

Hearsay

A Publication of the Minnesota State Bar Association New Lawyers Section

Winter 2008-09

Volume X, No. 2

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If you have any questions about the publication or would like to submit an article for a future issue, please contact Shanda Pearson or Samuel Edmunds.

MSBA



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Greetings from the Chair

Erika Donner

It is hard to believe that March is already here, and that means that much of the Bar year is behind us. And, what a year it has been so far. I want to thank the many, many people who worked very hard on making the annual Tri-Bar social and Toys for Tots fundraiser and toy drive a resounding success. Despite the current state of the economy, young lawyers and area firms gave graciously. I am also thrilled that the effort was truly one of all three area New Lawyers Sections: HCBA, RCBA, and MSBA.

The tri-bar fun continues into the spring with our annual Spring Social and Second Harvest food drive on Thursday, April 16th. Look for details in the emails you receive from NLS.

In January, we hosted our third annual “Real Life Financial Planning for Young Lawyers” seminar. It remains one of our most popular events every year. Those of us in attendance learned about keeping our “financial house” in order, particularly during these turbulent economic times. If you missed this year’s presentation, I anticipate that hosting financial planner Tom Haunty every January will continue to be a tradition, so look for next year’s presentation.

We will have free CLEs in March and April the hour before our council meetings. On March 19, Minnesota Court of Appeals Judge Francis J. Connolly will speak to issues related to ethics and professionalism. This CLE will be held from 4:30 to 5:30 p.m. at the MSBA office. We will also be voting on funding for participants to ABA’s Young Lawyers Division Spring conference at our March meeting.

The NLS always, always welcomes your input and ideas. We love it when new members attend our council meetings and provide us with valuable feedback on the issues we discuss and events we’re planning. Our meetings are the third Thursday of the month, through May, at 5:30 p.m. at the MSBA office. Our next meeting is Thursday, March 19th.

Erika Donner
Chair, New Lawyers Section



Erika Donner is the chair of the MSBA New Lawyers Section and a business litigation attorney at The Kuhn Law Firm, PLLC. Erika can be reached at edonner@thekuhnlawfirm.com.

New Lawyer's December Happy Hour a Hit!

Sam Edmunds

On December 4, 2008, the New Lawyers Sections of the MSBA, HCBA, and RCBA teamed up to host the annual December Happy Hour and Toys for Tots Fundraiser. The event was held in downtown Minneapolis at Nami and was a huge success. Shannon Cox, a St. Paul new lawyer, said, “the happy hour was a great time and an excellent way to meet other new attorneys. I’d definitely recommend that other new lawyers attend these events.”

The event was held in a very large room, yet there was hardly space to move around. New lawyers from across the Twin Cities and the state attended. Though there is not an official count, attendance must have exceeded 150. During the event, Kevin Sieben, a Minneapolis new lawyer, was overheard saying, “in this economy, it’s amazing that so many people turned out for such a good cause.”

The list of sponsors included Benchmark Reporting, Twin Cities Professional Alliance, Fitness Together, Keller Williams, and Thomson Reuters. If you see them, please give a special thanks to Chanel Melin (MSBA), Lindsey McCune (HCBA), and Lesley Adam (RCBA) for organizing the event. In the end, the new lawyers sections raised over \$2,000.00 and collected more than 100 toys.

Watch your email inbox for details on the next joint social event to be held on April 16, 2009.

Sam Edmunds is an associate attorney with the law firm of Campbell Knutson, P.A., in Eagan and can be reached at sedmunds@ck-law.com.



Lesley Adam, Lindsey McCune, and Chanel Melin



Socializing

The Next Wave in the Foreclosure Crisis; the Alt-A Loan

Jane Bowman

The Alt-A Mortgage

The United States has never seen such an ugly underbelly to home ownership. Predatory lenders reaped the benefits associated with the dramatic rise in the number of first-time homebuyers as well as homeowners tapping into their home equity. As any astute media-watcher knows, the subprime mortgage crisis has bottomed out, sending thousands of Americans to foreclosure. What still needs to be highlighted is the Alt-A crisis about to begin.

An Alt-A loan, short for Alternative A-paper, is not a subprime loan, but is also not a prime loan. An Alt-A loan is somewhere in between. Fannie Mae defines an Alt-A mortgage as “a loan that can be underwritten with lower or alternative documentation than a [prime] mortgage loan but may also include other alternative product features.”¹ Those “other alternative products” could include a higher interest rate, an introductory teaser rate set to adjust upward after three or five years, or higher than normal fees and costs associated with the closing. As a result, Alt-A mortgage loans generally have a higher risk of default than a prime mortgage loan.

Differences Between Subprime and Alt-A Mortgages

An Alt-A loan is not as “bad” as a subprime loan; the terms are generally amenable to a borrower for at least a couple of years. This may come in the form of a 5-year initial Adjustable Rate Mortgage (“ARM”) rate, meaning the borrower is still paying a comfortable low mortgage rate, even if they

took the loan out in 2004. However, the end of those initial rates is approaching. An Alt-A loan may also mean the borrower had a fixed rate mortgage, but at a somewhat high rate of 8.5%. Although 8.5% is not unconscionable, it certainly requires the homeowner to front more cash each month than a more standard 6.5% rate would require.

The Alt-A borrower typically has more resources than the subprime borrower. Recent horror stories highlighted subprime loans given to people with “No Income, No Jobs, or Assets,” thus coining the “Ninja loan.” The Alt-A borrower may have had a job or assets, but probably not enough to support the loan they leveraged. Even as they approach delinquency on a mortgage, they may have to use retirement accounts or family resources to become current. However, those resources will quickly dry up.

Another difference between subprime loans and Alt-A loans is geography. As evidenced in many large cities across the U.S., urban cores, especially communities of color, have been decimated by subprime lending. The geography of the Alt-A loan is different. As the Alt-A loans start to go bad, we will see high foreclosure rates in the areas served by Alt-A loans, mainly in suburbs and rural areas. In Minnesota, this means our inner and outer ring suburbs, as well as Greater Minnesota.

For these reasons, the Alt-A loan is and will continue to catch up to many Minnesota borrowers. A job loss, divorce, or an upward mortgage rate change will undoubtedly cause homeowners to become delinquent, thus

starting a whole new cycle of foreclosures in Minnesota.

How to Help

Holders of Alt-A loans will increasingly request the help of attorneys to stave off foreclosure. Although not every Alt-A loan has a remedy, many of these loans violate federal and state laws governing originating, refinancing, or proceeding with a foreclosure sale. Although a borrower may come into your office for a will, divorce, business question, or any number of other issues, if you learn they are briskly walking towards a foreclosure proceeding, be sure to entertain the possibility that they may have an actionable mortgage.

If a borrower, afraid of an impending mortgage delinquency, walks into your office, what should you recommend?

1. Mortgage Counseling. Recommend the homeowner call a legitimate mortgage counselor. A great place to start is the Minnesota Home Ownership Center at 1.866.462.6466. Make sure the borrower *does not* get sucked into another scam. A great example is a business promising to negotiate a loan modification on behalf of the borrower. These schemes generally require an upfront fee, which is illegal.

2. Call an attorney who does foreclosure defense work for advice. There are many hurdles brokers and lenders need to jump to successfully originate or refinance a loan. Foreclosure defense attorneys know these hurdles, which include:

a. The Truth In Lending Act: The Truth In Lending Act,² or TILA, provides that the broker and lender must include certain disclosures at the

closing. If they don't, the homeowner is allowed to rescind a refinanced loan. TILA gives a wronged homeowner powerful leverage to negotiate a new loan.

b. Minnesota's Anti-Predatory Lending Laws: Thanks to the hard work of consumer advocate attorneys, Minnesota has strong anti-predatory lending laws.³ For example, kick-backs for brokers were finally addressed last legislative session, and refinances must actually *benefit* the homeowner and not merely provide fees to a broker/lender. There are many other provisions in Minnesota's anti-predatory lending laws, but they are only as helpful as you make them.

Notes

¹ Fannie Mae Glossary of Business Terms, at <http://www.fanniemae.com/ir/resources/glossary.jhtml;jsessionid=30KYLGTIPILVJ2FQSSIFGI?p=Investor+Relations&s=Investor+Resources&t=Glossary> (last visited Dec. 16, 2008).

² 15 U.S.C. §§ 1631-49.

³ See generally Minn. Stat. Ch. 58, 325N, 580 (2007).



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Nursing Home Litigation - Case Preparation and Pretrial Issues

Richard Cheng

As a former clinician in the field of occupational therapy, I have worked at numerous long term care facilities (e.g. nursing homes and assisted living facilities), hospitals and clinics. This specialized perspective on health care has provided me with a more focused mindset while handling nursing home litigation. This article will provide an overview of case preparation and pretrial issues often encountered during a nursing home case.

Overview

Nursing home litigation is rapidly increasing due to the growth in actual and potential nursing home residents. One factor contributing to this growth is the increasing number of retirees within the baby boomer generation. By 2011, the oldest of the baby boomers will reach 65 years old. The baby boomer generation is also the largest generation alive within our society. In response to this growth, Minnesota created "Project 2030" in January of 1997. It was an effort to analyze the impact of the aging of Minnesota's baby boomers and create momentum within all sectors to plan and prepare responses to the demographic shifts that will culminate in 2030 when the first baby boomers begin to turn 85. As the number of residents increases, so will the number of calls plaintiffs' lawyers receive from nursing home residents and family members asking whether they have a viable case.

Initial Contact

The first client contact is an excellent opportunity to gather information, build rapport with your potential client, and identify issues that the lawyer may have to address later. It is vital to understand the dynamics among family members and the relationship between the caller and the resident, although sometimes the caller is the resident. Find out if there are children involved and how many. If the caller is a child of the resident, the attorney should ask if the resident's spouse is alive and whether he or she can and will participate in any potential litigation. If no immediate family members are able to be active participants, the attorney must find out who will be the most involved in the case and who will potentially receive any verdict or settlement funds. Furthermore, the attorney should try to find out basic background information, including where the resident resided before the nursing home placement in question, how long the resident lived in the nursing home, any hospitalizations, the facility where the resident is currently located, and why the resident is located there. By gathering this information, the attorney can identify records she needs to review and how much time and money it will take to investigate the case.

Statute of Limitations

The attorney should determine the statute of limitations as soon as possible and reevaluate the issue as additional records are reviewed. In most states, the statute of limitations is tolled during the resident's

life if she is incompetent. More likely than not, the issue of competency will be challenged by the defense, so the attorney should obtain a physician's review before choosing this course. Determining the statute of limitations can be tricky at times. If the injury was sudden, such as a fall, the statute of limitations can be quickly assessed. However, if the injury was chronic and occurred after long-term neglect or abuse, such as a pressure ulcer or malnutrition, then determining the statute of limitations can be more complex and will require in-depth review of all records.

Potential Defendants

It is crucial to understand the potential defendants in a nursing home case. This issue should be brought up to the family members and the resident. Often, clients are more inclined to sue a nursing home than a physician. Consequently, many nursing home cases evolve into disputes between the nursing home and the treating physician. The resident's attorney can use this to her advantage during negotiations and trial.

If the physician is named as a defendant, her medical group or corporation should also be named. It is common to find that the attending physician has another physician from her office or group provide telephone orders or treatment for the resident. As a result, the medical group or corporation must be named as a defendant to hold any additional physicians liable for their actions.

Damages

Nursing home cases are quite costly for the client and the law firm. No matter how meritorious the case, if the law of the state makes it impossible to receive fair and

reasonable compensation for injury or death, it makes no sense to proceed. In a nursing home case, the injured nursing home resident frequently dies before or during the pendency of the suit. In addition, the resident is rarely a wage earner with dependents and the life expectancy is often short because of the resident's age. One difficult task an attorney will often face is measuring a resident's pre-existing condition or state (e.g. pre-existing disfigurement, pain and suffering, etc.) against the harm sustained as a result of a negligent act. The intangible elements of damages such as pain and suffering, emotional trauma, loss of a normal life, disability, and disfigurement are often the only compensable damages resulting from negligently imposed harm. Lastly, depending on the state you are in, punitive damages may be another avenue for compensation.

Conclusion

Deciding to represent a nursing home resident requires heavy consideration of a wide variety of factors. The decision to pursue a viable claim should be based on solid damages and legitimate reasons. Embarking on a nursing home case places the attorney on a long and arduous venture. Thus, adequate screening for merit is an imperative first step in nursing home litigation.

Notes

¹ See <http://www.allbusiness.com/health-care-social-assistance/nursing/4002536-1.html>.

² See www.dhs.state.mn.us.

³ Iyer, P.W., *Nursing Home Litigation: Investigation and Case Preparation*, Lawyers & Judges Publishing Company, Inc., at 14 (2006).

⁴ *Id.*

⁵ *Id.* at 15.

⁶ *Id.* at 16.

⁷ *Id.* at 17.



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The Expanding Legal Sphere of Immigration Enforcement

Sandra Feist

A New, Aggressive Approach to Worksite Immigration Enforcement

On May 12, 2008, U.S. Immigration and Customs Enforcement (ICE) agents arrested 389 illegal aliens at Agriprocessors, Inc., a kosher meatpacking plant located in Postville, Iowa.¹ The Postville raid was the largest criminal worksite enforcement operation in United States history and it exemplifies the new, aggressive approach to worksite enforcement by the federal government.² The federal government is not alone in its newfound forceful approach to staunching employment of illegal aliens. Agriprocessors, Inc. was fined nearly \$10 million by the State of Iowa for alleged violations of state labor laws.³ In addition, more states are enacting laws directly aimed at addressing immigration law violations.⁴

In light of the new focus on the employer as the anvil of immigration enforcement, it has become increasingly important to keep the applicable immigration laws and liabilities in mind when advising employers on a myriad of employment law issues. Illegal workers are no longer the sole focus of these

laws. Business owners, human resources specialists, and corporate executives are now commonly charged with civil and criminal violations in an effort to deter employers from hiring illegal aliens and thereby hinder illegal immigration.⁵ This article details the expansive and often creative methods by which the federal and state governments are enforcing restrictions on the hiring of illegal aliens.

The Immigration Reform and Control Act (IRCA) of 1986

Until recently, the Immigration Reform and Control Act (IRCA) was the primary mechanism through which immigration violations by employers were enforced. IRCA, passed by Congress in 1986, created the first sanctions for employers who hire unauthorized workers. IRCA contains provisions that make it unlawful for an employer to knowingly hire, or to recruit or refer for a fee, any person who is not legally authorized to work in the United States.⁶ IRCA also prohibits the continuation of employment once the employer becomes aware of the worker's unauthorized status.⁷

The employment verification system, or I-9 process, was made mandatory by IRCA and requires the hiring, recruiting, or referring individual to review the work authorization and verify the identity of new hires.⁸ Government inspections were mainly the result of I-9 file audits, both random and based on specific tips or criteria. Notably, in the past, the employer was normally given three days notice prior to an on-site inspection.

The penalties for violations of these IRCA provisions can be civil or criminal. The civil penalties, which have been merely adjusted for inflation since 1999, were increased by an average of 25% for violations that occurred after March 27, 2008.⁹ The civil penalties for hiring, recruiting, and referral violations are: (1) first offense, \$375 to \$3,200 for each foreign national; (2) second offense, \$3,200 to \$6,500 for each foreign national; and (3) third or additional offenses, \$4,300 to \$16,000 for each foreign national.¹⁰

Criminal penalties and injunctions are imposed under IRCA on employers who have exhibited a “pattern or practice” of violations.¹¹ An employer faces up to a \$3,000 fine for each unauthorized worker with respect to whom the violation occurred and could be imprisoned for up to six months for the entire pattern or practice.¹²

Criminal Sanctions for the Transportation and Harboring of Illegal Aliens

In 1981, Congress created a criminal penalty for “any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection” the alien.¹³ This crime extends to both conspiracy and attempted harboring and transportation of

illegal aliens.¹⁴ The statute, section 247 of the Immigration and Nationality Act, initially created an explicit statutory exception for employers of undocumented workers.¹⁵ In 1986, Congress eliminated this exception with the passage of IRCA.¹⁶ This provision of the Immigration and Nationality Act is now a tool in the arsenal of federal statutes utilized against employers, including management-level personnel, who have employed undocumented workers.¹⁷

The criminal penalties for transporting and harboring aliens under section 274 are severe and, under certain aggravated circumstances, can result in 20 years imprisonment.¹⁸ In most cases where the offense “was done for the purpose of commercial advantage or private financial gain,” the offender will be fined under Title 18 of the United States Code and imprisoned for not more than 10 years.¹⁹

Federal Employment Tax Evasion

In addition to direct charges of hiring and harboring illegal aliens, ICE now regularly charges employers with tax evasion in connection with employing an illegal workforce. Employers are punished for failure to collect and pay federal income, Social Security, Medicare, and federal employment taxes on the wages paid to their workers.²⁰ An extreme example of this strategy is the felony indictment in 2007 of three top executives of Rosenbaum-Cunningham International, Inc. (RCI), a cleaning and grounds-maintenance service, for failing to pay federal employment taxes.²¹ By failing to collect and pay federal income, Social Security, and Medicare, and federal employment taxes on the wages it paid to its workforce, RCI was able to evade payment of over \$18,640,000 in employment taxes.²² These activities constitute a felony punishable by up to five

years imprisonment and \$10,000, as well as restitution of illegally-obtained profits.²³ The RCI executives were sentenced to extended imprisonment as a result of their collective crimes and were ordered to pay restitution in an amount over \$48,800,000.²⁴

Racketeer Influenced and Corrupt Organizations Act (“RICO”)

The federal government has also utilized the Racketeer Influenced and Corrupt Organizations Act (RICO) laws to prosecute employers of illegal aliens.²⁵ RICO penalizes criminal acts performed as part of an ongoing criminal organization.²⁶ Initially created in order to target organized crime syndicates, RICO has now become an enforcement tool utilized against employers, recruiters, and employment agencies.²⁷

State Labor Laws

The ongoing lawsuits against the managers and owners of the Agriprocessors plant exemplify the state governments’ intentions to expand the sphere of criminal and civil enforcement tools to be used against employers who employ and exploit illegal workers. The plant was recently fined nearly \$10 million for state labor violations. These violations included illegal paycheck deductions and illegal withholding of final paychecks from 42 workers arrested in the raid. In addition, the owner of the plant, his son, and the top manager of the plant at the time of the raid were indicted for gross violations of child labor laws including more than 9,300 misdemeanor violations.²⁸

Actions Against Workers Arrested in Worksite Raids

Several new and creative approaches to worksite enforcement target the illegal workforce with the ultimate goal of

deportation, as well as the development of testimony and evidence against corporate management. This use of criminal sanctions to effectuate removal of illegal aliens has become extremely common under the new theory of worksite enforcement. Within three days of the Agriprocessors raid, 297 of the 389 detainees pleaded guilty and were sentenced on federal felony charges.²⁹

It has become common to charge illegal workers with identity theft for the use of false documents as evidence of employment authorization.³⁰ Of the 297 defendants arrested in the Agriprocessors raid, 230 were sentenced to five months in prison and three years of supervision for using false identification to obtain employment after admitting to using another person's identity.³¹ In addition, the former CEO of Agriprocessors was charged in October 2008 with aggravated identity theft and currently faces a two-year prison sentence and a \$250,000 fine.³² The charge of identity theft was also the primary strategy for effectuating removal of illegal workers detained during the raid of Swift & Company (“Swift”) Meatpacking Plant in December 2006 in Worthington, Minnesota. 1,297 workers were arrested in this raid, publicized as part of an ongoing investigation into “a massive identity theft scheme.”³³

Illegal workers are also regularly charged under the felony fraud section of the Social Security Act.³⁴ Under section 408(a)(7) of the Social Security Act, a person is subject to criminal penalties for using a false social security card or number, or purchasing or modifying a social security card. This law has been utilized against illegal workers who have demonstrated employment authorization through the use of a false social security number.³⁵ Social security fraud carries a maximum punishment of five years imprisonment and a \$250,000 fine.³⁶

Conclusion

Both the federal and state governments have grown more aggressive and creative in combating workplace immigration violations, criminalizing actions where even civil penalties used to be rare. In addition to the expansion of the number and type of laws that are used against employers, a concerted effort has been made to publicize the ICE raids and this publicity has resulted in the collateral impact of loss of reputation and business. Therefore, the threat of immigration worksite enforcement must be a key consideration in advising employers on legal matters that may overlap with immigration compliance.

Notes

¹ Press Release, Immigration and Customs Enforcement, *85 Sentenced for Criminal Offenses in One Day Following ICE Operation in Iowa* (May 20, 2008), available at <http://www.ice.gov/pi/news/newsreleases/articles/080520waterloo.htm?searchstring=postville>.

² Worksite arrests jumped from approximately 500 in 2002 to 5,000 in 2007. See Fact Sheet, Immigration and Customs Enforcement Fact Sheets: FAQ About Worksite Enforcement (Aug. 12, 2008), available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

³ Julia Preston, *Meatpacker is Fined Nearly \$10 Million*, N.Y. Times, Oct. 30, 2008, at A22.

⁴ In 2007, legislators across the United States introduced a total of 1,059 immigration-related bills and resolutions. Migration Policy Institute, *Regulating Immigration at the State Level: Highlights from the Database of 2007 State Immigration Legislation and the Methodology* (2007), <http://www.migrationpolicy.org/pubs/2007methodology.pdf>.

⁵ Of over 1,100 arrests tied to worksite enforcement investigations in fiscal year 2008, 130 of those charged criminally were business owners, managers, supervisors, and human resources personnel. U.S. Attorney's Office for the Eastern District of California, U.S. Fed News, Oct. 23, 2008, 2008 WLNR 20264283.

⁶ Immigration and Nationality Act (INA) § 274A(a)(1)(A); 8 U.S.C. § 1324a(a)(1)(A).

⁷ INA § 274A(a)(2); 8 U.S.C. § 1324a(a)(2).

⁸ INA § 274A(b); 8 U.S.C. § 1324a(b). The U.S. Citizenship and Immigration Services Handbook for

Employers is an extremely useful tool for employers who struggle with the details of this sensitive process. See U.S. Citizenship and Immigration Services Handbook for Employers, available at <http://www.uscis.gov/files/nativedocuments/m-274.pdf>.

⁹ 73 Fed. Reg. 10130-37 (Feb. 26, 2008).

¹⁰ INA § 274A(e)(4); 8 U.S.C. § 1324a(e)(4); 8 C.F.R. § 274a.10(b).

¹¹ Pattern and practice is defined as "regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts." 8 C.F.R. 274a.1(k).

¹² INA § 274A(f); 8 U.S.C. § 1324a(f); 8 C.F.R. § 274a.10(a).

¹³ INA § 274A(a); 8 U.S.C. § 1324a.

¹⁴ *Id.*

¹⁵ The statute provided that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." INA § 274A(a); 8 U.S.C. § 1324a (parenthesis in original). Based upon this exemption, the fact that an employer simply employed an illegal alien would not equate to "harboring," which implies a more active role in evading the immigration laws.

¹⁶ Section 112 of the Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), amending 8 U.S.C. § 1324(a); INA § 274(a). The introductory comments to the amendment stated: "While section 112 of IRCA amends section 274(a) of the Act . . . employment of illegal aliens in and of itself does not constitute harboring under section 274 (a) of the Act as amended." See Department of Justice, 52 Fed. Reg. 16217 (May 1, 1987).

¹⁷ For example, ICE charged five current and former managers of IFCO Systems North America with felony and misdemeanor charges stemming from a raid. These charges included felony indictment charges of engaging in a conspiracy to hire illegal aliens and to transport illegal aliens. Press Release, Immigration and Customs Enforcement, *Two New Guilty Pleas in Government's Probe of Immigration Violations at IFCO* (Oct. 21, 2008), available at <http://www.ice.gov/pi/nr/0810/081021albany.htm>.

¹⁸ INA § 274(a)(1)(B); INA § 274(a)(2).

¹⁹ INA § 274(a)(1)(B)(i); see also 18 U.S.C. § 981, *et seq.*

²⁰ See, e.g., Press Release, Immigration and Customs Enforcement, *The Last of 3 RCI Officers Pleads Guilty to Immigration Violations, Tax Evasion* (Nov. 7, 2007) available at <http://www.ice.gov/pi/news/newsreleases/articles/071107grandrapids.htm>.

²¹ Press Release, Immigration and Customs Enforcement, *Three Executives of National Cleaning Company Indicted for Harboring Illegal Aliens and Evading Taxes* (Feb. 22, 2007), available at <http://www.ice.gov/pi/news/newsreleases/articles/070222grandrapids.htm?searchstring=RCI>.

²² *Id.* John H. Imhoff, Jr., Acting IRS Chief, Criminal Investigation, stated that the IRS will enforce the law “with particular vigor in the corporate arena. This type of corrosive activity by corporations is just not acceptable to any of us and their behavior undermines the integrity and trust in our tax system.” *Id.*

²³ 26 U.S.C. § 7202 (2008).

²⁴ Press Release, Immigration and Customs Enforcement, *Leaders of Multi-Million Dollar Immigration and Tax Scam Sentenced to Hard Time* (Mar. 4, 2008), available at <http://www.ice.gov/pi/news/newsreleases/articles/080304grandrapids.htm?searchstring=RCI>.

²⁵ Legal scholars have also explored the possibility of civil RICO lawsuits by legal workers against employers of a vast illegal workforce. *See, e.g.,* Megan M. Reed, *RICO at the Border: Interpreting Anza v. Ideal Steel Supply Corp. and its Effect on Immigration Enforcement*, 64 Wash. & Lee L. Rev. 1243 (2007).

²⁶ RICO was enacted by section 901(a) of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, enacted Oct. 15, 1970. RICO is codified as Chapter 96 of Title 18 of the United States Code, 18 U.S.C. § 1961-68.

²⁷ *See, e.g., Mohawk Indus., Inc. v. Williams*, No. 04-13740, 2006 WL 2742005 (11th Cir. Sept. 27, 2006) (holding that an employer's arrangements with recruiters and employment agencies, under which recruiters and agencies supplied illegal aliens to work for employer, qualified as an “enterprise” under RICO distinct from the defendant employer’s own affairs).

²⁸ Julia Preston, *Meatpacker is Fined Nearly \$10 Million*, N.Y. Times, Oct. 30, 2008, at A22.

²⁹ Press Release, Immigration and Customs Enforcement, *297 Convicted and Sentenced Following ICE Worksite Operation in Iowa* (May 15, 2008), available at <http://www.ice.gov/pi/news/newsreleases/articles/080515waterloo.htm?searchstring=agriprocessors>.

³⁰ This is extremely problematic, as identity theft statutes were created to protect the individual whose identity was stolen and who suffered actual harm as a result. Arguably, the individuals whose true identities were utilized in order for illegal workers to gain employment were not harmed by the action. Therefore, the use of identity theft as a method of immigration enforcement is extremely suspect.

³¹ Press Release, *supra* note 29.

³² Press Release, Immigration and Customs Enforcement, *ICE Arrests Former Agriprocessors CEO* (Oct. 30, 2008) available at <http://www.ice.gov/pi/nr/0810/081030cedarrapids.htm?searchstring=agriprocessors>.

³³ Kevin R. Lashush, Magali S. Candler, & Robert F.

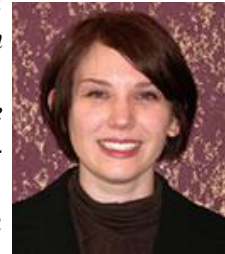
Loughran, *Fear the ICE Man: Lessons from the Swift Raids to Warm You Up- The New Government Perspective on Employer Sanctions*, 32 Nova L. Rev. 391 (2008); *see also* *Inside ICE: ICE Cracks Large-Scale Identity Theft Scheme*, Vol. 4, Issue 1 (2007), available at http://www.ice.gov/pi/news/insideice/articles/insideice_070130_web1.htm?searchstring=swift%20AND%20minnesota.

³⁴ 42 U.S.C. § 408(a)(7)(A)-(C).

³⁵ Lashush et al., *supra* note 33.

³⁶ 42 U.S.C. § 408(a)(7)(A)-(C); 18 U.S.C. 3571.

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When Good Clients Go Bad: Withdrawing as Counsel

Brad Welp

Although duty bound to be zealous advocates, attorneys may feel at times like they are not even on the same team as their clients. Conflict between counsel and client regarding the strategies and direction of a case, or more often over payment of fees, is something every lawyer will experience. However, there are those rare occasions when an attorney decides to withdraw from representation. When that time comes, an attorney must be mindful of her obligations to the opposing parties, the court, and yes, even the troublesome client.

In practice, an attorney may withdraw from representation in a civil case without a motion and without the permission of the court.¹ The requirements for withdrawal are found in Rule 105 of the Minnesota General Rules of Practice. After appearing in any action, a lawyer who seeks to withdraw must: (1) provide written notice of withdrawal served upon all parties who have appeared, (2) file the same with the court administrator,² and (3) include in the notice the address and phone number where the party can be served or notified of matters in the case.³ If the requirements of Rule 105 are met, then court approval of the withdrawal is not required.⁴ However, an attorney must note that her withdrawal "does not create any right to continuance of any scheduled trial or hearing."⁵ This limitation is among many ethical duties that an attorney must consider when withdrawing from representation.

While Rule 105 provides a simple procedure for withdrawing as counsel, it neither authorizes nor regulates an attorney's withdrawal, which is instead governed by the

Rules of Professional Conduct and the Lawyers Professional Responsibility Board.⁶ The right to withdraw is found in Rule 1.16 of the Minnesota Rules of Professional Conduct. Depending on the circumstances, the rule both mandates and permits an attorney to terminate her representation of a client. The rule obligates a lawyer to withdraw from representation if (1) the representation will result in violation of the Rules of Professional Conduct or other law, (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, (3) the lawyer is discharged (by the client), or (4) the client persists in a course of action using the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.⁷

In addition, an attorney may withdraw⁸ from representation for one or more of the following five reasons: (1) the client has used the lawyer's services to perpetrate a crime or fraud, (2) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent, (3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled, (4) the representation has been rendered unreasonably difficult by the client, or (5) other good cause for withdrawal exists.⁹

Having found authorization to withdraw in Rule 1.16, an attorney nevertheless must "take steps to the extent reasonably practicable to protect a client's interests."¹⁰ This may include giving the client reasonable notice and time to find new

counsel, turning over papers and property to which the client is entitled, and refunding any unused retainer fee.¹¹ A frequent problem for attorneys arises when the client does not pay her legal fees. In that case, withdrawal is authorized by Rule 1.16(b)(4); however, even when a client fails to pay his legal fees, an attorney must continue her representation if withdrawal cannot be ethically accomplished. For instance, if trial is coming up in one or two weeks, an attorney's withdrawal would jeopardize the client's interests, particularly since a withdrawal creates no right to a continuance. Further, the client would likely be unable to find replacement counsel in time for trial (one of the ethical considerations enumerated in Rule 1.16(d)).¹² Therefore, to avoid this situation, attorneys should make financial arrangements with their clients before any pretrial conference to ensure that money is available if the case proceeds to trial.

Although the factual issues prompting withdrawal are outside the purview of the trial court, an attorney's decision to withdraw is still subject to the Lawyers Professional Responsibility Board. Improper withdrawal might lead to disciplinary action or a malpractice lawsuit.¹³ Even when a lawyer is obligated or permitted to withdraw under Rule 1.16 of the Minnesota Rules of Professional Conduct, a lawyer's ethical obligations to her client remain paramount and cannot be neglected.

Notes

¹ See 3A Minn. Prac. § 105.3 (2008 ed.); Minn. Gen. R. Prac. 105 (2008).

² Filing a Notice of Withdrawal with the court is not required if no other papers have yet been filed in the action. Minn. Gen. R. Prac. 105.

³ *Id.*

⁴ 3A Minn. Prac. § 105.2 (2008 ed). The reader should note that Rule 105 applies only in civil matters; withdrawal in criminal cases is governed by Minn. Gen. R. Prac. 703 (2008), which requires court approval for withdrawal.

⁵ Minn. Gen. R. Prac. 105.

⁶ 1997 Comment to Minn. Gen. R. Prac 105.

⁷ Minn. R. Prof. Cond. 1.16(a)(1)-(4) (2008).

⁸ Both mandatory and permissive withdrawal under Rule 1.16 are subject to subdivision (c), which requires a lawyer to comply with the applicable law of a tribunal when terminating representation, and if the tribunal so orders, a lawyer must continue representation despite good cause for termination., Minn. R. Prof. Cond. 1.16(c) (2008).

⁹ Minn. R. Prof. Cond. 1.16(b)(1)-(5) (2008).

¹⁰ *Id.*, subd. (d).

¹¹ *Id.*

¹² In family court, the judge usually will not allow withdrawal by counsel if the matter is scheduled for trial. See 14 Minn. Prac. § 22.6 (2d ed.).

¹³ 3A Minn. Prac. § 105.3; see, e.g., *In re Disciplinary Action Against Fuller*, 621 N.W.2d 460, 466-67 (Minn. 2001) (attorney suspended for, *inter alia*, improper withdrawal).

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11th District Affiliate News

The 11th District New Lawyers Section held its third annual holiday party for the women and children of Safe Haven Shelter for Battered Women in Duluth, Minnesota. The event took place on December 22, 2008, at the Lake Superior Railroad Museum. The children had a great time exploring the trains, listening to a local band (AM Rubin) perform Christmas carols, and opening presents delivered by Santa. The women also enjoyed themselves and each received a care package including a robe, laundry basket, and personal care items.

The 11th District New Lawyers Section also put on its annual SANTA BRINGS A LAW“SUIT” clothing drive this past December. Members of the 11th District New Lawyers organize drop locations at their offices and collect professional clothing, which is donated to the Damiano Center’s “Clothes That Work” program. The “Clothes That Work” program provides professional clothing to people in need so that they are able to make a good impression at job interviews.

The 11th District New Lawyers Section continues to meet on a monthly basis for lunch socials or for scheduled speakers. In December, the group heard from the League of Women Voters regarding the League’s position on Judicial Elections. In February, the group heard from District Court Judges Shaun Floerke and Sally Tarnowski regarding the Sixth Judicial District’s successful implementation of the Early Neutral Evaluation process for family law cases.

This Spring, the group hopes to organize a second annual “Office Crawl,” which provides New Lawyers an opportunity to tour a number of local law firms and meet shareholders and partners from the different firms. Last year’s tour also included a stop at the St. Louis County Courthouse and a stop at Legal Aid Service of Northeastern Minnesota.

Mia Thibodeau is the Chair of the 11th District New Lawyers Section. She can be reached at 218.725.6873 or mthibodeau@fryberger.com.

2008-2009 NLS Liaisons

Art & Entertainment Law Section
Maxwell Felsheim

Business Law Section
John Remaker & Meredith Bauer

Civil Litigation Section
Joy Anderson & Melissa Wendland

Computer & Technology Law Section
Jeffrey Anderson & Todd Schenk

Construction Law Section
Chanel Melin

Criminal Law Section
Sam Edmunds

Elder Law Section
Sarah McGuire

Employee Benefits Section
Brita de Malignon

Health Law Section
Mike Espenson & Erin Furlong

Human Rights Committee
Nicole Haaning

International Business Law Section
John Kindseth & Kimberly Lange

Judiciary Committee
Valerie LeMaster

Labor & Employment Law Section
Jodee McCallum & Jody Ward

Legislative Committee
Jon Drewes and Mike Miller

Probate and Trust Law Section
Mia Peterson & Zach Volk

Professionalism Committee
Laurie Young

Public Law Section
Michael Goodwin

Real Property Law Section
Nikki McCain & Mike Cimino

Tax Law Section
Ann Peterson

2008-2009 NLS Open Liaison Positions

Committees

- . Convention
- . Diversity
- . Fair Response
- . Insurance for Members
- . Legal Assistance to the Disadvantaged
- . Life and the Law
- . Membership
- . Paralegal
- . Pro Se Implementation
- . Publications
- . Rules of Professional Conduct
- . Women in the Legal Profession

Sections

- . Administrative Law
- . Alternative Dispute Resolution
- . Animal Law
- . Antitrust
- . Appellate Practice
- . Bankruptcy Law
- . Children and the Law
- . Communications Law
- . Environmental, Natural Resources and Energy Law
- . Family Law
- . Food and Drug Law
- . General Practice, Solo and Small Firm
- . Immigration Law
- . Outstate Practice
- . Practice Management & Marketing
- . Public Utilities

New lawyers can become liaisons to various committees and sections in the MSBA. This is a great opportunity to get involved with a substantive or procedural area of law. If you are interested in becoming a liaison, please contact Lacey Anderson, Vice-Chair, at [lacea@esquiregroup.com](mailto:lancea@esquiregroup.com).

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