence, the ABA Report suggests that the uncertainty surrounding the discoverability of expert reports and attorney-expert communications has obstructed the collaborative process between attorneys and their testifying experts. This undermines the work product doctrine’s underlying principle that counsel should be able to explore different theories in preparing a case, and that “[t]his is archetypal work product – a lawyer’s mental impressions – and a rule requiring their disclosure makes it difficult for counsel to strategize, theorize and develop the client’s case and the expert’s testimony to support it.”¹⁶ Additionally, the ABA Report notes that the current framework significantly increases litigation costs, which provides an advantage to wealthy litigants able to afford two experts, and thus runs contrary to the principle of securing the “just, speedy, and inexpensive” determination of cases.¹⁷ Finally, the ABA Report states that no evidence suggests that the disclosure of preliminary analyses and attorney-expert communications actually improves the quality of justice in any measurable way.¹⁸

California delegates, however, saw no need to amend the rules, and at least one commentator has suggested the proposals that were approved go too far in preventing the disclosure of appropriate information.¹⁹ The proposed rule changes would likely prevent the discovery of correspondence such as an expert’s engagement letter, billings, requests to see specific documents, and legal counsel’s instructions to an expert to take or abandon a particular approach.²⁰

In the Meantime...

The U.S. Supreme Court’s Advisory Committee on Civil Rules is now reviewing the ABA’s measure and considering whether it should be implemented.²¹ Until federal, state, and local courts adopt amendments, the ABA recommends that counsel enter into voluntary stipulations not to seek discovery of draft expert reports and attorney-expert communications from each other, and to assume that any communication with an expert will have to be disclosed.²² Although stipulations that sharing work product with an expert will not constitute waiver might not protect the information against nonparties in other cases,²³ such stipulations can protect drafts of expert reports, as well as communications between an attorney and expert relating to their reports, between parties entering into them.

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⁶ See, e.g., *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997); *All W. Pet Supply Co. v. Hill’s Pet Prods. Div., Colgate-Palmolive Co.*, 152 F.R.D. 634, 638-39 (D. Kan. 1993).

⁷ ABA Report 120A, *supra* note 3, at 1.

⁸ *Id.*

⁹ ABA Recommendation 120A, <http://abanet.org/crimjust/policy/am06120a.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Brennan, *supra* note 1.

¹³ *Id.*

¹⁴ ABA Report 120A, *supra* note 3, at 1.

¹⁵ *Id.* at 7-8.

¹⁶ *Id.* at 6-7.

¹⁷ *Id.* at 7; Fed. R. Civ. P. 1.

¹⁸ ABA Report 120A, *supra* note 3, at 7.

¹⁹ David Nolte, ABA Proposes Limitations on Expert Disclosures (Sept. 21, 2006), <http://www.expertclick.com/NewsReleaseWire/default.cfm?Action=ReleaseDetail&ID=13910&NRwid=6167>.

²⁰ *Id.*

²¹ See Brennan, *supra* note 1.

²² ABA Report 120A, *supra* note 3, at 15.

²³ See *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (“[B]ecause the purpose of the work product doctrine is to prevent an adversary from taking advantage of an attorney’s preparation for litigation, waiver [...] occurs where disclosure to a third-party substantially increases the likelihood that the work product will fall into the hands of the adversary.”)

Does Your Client Really Need a Non-Compete Agreement?

By: Jodi F. Colton

Restrictive covenants in employment agreements are commonplace in a wide variety of business and industries, from insurance to entertainment. However, before an employer asks for or an employee agrees to enter into a restrictive covenant, the need for such an agreement should be thoroughly analyzed. The first step in drafting an enforceable agreement for an employer, or reviewing an agreement on behalf an employee, is to determine what the employer is attempting to guard against and then to tailor the contractual provisions as narrowly as possible to meet that objective.

Restrictions imposed in employment agreements can come in many forms, the most common of which is a covenant not to compete, which generally prohibits an employee from performing a certain type of work in a particular location for a set period of time. Because these sorts of agreements are a restriction on trade and competition, they are generally disfavored by courts.¹ To be upheld they must be “necessary for the protection of the business or good will of the employer,” and must not impose “upon the employee any greater restraint than is reasonably necessary to protect the employer’s business.”²

For many employers the greatest concern is that an employee will “steal” business or confidential information when he or she leaves, not that the employee will continue to work in the same field or profession. In these cases a non-compete may be more of a restraint than is reasonable or necessary. One way to narrow the scope of the restriction is to use a non-solicitation agreement, which prohibits the employee from soliciting business from current and/or prospective customers or clients of his former

employer for a predetermined period of time. Courts often view non-solicitation provisions as less of a restriction on competition and therefore, more reasonably tailored to protect an employer’s interests.³ Depending on the nature of the business, this type of restriction may be sufficient to protect the employer’s interest.

In addition to the non-solicit provisions, an employer may want to include specific provisions protecting confidential information and/or trade secrets. Again, it is important to determine what information the employer is trying to protect. Does it qualify as a trade secret as defined by the Minnesota Uniform Trade Secrets Act, or is it confidential information that may not rise to the level of a trade secret but still merits protection?

The Minnesota Uniform Trade Secret Act (MUTSA) protects certain types of information by providing for a separate cause of action for misappropriation of trade secrets.⁴ The MUTSA defines a trade secret as “information, including a formula, pattern, compilation, program, device, method, technique, or process” that meets the following criteria: (1) the information must be neither generally known nor readily ascertainable; (2) the information must derive independent economic value from secrecy; and (3) the plaintiff must make reasonable efforts to maintain secrecy.⁵ Courts have generally held that customer lists, business information and the like are not trade secrets as defined by the MUTSA.⁶ However, “confidential business information which does not rise to the level of a trade secret can be protected by a properly drawn covenant not to compete.”⁷ Alleged confidential or propri-

Continued on page 5

¹ See *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965).

² *Id.*

³ See, e.g., *Webb Publ’g Co. v. Fosshage*, 426 N.W.2d 445, 450 (Minn. Ct. App. 1988) (upholding non-solicitation restriction); *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 88 n.2 (Minn. 1979) (where defendant was free to solicit business from others with whom plaintiff did not do business, the restraint was reasonable).

⁴ Minn. Stat. § 325C.01; *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897 (Minn. 1983).

⁵ Minn. Stat. § 325C.01, subd. 5.; see also *Electro-Craft*, 332 N.W.2d at 899.

⁶ See *Reliastar Life Ins. Co. v. KMG America Corp.*, No. A05-2079, 2006 WL 2529760, at *4 (Minn. Ct. App. Sept. 5, 2006) (citing *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 645 (Minn. Ct. App. 1985); *Cherne*, 278 N.W.2d at 89) “Customer lists are generally not deemed trade secrets or confidential. But customer lists and information that meet the elements of the UTSA will receive protection.”).

⁷ *Modern Controls v. Andreadakis*, 578 F.2d 1264, 1268 (8th Cir. 1978); *Bennett*, 270 Minn. at 892; see also *Cherne*, 278 N.W.2d at 91 (finding that a list of customers amounted to confidential information and affirming injunction prohibiting use by former employee).

Continued from page 4

etary information that does not fit squarely within the MUTSA should be specifically identified and described in the agreement to help ensure that it will ultimately be viewed as “confidential” by a court later charged with enforcing the agreement.

Many options and variations are available to drafters of restrictive employment covenants. The goal should al-

ways be to focus on the client’s needs and tailor the agreement as narrowly as possible to meet his or her objectives.

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Protecting Military Service Members and Their Families: Three Laws all Minnesota Employers Must Know

By: Rebecca J. Bernhard

In January, President Bush announced that he will send 21,500 more troops to Iraq. Here in Minnesota, this requires the extension of tours of duty for many Minnesota National Guard members who were due home soon. Since September 11, 2001, over 500,000 members of the National Guard and Reserve have been mobilized.¹ In this state, the Minnesota National Guard has mobilized more than 11,000 troops since the attacks on 9/11.² This underscores the reality that our national security efforts at home and abroad rely heavily on the use of Army reservists and National Guard members. With such a high number of our fellow Minnesotans away from home, it is likely that you or someone you know has been affected. And, because most of these National Guard members held civilian jobs before being called to active duty, it is likely that many employers are also affected by the Global War on Terror.

Many employers have felt the impact of the increased use of reservists on their workforces. Employees have been absent for years, while in the past reservists and National Guard members were typically absent only for weeks. When employees do come home and return to work, they may need retraining to perform their jobs. Further, some employees have suffered injuries while on duty that impact their abilities to perform their civilian jobs. Employers need

advice on how to handle these situations as there are federal and state laws that protect the rights of military service members.

The federal Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”)

Enacted to encourage uniformed service, USERRA seeks to eliminate or minimize the detrimental impacts of uniformed service on civilian careers by providing protection for those who serve against discrimination or retaliation, and by protecting civilian employment and benefits.³ USERRA regulations, containing detailed information about each of these protections, became final last January 2006. USERRA applies to all employers, regardless of the number of employees, so it is important that employers – and those attorneys that work with employers – understand the law.⁴

With respect to members of the military who are returning from active duty, USERRA requires employers to promptly reemploy eligible employees to the positions that the returning employees would have attained but for absence due to uniformed service (the “escalator principle”).⁵ The escalator principle applies in either the “up” or “down” di-

Continued on page 6

¹ Preamble to USERRA Regulations (“Preamble”), 70 FR at 75313.

² Current deployment statistics for Minnesota’s service members may be found at <http://tinyurl.com/2abypj>.

³ USERRA is found at 38 U.S.C. §§ 4301 *et. seq.* See the September 2006 issue of *The Hennepin Lawyer* (Vol. 75, No. 8) for more in depth information regarding USERRA. This article only summarizes briefly the reemployment and benefit protection upon return from leave from active duty.

⁴ The definition of employer is broad enough to include individual supervisors, third party benefit administrators, and successors-in-interest (such as asset purchasers). See Preamble, 70 FR at 75249.

⁵ See 38 U.S.C. §§ 4304, 4312 and 20 C.F.R. § 1002.32 for the details regarding eligibility for reemployment.

Continued from page 5

rection while the employee was on leave depending on the actual employer policy or practice. Generally, prompt reemployment should occur within two weeks of the employee's request to return to work.⁶ Employers must understand that removing another employee from the position may be required to meet the prompt reemployment obligation.

Prompt reemployment may also involve reasonable efforts by the employer to refresh the employee's skills or to train the employee. Moreover, USERRA requires employers to make reasonable accommodations for disabilities incurred or aggravated while in uniformed service. Reasonable accommodations under USERRA include job training, job restructuring and training for a different position if the original position cannot be restructured to accommodate the disability. Unlike other laws that protect disabled workers, USERRA places the exclusive responsibility for accommodating the disability on the employer.

USERRA provides "just cause" protection to employees (i.e., the employee can only be terminated for just cause) for up to 1 year, depending on the length of the leave. Examples of "just cause" include (a) the employee's own misconduct, provided the employee had notice that the conduct would be cause for discharge or (b) through the application of legitimate, nondiscriminatory reasons, the elimination of the employee's position or the placement of the employee on layoff status.⁷

Employees are entitled to the following benefits upon reemployment: reinstatement of seniority-based benefits; the option to enroll in non-seniority benefits; and reinstatement of health plan coverage. The escalator principle discussed earlier applies to seniority-based rights and benefits for the returning employee. Seniority-based benefits are based on an employee's length of service. The escalator principle requires that an employee's uniformed service count as service for the employer for most purposes. For example, the employer's vacation accrual schedule must

count the employee's period of uniformed service. An employee returning from USERRA leave must be given credit toward FMLA eligibility requirements. Employees returning from USERRA leave must also be offered the right to enroll in any non-seniority benefits that were offered or became available during the USERRA leave. Although not specifically stated in the Regulations, Veterans' Employment and Training Service Division of the DOL ("VETS") states in its informal guidance that "[r]eturning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for uniformed service, but also those that became effective during their service."⁸

USERRA regulations set forth in great detail an employer's obligations regarding pensions. Briefly, a reemployed employee is entitled to the following pension plan benefits:

- credit towards employment service for periods of uniformed service
- contributions and benefit accruals based on deemed pay
- option to make up 401(k) contributions
- employer match on made up 401(k) contributions
- repayment of a defined benefit plan distribution and restoration of the benefit

Minnesota Passes Two New Laws

In addition to the rights for military personnel under USERRA, Minnesota military families now enjoy certain rights related to short-term leaves of absence from employment. Minnesota has recently enacted two laws to address the rights of family members of military personnel. Minnesota Statute §181.947 requires all private employers to grant unpaid leave of absence of up to 10 working days to an employee whose immediate family member is killed or injured while on active military duty.⁹ The definition of immediate family member includes parent, child, grandpar-

Continued on page 7

⁶ See 20 C.F.R. § 1002.181.

⁷ See 20 C.F.R. § 1002.248.

⁸ VETS "Non-Technical Resource Guide to USERRA" at p. 9 (March 2003).

⁹ Minn. Stat. § 181.947, subd. 2.

¹⁰ *Id.* at subd. 1(e).

¹¹ *Id.* at subd. 1(c).

¹² *Id.* at subd. 4.

¹³ Minn. Stat. § 181.948, subd. 2.

¹⁴ *Id.* at subd. 1(e).

¹⁵ *Id.* at subd. 1(c).

¹⁶ *Guard and Reserves "Define Spirit of America,"* White House News Release dated Sept. 17, 2001, available at <http://tinyurl.com/yuo8od>.

Continued from page 6

ent, sibling or spouse,¹⁰ and the definition of employee under this statute includes independent contractors providing services to the employer.¹¹ If an employer provides paid time off under a bereavement policy, it may apply this time off toward the 10-day period required by §181.947.¹²

The second new law, Minnesota Statute §181.948, requires all private employers to grant unpaid leave to employees to attend certain military ceremonies for immediate family members. The leave may be limited to the actual time required to attend the ceremony, not to exceed one day's duration in any calendar year. Employers may refuse if granting the leave would be unduly disruptive.¹³ Family member is defined differently under this statute and includes, in addition to those family members covered in §181.947, legal guardian, grandchild, fiancé or fiancée.¹⁴ The definition of employee under this statute does not

include independent contractors.¹⁵

With no end to the various conflicts in sight, there is a pressing need for employers of every size – and the lawyers who serve them – to have an understanding of the laws protecting military service members and their families. As President Bush acknowledged shortly after the attacks on September 11, 2001, "... there is more to corporate life than just profit and loss."¹⁶

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Shifting the Risk of Loss - Exculpatory Clauses and Contractual Indemnity Agreements

By: Nancy J. Berry

Exculpatory clauses and indemnity agreements are two methods of shifting the risk of loss or liability between or among contracting parties. In many cases, exculpatory clauses and indemnity agreements are enforceable, but Minnesota courts have placed limits on their enforceability. Care should be taken in drafting or reviewing these provisions to be sure the parties clearly understand what is being undertaken and the limitations on their enforceability.

Exculpatory Clauses. An exculpatory clause is a contractual provision through which a party gives up any claims it may have against another party before any loss or damage occurs. In some circumstances, a party may be able to use an exculpatory clause to protect itself against liability for its own negligence.¹ For example, a runner wishing to participate in a road race often is required to sign a release when entering the race. An exculpatory clause may be included in the release, in which the runner agrees to release and discharge the race sponsors, organizers and their officers, directors, employees and volunteers from any claims of personal injury or property dam-

age arising out of or connected with participating in the race, even if the injury or property damage is caused by the negligence of the released parties.

In Minnesota, exculpatory clauses have been upheld in a number of contexts, but the clauses are not favored by courts because an injured party is left without a remedy against a negligent party and without compensation for its injuries. In *Schlobohm v. Spa Petite, Inc.*, the Minnesota Supreme Court held that an exculpatory clause will be strictly construed against the party benefited by the clause, and it will not be enforced if it is ambiguous in scope, purports to release the benefited party from liability for intentional, willful or wanton acts, or if enforcement of the clause would violate public policy.²

An exculpatory clause is ambiguous if it is reasonably susceptible to more than one construction, each of which is reasonable, or if it fails to precisely and clearly inform the contracting parties of the meaning of their apparent agreement.³ If an exculpatory clause is so vague, general

Continued on page 8

¹ See *Anderson v. McOskar Enterprises, Inc.*, 712 N.W.2d 796, 801 (Minn. Ct. App. 2006).

² *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).

³ *Anderson*, 712 N.W.2d at 800-01.

Continued from page 7

or broad that it fails to specifically designate the exact nature of the liability being exonerated, it is not enforceable.⁴ In several Minnesota cases, exculpatory clauses that specifically exonerated the benefited parties from liability for their own negligence were found to be unambiguous. In each case, the exculpatory clause clearly stated that the benefited party was released from liability for its own negligence, and the claim against the benefited party was based on negligence.⁵

If an exculpatory clause purports to release the benefited party from liability for intentional, willful or wanton acts, the clause is invalid. Exculpatory clauses limited only to acts of negligence have been upheld as valid against claims based on negligence. However, the Minnesota Court of Appeals has indicated that an exculpatory clause containing language to suggest that the benefited party is released from liability for any claims arising from whatever cause, including its own negligence, may not be enforceable if a claim against the benefited party is based on intentional, willful or wanton acts, rather than negligence only.⁶ Accordingly, an exculpatory clause specifically stating that the benefited party is not released from liability for its intentional, willful or wanton acts is more likely to be found enforceable.

Even if an exculpatory clause is unambiguous and limited to negligence, it will not be enforced if doing so would contravene public policy. Minnesota courts apply a two-part test in deciding whether an exculpatory clause contravenes public policy: (1) whether there was a disparity of bargaining power between the parties; and (2) whether the types of services being offered or provided are public or essential.⁷

In the first part of the public policy test, a disparity of bargaining power may be shown by compulsion to sign the agreement containing the exculpatory clause and lack

of ability to negotiate elimination of the clause in connection with services that cannot be obtained elsewhere.⁸ In upholding exculpatory clauses, Minnesota courts often emphasize the fact that the services involved could be obtained elsewhere. For example, in two Minnesota cases involving injuries arising out of the use of health club services, the court did not find a disparity of bargaining power because the injured parties voluntarily chose to join the health clubs and they could have gone elsewhere to obtain similar services.⁹

In the second part of the public policy test, the service being provided must be a public or essential service. A service suitable for public regulation, such as a hospital, doctor, public utility or innkeeper, generally is a public or essential service.¹⁰ In the 2005 case of *Yang v. Voyageaire Houseboats, Inc.*, the Minnesota Supreme Court refused to enforce an exculpatory clause contained in a rental agreement for a houseboat, holding that the houseboat company qualified as a resort subject to state regulation since it furnished sleeping accommodations to members of the public seeking recreation.¹¹ As a result, the houseboat company could not circumvent its duty as an innkeeper to protect its guests by requiring them to agree to exonerate the company from liability for its own negligence.¹²

However, the mere presence of some public regulations on a service or activity does not automatically make an exculpatory clause signed in connection with such service or activity void as against public policy. In *Johanns v. Minnesota Mobile Storage, Inc.*, the court of appeals held that although self-storage facilities are regulated, an exculpatory clause signed in connection with the rental of a PODS storage unit was valid.¹³ The court reasoned that the injured party was not precluded from negotiating the terms of the rental agreement or required to accept unreasonable terms and could have selected a different storage facility since such facilities are widely available.¹⁴

Continued on page 9

⁴ *Id.* at 801.

⁵ *See, e.g., id.; Schlobohm*, 326 N.W.2d at 923.

⁶ *See Anderson*, 712 N.W.2d at 801; *Nimis v. St. Paul Turners*, 521 N.W.2d 54, 58 (Minn. Ct. App. 1994).

⁷ *Schlobohm*, 326 N.W.2d at 923.

⁸ *Id.* at 924-25.

⁹ *Id.* at 925; *Anderson*, 712 N.W.2d at 802.

¹⁰ *Schlobohm*, 326 N.W.2d at 925.

¹¹ *Yang v. Voyageaire Houseboats, Inc.*, 701 N.W.2d 783, 790-91 (Minn. 2005).

¹² *Id.* at 791.

¹³ *Johanns v. Minn. Mobile Storage, Inc.*, 720 N.W.2d 5, 11 (Minn. Ct. App. 2006); *see also Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 730-31 (Minn. Ct. App. 1986) (concluding that the presence of federal regulations on parachute jumping did not void an exculpatory clause).

¹⁴ *Id.*

Continued from page 8

Courts also consider whether the service provider offers a service of great importance to the public, which is a practical necessity for some people. In *Bunia v. Knight Ridder*, the court of appeals found an exculpatory clause in a newspaper carrier's contract unenforceable as against public policy because the income was essential to the carrier, and the carrier assented to the clause from an inferior bargaining position.¹⁵

Several of the Minnesota cases dealing with exculpatory clauses involve recreational activities such as horseback riding,¹⁶ snowmobiling,¹⁷ and scuba diving.¹⁸ Generally, Minnesota courts have not found recreational activities to be within the categories where public interest is involved, and the exculpatory clauses signed in connection with these activities have been upheld. However, the dissenting judge in an unpublished 2003 decision raised an interesting argument as to whether a recreational activity or instruction in such activity was involved in the case. In *Dailey ex rel. Tabriz v. Sports Worlds, Inc.*, a man taking scuba diving lessons perished during a training dive.¹⁹ Before taking lessons, the man had signed a release containing an exculpatory clause, which exonerated the scuba diving club and the man's instructors from liability for their own negligence. The court upheld the exculpatory clause, finding it did not violate public policy. The dissenting judge argued the clause violated public policy because the man was being *instructed* in scuba diving, not merely partaking in the activity for recreation.²⁰ Although a majority of the court did not find this argument compelling, it raises the question of whether an individual should be required to assume the risk that he or she will be injured due to a mistake by a person presumed to have expertise in an activity the individual wants to learn.

Indemnity Agreements. An indemnity agreement or indemnification clause shifts the risk of liability or loss from one party to another. Unlike an exculpatory clause, an indemnity agreement does not deny compensation to an injured party. Instead, an indemnity agreement determines who will be responsible for compensating an injured party.

In an indemnity agreement, one party (the "indemnitor") takes on or assumes the liability of another party (the "indemnitee"). The indemnitor promises to reimburse and/or defend the indemnitee against claims brought by third parties. The indemnitor essentially assumes the role of an insurer.

The right to indemnification can be contractual or it can arise under common law or statute. For example, unless their articles or bylaws provide otherwise, Minnesota corporations and limited liability companies must indemnify their officers, directors and employees who are made or threatened to be made parties to any proceeding by reason of their capacity as officers, directors or employees, if certain conditions are met.²¹ Under common law, a party who is not at fault, but nevertheless is found liable in tort, can seek indemnification from the party who is at fault. Thus, the seller of a defective product who was not at fault can seek and recover indemnity from the party in the chain of distribution who was at fault.²²

The purpose of contractual indemnity agreements is to allocate who should bear the loss or liability that may arise in connection with performance of the contract. Contractual indemnity agreements should be bargained for as part of the agreement, and one focus in negotiating indemnity agreements should be on which party is in a better position to bear the risk of loss.

An indemnity agreement may provide different types of protections. An indemnitor can protect an indemnitee when the indemnitee is damaged or suffers loss and the damage or loss is caused by the indemnitor's own negligence. This type of protection essentially restates the common law that the party whose actions cause a loss should be responsible for the loss, but the indemnity agreement creates a contractual obligation for the party at fault to suffer the loss.

An indemnitor also can protect an indemnitee when the indemnitee is damaged or suffers loss and the damage or

Continued on page 10

¹⁵ *Bunia v. Knight Ridder*, 544 N.W.2d 60, 63 (Minn. Ct. App. 1996).

¹⁶ *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827-28 (Minn. Ct. App. 2001).

¹⁷ *Ball v. Waldoch Sports, Inc.*, No. C0-03-227, 2003 WL 22039946, at *3 (Minn. Ct. App. Sept. 2, 2003).

¹⁸ *Dailey ex rel. Tabriz v. Sports Worlds, Inc.*, No. A03-127, 2003 WL 22234699, at *5 (Minn. Ct. App. Sept. 30, 2003), aff'd 683 N.W. 2d 302 (Minn. 2004).

¹⁹ *Id.*

²⁰ *Id.* at *6.

²¹ Minn. Stat. §§ 302A.521; 317A.521; 322B.699.

²² See *In Re Shigellosis Litigation*, 647 N.W. 2d 1, 6 (Minn. Ct. App. 2002).

Continued from page 9

loss is caused by the indemnitee's own negligence. This type of protection shifts the risk of loss between the parties and could result in the indemnitor bearing the risk of loss even though the indemnitor is without fault. The indemnity agreement would not relieve the negligent indemnitee of liability to a third party, but the indemnitee has a legal right to look to the indemnitor for reimbursement for any damages paid to the third party. Like exculpatory clauses, indemnity agreements that protect a party against its own negligence are not favored at law, and they are strictly construed against the party to be indemnified.²³ The agreement must make specific reference to protection from the indemnitee's own negligence, and there must be clarity in the scope of the indemnity agreement.²⁴

Minnesota courts will not enforce an indemnity agreement that protects an indemnitee from its own negligence if enforcement will violate public policy.²⁵ If the indemnity agreement relieves a party from negligence in the discharge of an absolute duty imposed by law for the protection of others, it is void.²⁶ In *Yang*, the Minnesota Supreme Court held that an innkeeper cannot, as a matter of public policy, shift liability for its own negligence onto the guests it has a duty to protect.²⁷ An indemnity agreement also will not be enforced to require indemnification for conduct by the indemnitee that would warrant an award of punitive damages.²⁸ The same public policy reasons that prohibit a party from insuring against punitive damages apply to prevent a party from indemnifying another against an award of punitive damages.²⁹

By statute, indemnity agreements in construction contracts that attempt to indemnify a party from liability for its own negligence are not enforceable.³⁰ The intent of the statute is to ensure that each party to a construction contract will remain responsible for its own negligent acts or omissions. However, the parties are not prohibited from

requiring one party to procure insurance coverage to protect the other party. Therefore, a promise by a party to purchase insurance to cover claims arising from any negligent acts by another party is valid and enforceable in a construction contract.³¹

Indemnity agreements are akin to insurance contracts in that the indemnitor gives assurance that it will compensate and protect the indemnitee for losses, damages or liabilities sustained by the indemnitee and arising from specific risks. A party undertaking a contractual duty to indemnify may obtain insurance to cover its contractual obligations. Alternatively, contracting parties may require one party to obtain insurance to protect the other party or both parties from liability, rather than using a contractual indemnity agreement. In this case, the parties shift the risk of loss from themselves to the insurance company. Generally, the insurance policy would name both parties as insureds and provide coverage for both parties for liability arising from the contractual undertaking in question.

Exculpatory clauses and indemnity agreements can be powerful tools in shifting the risk of loss or liability by contract, but they should be carefully worded and their context carefully considered to increase the likelihood of enforcement. Exculpatory clauses and indemnity agreements must be clearly written so that there is no ambiguity in their meaning and scope. In addition, the potential limitations on enforceability of an exculpatory clause or indemnity agreement due to public policy must be considered.

Nancy J. Berry is an attorney in the law firm of Moore, Costello & Hart, P.L.L.P., practicing in the areas of health law and business and commercial law. She can be reached at njb@mch-pllp.com.

²³ See *Farmington Plumbing & Heating Co. v. Fisher Sand & Aggregate, Inc.*, 281 N.W.2d 838, 842 (Minn. 1979).

²⁴ See *Yang*, 701 N.W.2d at 791 n.5.

²⁵ See *Zerby v. Warren*, 210 N.W.2d 58, 64 (Minn. 1973).

²⁶ *Id.*

²⁷ *Yang*, 701 N.W.2d at 792.

²⁸ *Lake Cable Partners v. Interstate Power Co.*, 563 N.W.2d 81, 86-7 (Minn. Ct. App. 1997).

²⁹ *Id.*

³⁰ Minn. Stat. § 337.02.

³¹ *Katzner v. Kelleher Const.*, 545 N.W.2d 378, 381-82 (Minn. 1996).



Hennepin County Affiliate News

By: Elizabeth A. Larson

The Hennepin County Bar Association New Lawyers have had a busy year and we are making a strong finish!

April 10, 2007 heralded the return of the HCBA NLS Wish Upon A Prom event at Patrick Henry High School. The HCBA NLS collected new and gently used prom dresses, gloves, evening bags, jewelry, unopened makeup, as well as gift certificates and cash donations during the week of April 2-6. Then on April 10, the new lawyers hosted a boutique to help the Patrick Henry students feel like Cinderella at the ball.

We have also participated in Achieve! Minneapolis by presenting attorney panel discussions at several local high schools. These have been popular events that provide the students with great information about what it is really like to be an attorney in various areas of practice. We are following up these successful panel presentations by participating in the Southwest High School Career Fair in April.

Our lunchtime CLE and professional development programming continues to present a variety of topics and draw good crowds. Upcoming events include a lunchtime CLE with the HCBA Civil Litigation Committee on May 14. Martin Cole, Director of the Professional Responsibility Board will present on "The 10 Most Common Ethical Pitfalls for Civil Litigators and New Lawyers." It promises to be interesting and informative presentation.

Of course, we cannot forget our upcoming social events. The HCBA NLS continues to host monthly happy hours, which provide great networking opportunities. The next event is the Spring Social, co-hosted by the MSBA New Lawyers at Nami. This is always a fabulously fun event

worth attending! Another must-attend event is our annual Saints game, scheduled for Sunday, June 10, 2007. We will have a tailgating spot and access to the Saints hot tub. Tickets always sell out fast. If interested in getting in on this event, contact Nick Furia at 612-492-7335 or nfuria@fredlaw.com.

Finally, as our year draws to a close, it is time for electing new leadership for the 2007-2008 bar year. Elections are scheduled for our May 9 meeting and we are seeking statements of interest now. If any HCBA NLS members are interested in taking a more active role by leading one of our committees or serving as an officer, please contact Elizabeth Larsen at 612-335-1861 or elizabeth.larsen@leonard.com. Nominations will be made at the April 11 meeting.

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. Keep an eye open for upcoming events, announced in our bi-weekly e-mails, or check out our website at <https://www.hcba.org/programs/newlawyers.htm>. We hope to see you at a committee meeting, happy hour, CLE or community service event soon!

Elizabeth A. Larson 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

Duluth Affiliate News

By: Anna Mickelson

The 11th District Bar Association New Lawyers are anxiously awaiting Spring! We are looking forward to having District Court Judge David Johnson join us at our April lunch meeting. In May, the New Lawyers will be assisting with Law Day activities, the highlight of which will surely be our keynote speaker, comedian turned U.S. Senate hopeful, Al Franken. Thanks to the hard work of New Lawyer Nick Schutz for your efforts in planning this event!

“Motion to Strike,” our New Lawyer bowling team has had an unprecedented season, securing decisive victories over such bowling powerhouses as the “Split Enders” (hair styl-

ist team), “Spare Change” (accountant team), and the “Holy Rollers” (church team). We are so very proud.

As the warmer weather approaches, we will begin to plan our spring social events, which will likely include a picnic and possibly a Brule River canoe trip.

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

Sixth District Affiliate News

By: Mark Better

The Sixth District Bar Association – New Lawyers Section gives its best wishes to Jay Ramos and Keith Russell, who recently resigned as officers in the 6th District NLS. Both attorneys accepted positions outside the Mankato Area. Now the NLS looks to the Spring when we will be gathering once again for a Spring fling event. In the meantime, we continue to meet monthly in the Mankato Area. The 6th

District NLS continues to be a great avenue to meet and build relationships with fellow attorneys that are relatively new to the practice. We are happy to say that we have continued to grow and the interest in the group is high.

Mark Better is the Chair of the 6th District New Lawyers Section. He can be reached at bettters@manahanbluth.com

Ramsey County Affiliate News

No Report Submitted.

2006-2007 NLS Liaisons

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Construction Law Section

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Diversity Committee

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Tax Law Section

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Women in the Legal Profession Committee

Dana Bartocci
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NLS Open Liaison Positions

Committees

Convention Committee
Diversity Committee
Fair Response Committee
Insurance for Members Committee
Judicial Elections Committee
Law School Liaison Committee
Legal Assistance to the
Disadvantaged Committee
Life and the Law Committee
Membership Committee
Multijurisdictional Practice Committee
Paralegal Committee
Professionalism Committee
Pro Se Implementation Committee
Publications Committee
Rules of Professional
Conduct Committee

Sections

Administrative Law Section
Alternative Dispute Resolution Section
Animal Law Section
Appellate Practice Section
Art & Entertainment Section
Business Law Section
Civil Litigation Section
Children and the Law Section
Criminal Law Section
Communications Law Section
Computer & Technology Law Section
Elder Law Section
Employee Benefits Section
Environmental & Natural
Resources Law Section
Family Law Section
Food and Drug Law Section
General Practice Solo
Small Firm Section
Health Law Section
International Business Law Section
Outstate Practice Section
Practice Management
& Marketing Section
Probate & Trust Law 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