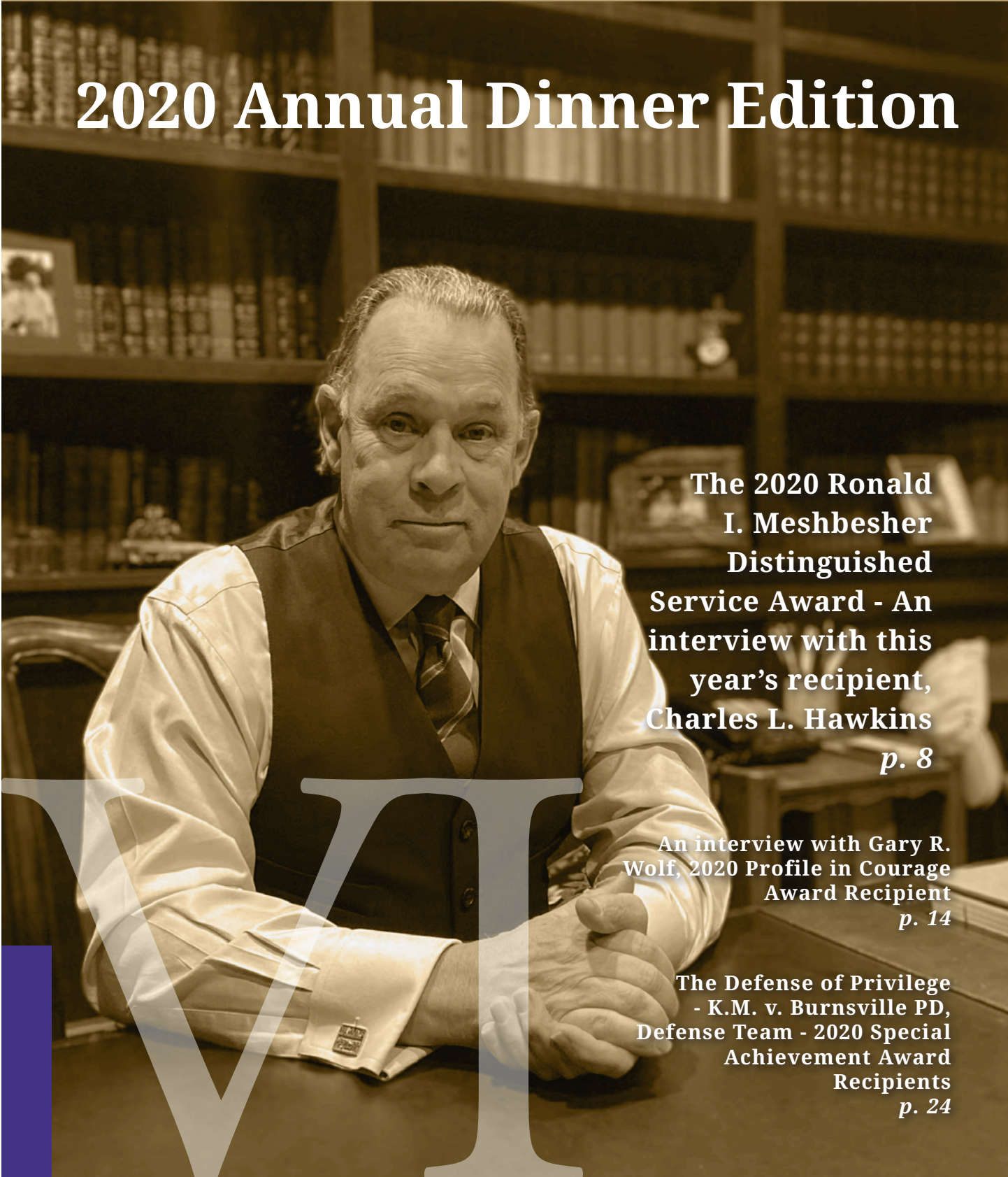


MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

# 2020 Annual Dinner Edition



The 2020 Ronald  
I. Meshbesher  
Distinguished  
Service Award - An  
interview with this  
year's recipient,  
Charles L. Hawkins  
*p. 8*

An interview with Gary R.  
Wolf, 2020 Profile in Courage  
Award Recipient  
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The Defense of Privilege  
- K.M. v. Burnsville PD,  
Defense Team - 2020 Special  
Achievement Award  
Recipients  
*p. 24*

# *Note from the Editor:*

Members:

This issue of VI highlights this year's MACDL award winners:

- Charles L. Hawkins – The Ronald I. Meshbeshier Distinguished Service Award;
- K.M. v. Burnsville Police Department, Defense Team – The Special Achievement Award;
- Gary R. Wolf – The Profile in Courage Award

These remarkable practitioners will be celebrated at MACDL's Annual Dinner & Auction on March 7, 2020. The Annual Dinner is the single-most important fundraiser for MACDL. Contributions at the dinner fund the organization's efforts to enhance criminal defense in Minnesota. This issue contains registration information for the dinner. If you have not registered, please do. It is a great time. Someone will probably buy you a drink.

To you,

Stephen

# ATTENTION CRIMINAL ATTORNEYS

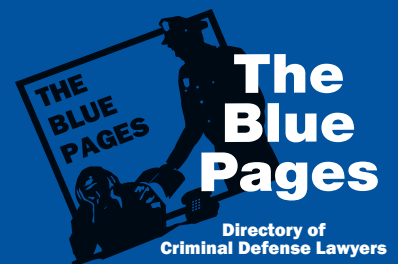
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**Minnesota Association of  
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VI Magazine is published by MACDL, a Minnesota nonprofit corporation. MACDL works to advance the advocacy skills of MACDL members, inspire and motivate aggressive, ethical, and effective defense for all accused, and connect the criminal defence community in Minnesota.

Articles express the opinion of the contributors and not necessarily that of VI Magazine or MACDL. Headlines and other material outside the body of articles are the responsibility of the Editor. VI Magazine accepts letters and unsolicited manuscripts about the practice of criminal defense or the trial of criminal cases.

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# President's Corner

*Kelly Keagan*



It's the time of year – spring is near! A time when two major annual events are happening with MACDL: the 2020 MACDL Annual Dinner, and the Minnesota Legislative session.

The Minnesota Legislative session began on February

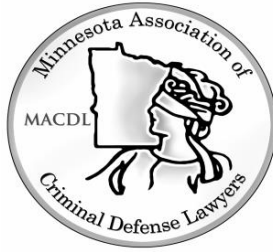
11. Our MACDL legislative committee met in November with our lobbying team, Hylden Law & Advocacy, and set out our agenda for the session. This is the second year of a biennium and thus, many of our priorities and introduced legislation are carrying over from the previous year. We expect to see major changes especially with regard to probation term lengths, as well as asset forfeiture reform. On January 9, 2020, the Minnesota Sentencing Guidelines Commission passed probation term limits of five years for most felony offenses. Unless the legislature acts, the probation term limits will go into effect. It appears unlikely the legislature will organize to make changes, as the Minnesota House is controlled by democrats and is in favor of probation reform, whereas the Minnesota Senate is controlled by Republicans and is opposed to probation reform. MACDL is also continuing our years long effort to overhaul policing for profit in Minnesota.

Over the years we have worked on several forfeiture initiatives such as requiring a conviction, extending deadlines for filing petitions to challenge forfeiture, and expanding innocent owner defenses. We have been in talks with the Minnesota County Attorney's Association and other stakeholders to continue reforms. Details are not yet finalized, but MACDL will keep members apprised. Log on to MACDL's new and improved website to opt in for legislative committee updates.

Our annual dinner is March 7, 2020. For the second year we will be at the Golden Valley Country Club. The annual dinner, affectionately sometimes referred to as "Lawyer Prom," is our biggest event of the year. We rely on money raised at the dinner to fund our operations including our lobbying efforts, our executive director, our website, CLE events, and amicus issues before the appellate courts. Please attend, but also consider making a donation of services or goods to help make the silent and live auctions a success. This issue of the VI Magazine has wonderful articles to give background on our awardees this year. Log on to our website for details on the annual dinner and other upcoming events. You can register for the dinner online.

Last, I want to recognize the efforts of our Interim Executive Director, Piper Wold. Piper has been tireless in fundraising and making our annual dinner a success. She stepped in at a time MACDL needed her most and we are grateful. I am happy to report our membership is the now largest it has ever been. Thank you for being a member and supporting this wonderful organization. ■





***Join us for our Annual Dinner & Auction***

**SATURDAY MARCH 7<sup>TH</sup> 2020**

**6:00 pm Cocktail Hour; 7:00 pm Dinner & Program**

**Golden Valley Country Club  
7001 Golden Valley Road  
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**DISTINGUISHED SERVICE AWARD RECIPIENT:**

**Charles L. Hawkins**



**SPECIAL ACHIEVEMENT AWARD RECIPIENTS:**

***K.M. v. Burnsville Police Department Defense Team***

**(Andy Birrell, Ian Birrell, Ryan Garry, Elizabeth Duel,  
Chris Madel, Mack Reed & Stephen Premo)**

**PROFILE IN COURAGE AWARD RECIPIENT:**

**Gary R. Wolf**

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# Not Just a Profession, an Avocation:

## An interview with Charles Hawkins, the 2020 recipient of MACDL's Ronald I. Meshbesher Distinguished Service Award

*Stephen Foertsch, Bruno Law, PLLC*

On March 7, 2020, MACDL members will gather to eat, drink, raise money, and be generally merry at the Annual Dinner. Every year, MACDL honors an exemplary criminal defense practitioner for a lifetime of achievement and devotion to the practice of criminal defense. The award formerly known as the Distinguished Service Award has been aptly renamed the Ronald I. Meshbesher Distinguished Service Award, after legendary Minnesota criminal defense attorney, Ron Meshbesher. Past recipients include some of the most influential criminal defense practitioners in Minnesota.

This year's recipient is Charles "Chuck" Hawkins, a legend in his own right. A disciple of Douglas W. Thomson, Chuck continues a high level of practice after 40 years and over 200 state and federal jury trials. I had the pleasure to sit down with Chuck for a conversation about life, his career, and his love of a jealous mistress, the law.

---

**SF:**

What's your favorite war story?

**CH:**

I represented an individual charged with burglarizing a Walgreens. The evidence is that he, sometime during the day, went into the pharmacy, entered the restroom, removed a ceiling tile, climbed up into the bathroom ceiling, and worked his way towards the pharmacy. After closing, he hung out above the pharmacy for a period of time, dropped down into the pharmacy, and stole a lot of Dilaudid and

Percodan—drugs of choice at the time. Eventually, he gets charged with burglarizing the pharmacy.

We tried the case and when I got done arguing to the jury, I went back and sat next to my client. My client leaned over and whispered, "You convinced me I didn't do it."

**SF:**

If you had to attribute one piece of advice to your success, what would it be?

**CH:**

What's one piece of advice that I attribute to my success? Never judging my clients. We're not here to judge them. We're here to advocate for them, and if you're judging them, you're not going to advocate the way you should, because you have a pre-conceived notion about who they are, what they are, and whether or not they are guilty or not guilty. In almost 40 years of doing this, I believe in 95% or more of the cases, you don't need to know if your client's guilty or not guilty. Lawyers that ask their clients if they're guilty are generally lawyers that use that to compel or convince or coddle their client into taking a plea, instead of just going to trial and fighting. You've got to be willing to try cases. You want to be a criminal defense lawyer? That's one thing. You want to be a criminal defense trial lawyer, that's something else.

**SF:**

Who are your mentors?



**CH:**

I had two mentors. One, my father. My father got me to do everything he ever wanted me to do without asking me to do anything, including going to law school. When I was growing up, he'd talk to me about, "Well, what do you want to do?" I'd say, "Well, I want to be a fireman." He'd tell me, "Firemen are honorable and heroic-type people, and, you know, an honorable profession. But, you know, if you want to be a fireman, did you ever think that if you went to law school, and got yourself a law degree, that if you ever got tired of being a fireman, you could become a lawyer?" And the next time around, he says, you know, "You can be whatever you want to be, just be the best you can be, at whatever it is you decide to be. You want to be a ditch digger? That's okay with us, that's okay, that's an honorable job. But if you want to be a ditch digger, be the best ditch digger you can be. But if you ever get tired of being a ditch digger, and you go to law school, you can always just hang out a shingle and practice law."

My other mentor was Douglas W. Thomson. As he would say, "he taught me everything I know about the practice of law, but not everything he knows." There is no question that anybody that knew him, that anybody that practiced with him, that anybody who had the privilege of trying cases with him, would tell you, without a doubt, he was as good a lawyer as you were ever going to find. He professed that the only thing that stands between a lawyer winning an acquittal for their client is their own imagination. For instance, he represented a guy who was accused of rape. His defense was the woman who made the accusation, who recently had left eight years in the convent, was actually lying about non-consensual sex because the guilt of leaving the convent and the vows she took when she entered it had so guilt-ridden her, that she fabricated a claim of non-consensual sex and self-inflicted the ligature marks around her neck so she would appear more believable. He then got the jury to agree that all that was true. That's the type of advocate Doug Thomson was. That's the type of advocate that every lawyer doing criminal defense should strive to become. Everybody, and it's too bad they can't, should be able to listen to Doug Thomson's closing arguments.

**SF:**

What do you know now that you wish you knew "then"?

**CH:**

(Long pause) How valuable time is. Abraham Lincoln said, "A lawyer's stock and trade is his time." Judge Robert Traver, I believe, from the Michigan Supreme Court, said, "The law is a jealous mistress." When I started practicing law in 1980, I went to work, every day, seven days a week. I was in the office early, was in court, generally, most days. Otherwise, working on preparing cases. I was with lawyers in the evening, back at it the next day. Saturday, Sunday, always. And at the same time, what I didn't realize, is how special the time I had practicing law with Doug Thomson was. It wasn't until later on, you realize how important all of those minutes with Doug Thomson were for you—ah, so important to your development as a lawyer. Whether it's seeing clients in jail on Saturdays or seeing them at 7:00 at night, because you haven't been able to do it before, you saw them, and you spent time getting to know them. You don't really understand how valuable time is when you start practicing law. And what I have found over time, is the time commitment to the law is the greatest thing you can do, as far as becoming a good lawyer. Because it is, without a question, time consuming. When I started in 1980, it was expected that you would be committed to the practice and that it would be time consuming. You were expected to make sacrifices.

My daughter was born on Sunday. I had a hearing on a motion to suppress on Monday morning. At twelve noon, the judge said, "We'll recess until 1:30." The prosecutor said, "Your Honor, we've probably only got five to ten minutes left, Mr. Hawkins wife had their first daughter yesterday. He's got to go to the hospital, pick up his daughter. Could we just continue for another five to ten minutes, and we'll complete the hearing?" The judge said, "We'll reconvene at 1:30."

When my daughter was six months old, I ended up in a nine-week trial in Michigan. I came back two weekends. When Jane and I were dating, we had plans to take a trip

together, to Aspen. I ended up in trial for six weeks in Texas.

The law is a jealous mistress, because the time that there is in a given day limits your ability to share your time, and you have to be careful with it. It is so crucial to understand that whatever you give the law, it will give you back in multiples. If you short-change the law, if you short-change preparation, if you short-change legal research, if you short-change, just thinking about a theory of the defense, you're going to short-change you and your client. It's a profession, but the reality is, it is also an avocation.

I'm fortunate that I married a woman who understood what my belief in the practice was and understood how I practice law. She knew about that before she ever got involved. By getting involved, I mean by saying she'd be my wife. You can tell from her standing on the back stoop with a new baby, flowers, and balloons, and I'm running off to head back to court, and she's standing there crying, that she made a lot of sacrifices. I was fortunate—very fortunate—that I had somebody supporting me who was willing to make a lot of sacrifices to allow me to do what I wanted to, and to do it the best I could do it.

**SF:**

What does this award mean to you?

**CH:**

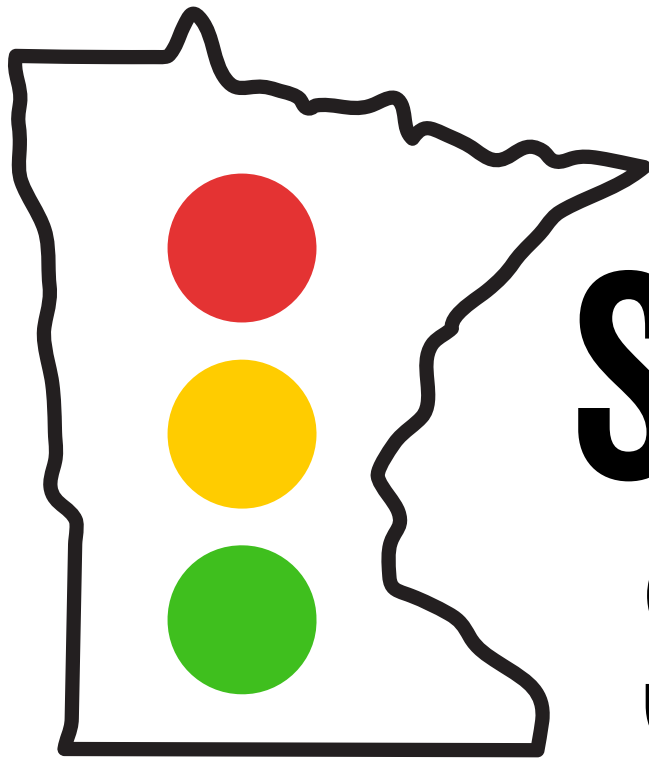
Well, it's an absolute honor to receive an award like this from a group of your peers, and it not only is an honor, but it's probably, without a question as humbling an experience as I have had. I say that with the deepest sincerity from the bottom of my heart. You know, it's a tremendous honor to be put into the group of lawyers that have previously received this award from this association. This is particularly true when receiving the first Ronald I. Meshbesher Distinguished Service Award. ■

## *About Charles L. Hawkins*



Charles L. Hawkins is the 2020 recipient of the Ronald I. Meshbesher Distinguished Service Award. Mr. Hawkins graduated cum laude from Concordia College in Moorhead, Minnesota, before earning his Juris Doctorate from Hamline University School of Law in 1980. Mr. Hawkins

began his legal career with Douglas W. Thomson and opened his own practice in 1987. He is licensed in the State of Minnesota, and admitted in the United States District Court for the Districts of Minnesota, Nebraska, and North Dakota. He is also admitted to practice before the Eighth Circuit Court of Appeals, the Seventh Circuit Court of Appeals, the Fifth Circuit Court of Appeals, and the United States Supreme Court. Mr. Hawkins has been listed in Best Lawyers in America since 1995, he is a Fellow and treasurer in the American Board of Criminal Lawyers, he is a Life Member of the NACDL, he is a member and past president of MACDL, and he is a MSBA Certified Criminal Law Specialist. Mr. Hawkins has tried over 200 State and Federal criminal cases.



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### These Machines Can Put You in Jail. Don't Trust Them.

Alcohol breath tests, a linchpin of the criminal justice system, are often unreliable, a Times investigation found.

By Stacy Cowley and Jessica Silver-Greenberg

Nov. 3, 2019



Jan Semenoff served as the principal technical advisor to *The New York Times* in their year-long investigation on breath testing deficiencies in North America. Jan will speak about the investigation and his role, as well as the findings which led to the *Times* exposé. Mr. Semenoff will also speak about the background to his now famous quote "They turned the damn thing into a paperweight" and its current day implications.

Minneapolis Marriott NW  
7025 Northland Drive North  
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# A Profile in Courage:

## An interview with Gary R. Wolf

*Katherian D. Roe, Federal Defender, District of Minnesota*

*Gary Wolf was chosen to receive MACDL's Profile in Courage Award, to be awarded at the Annual Dinner on March 7, 2020. On February 10, 2020, I sat down with Gary to talk about his career and his thoughts about receiving this award. At the time of our discussion, Gary had been battling cancer for 5 ½ years. His battle was one that was well known in the legal community and his colleagues watched with admiration as he waged his personal battle against cancer while continuing his public battles in the criminal courts on behalf of his clients.*

---

### KDR:

I think we can agree that being a criminal defense attorney is a difficult job. Why did you choose to do this kind of work, Gary, knowing or maybe not yet knowing how hard it would be?

### GW:

I guess it goes back to why I became a lawyer. I became a lawyer because I saw a lot of injustice in our society and who corrects that? What I saw in my life was that legislatures can correct that, but I didn't like politics and I also saw that lawyers fight against injustice and they do it on a case by case basis. The results are immediate and somewhat pure because they're not all tangled up in moneyed interests and we make a big difference in our society. If a lawyer wins a big case, a criminal case for example, the Constitution is

vindicated and the whole society benefits from that kind of victory... one case has the potential to make the whole society better. So that's where I saw my future leading and that's where it led.

### KDR:

Let's talk about your practice—you have both a state and federal practice. You have been in federal practice for a long time; not just private cases but you are also a member of the Criminal Justice Act (CJA) Panel. You have been a member of the CJA Panel for 25 years. Did you know that?

### GW:

Well I know it was up there, I didn't count.

### KDR:

25 years.

### GW:

Ok.

### KDR:

So that's an amazing accomplishment and an amazing contribution to the community. It is so important to have high quality attorneys on the CJA Panel who are willing to represent folks who cannot afford counsel. In the 25 years that you have been on the Panel you have represented



approximately 160 people. That's quite an accomplishment, Gary. How did you get involved with the Panel in the first place? Why were you willing to take on the challenge of federal court and represent folks who couldn't afford to pay your fee?

### **GW:**

My first federal case was a case where I was retained. I tried the case in front of Judge Alsop. I was paid a very small amount of money. I had just left the government as my employer -- I was a naval officer, Navy JAG and then I was general counsel for an agency of the Defense Department. So 11 years with the government and when our daughter was born, my then wife wanted to come home and raise her. It was a good life decision, it was great. But my first case I was retained. Tried the case. After the trial, Judge Alsop called me into his chambers and said - you know I lost the case - he said you did a hell of a job. You really tried the hell out of this case. And I want to recommend to Dan Scott that you be placed on the federal panel. I didn't know who Dan Scott was; I didn't know what the federal panel was because we had just returned home from Cleveland, Ohio back to Minneapolis/St. Paul. But I thanked the Judge profusely, not knowing the great gift he had bestowed upon me. And then Dan Scott started to assign cases to me and I loved it because you got to work for someone without taking - and I just think that it was a very pure form of representing people - without taking money away from the family. And on the other side of that coin, you got all the resources as if your client did have money. So you could hire the investigators and the private experts that you needed to represent your client fully. So, not only are you not taking money from the family, but Uncle Sam is paying the bill for all kinds of good stuff. So I just thought that was so pure that I liked getting those cases.

### **KDR:**

Tell me about a case you really enjoyed trying—one of your favorites.

### **GW:**

One that I enjoyed the most --- a murder case that was so against us, there was no hope of winning. Ten eyewitnesses said our client shot the victim out in the open at the White Castle. And so I went to my mentor, Bruce Hanley, who I had worked for during law school. I was his second law clerk after Judge Reggie Chu. Bruce and I got along great. He formed my - the way I practice criminal defense. Who could be a better role model than Bruce Hanley?

### **GW:**

But let me get back to the case—Ten eyewitnesses said George Adkins shot Ronnie Smaller and killed him. Ten eyewitnesses testified to that and we got George Adkins acquitted.

### **KDR:**

How did that happen?

*(As you can imagine, Gary was smiling and animated as he told the story of the trial and how he and Bruce disproved the government's theory of the case and offered a very plausible alternate theory, one that the jury adopted. Although there is not enough space to retell it here, suffice it to say that the young Gary Wolf took some chances on cross examination that although risky, ultimately paid off).*

### **GW:**

I remember the jury commenting on the risky cross examination because the judge asked the jurors to stay back and talk to us. He asked the jurors, "What did you think or notice that stood out for you guys with respect to the trial?" The answer: three things. First: Gary only has two suits.

It was true, I did. A two week trial and I wore two suits. Second: The question about the muzzle flash (which I had deemed to be very risky cross examination), was pivotal to their decision on whether George was guilty or not. And third, that George Adkins really loved his lawyers. Because when they gave the not guilty verdict, George gave me the biggest hug you know and so those were the three things they noticed and he was acquitted. That got my career started.

### **KDR:**

That sounds like a great win! You mentioned mentoring. Did you have an opportunity to get good mentoring as a young lawyer?

### **GW:**

Oh yeah. Absolutely. Bruce Hanley, you know, he's the best in my mind. He's the best I think in everyone's mind who knows the law and knows lawyers. Bruce Hanley is the best, number one, pure. I think criminal defense lawyers are always willing to share their knowledge. Shiah, Peter Wold, Bill Orth, Kevin O'Brien were really great. I couldn't have been in a better spot, being in the same building with them. They are very giving with their knowledge you know because I guess we feel we're David and the government is Goliath and we have to join together....

### **KDR:**

Andrew Mohring would always say when he was talking about the Federal Defender's Office- that when he walked into the office he felt like he was in a safe space. Did you feel like that when you shared offices with all those guys? Did you feel like that was kind of your safe space?

### **GW:**

Oh yeah, you definitely would feel the support and I did in my office. There was no ulterior motives, everyone was -

all the cards were on the table to help you. So it's a giving situation when we all realize that not one of us can stand up against the government alone. We've got to have the comrades and people that you trust to get their ideas... with the criminal defense lawyers you do feel like it is some place where you can let down your guard and say, "I don't know this. Help me." Where else in society can you say that except with your family and friends?

### **KDR:**

As you know, the federal government prosecutes cases from the Red Lake Indian reservation. As federal criminal defense practitioners we have contact with that community. Many people in the community struggle for basic necessities. Over the years, you have been a leader in coordinating efforts to assist the Red Lake community and have been personally generous.

### **GW:**

I have a special relationship, you know, with Red Lake. Actually it's your office that is generous to that community by bringing up food and Christmas gifts for the kids and when I found out about it, I did all that I could to rent big cars and a truck to bring the food and stuff to Red Lake. Clothes that everybody on the federal panel and other people would donate and that was just well-received. These are courageous people.

*(Gary's wife went on to explain that Gary also drafted a letter asking his neighbors, her co-workers and local businesses to contribute food, supplies, clothes, toys and money to people in need in the Red Lake community.)*

### **GW:**

Yeah. We made several trips up there and befriended a lot of those folks. Red Lake they have courageous people, wonderful people.

## KDR:

Sometimes when we think about the cases that have been most important to us, they're not the cases that we win. Can you think of any cases where you have felt that you especially impacted someone's life or they especially impacted yours?

## GW:

I think all of my clients have made an impact on me. Even the one or two that even today want to see me strung up and drawn and quartered for whatever reasons they have for doing it, but most of my clients and I are friends. So they've all made an impact and I keep in touch with so many of them. I've had so many of them contact me just to talk or to get advice. It really doesn't really matter whether you won or lost, it's the experience in the - the impression that they left upon me.

## KDR:

In our practice we say that we "fight the fight" and we mean we fight against the government to support and represent our clients. But for you it's also been about fighting every day for your life. We've all seen you waging that battle for over 5 years now.

## GW:

When I got diagnosed with cancer it was already metastasized. I remember it was October 15th 2014. I remember because I had an argument in the Court of Appeals that day so I had to go argue my case and it was tax day. I went to the bathroom in the Court of Appeals in St. Paul and I remember urinating blood and parts of my kidney. I walked out of the bathroom and went and argued before the Court. Then I had to go to my CPA and sign my taxes and then I went to the emergency room and was admitted. After I got back home I had to decide how

do I protect my clients if I should die or how do I protect my clients if I should drop the ball because what if I'm not right. So what I did was on every (state) case after I was diagnosed, I had co-counsel. I felt ethical in going forward. I won trials after that. I was alert, I still am. I did those things to protect my clients' right to have a good lawyer.

## KDR:

When times got so hard for you personally, why did you keep on doing this very hard work?

## GW:

The work needed to be done. The challenge was there. People needed to be served and I could serve them. But also, the tuition and taxes had to be paid.

## KDR:

So you wanted to continue to serve, but there was also a practical side.

## GW:

Yeah. But you do want to have a meaningful life. You do want to have a meaningful life.

## KDR:

Any advice to young criminal defense lawyers as to things that they should think about if they're going to do this work?

## GW:

Besides don't do it?

## KDR:

*(laughs)* Yeah, besides don't do it; we need them.

## GW:

You can't be concerned about money. Once you take a case,

your financial needs, you don't care. You just go do the work. Serve your client on all levels. Let them know in fact you are the only person they can trust and that you have their best interests in your heart so they believe you and they see you in court being proficient and being respected by the prosecutors and the judge so that if you have to tell them "there's no way out; you've got to strike a deal" they do it because they trust you. Always, always, always be straight with everyone you deal with so they trust your word as solid gold. Your word is your reputation and is the most important thing. So don't get close to sully your reputation or your word. Period. I don't care how much money you're offered or what you feel the upside is to betraying your oath. It's never worth it.

**KDR:**

That's good advice. So are you glad you chose this career?

**GW:**

No, I'm not happy I chose the career. I think being a lawyer is not the best use of a career. I just think you give so much.

**KDR:**

What about all those folks that you have been able to help? You wouldn't have been able to help them if you hadn't chosen to be a criminal defense lawyer.

**GW:**

Right. Just thinking selfishly. It's just too much to give up. But it is necessary. Yeah, it is necessary. Maybe I did it wrong. I saw Bruce Hanley who makes me look like a weekend warrior because he did everything I did ten times better and volunteered his whole life to the legal community. I never volunteered anything to the legal community.

**KDR:**

Well, you could look at it that way, but in your case it's not about what you have or haven't given to the legal community, your contribution was to the community at large. You spent your professional life serving a community that needed your help and needed someone to stand up and be brave enough to do the work.

**GW:**

I would agree with that. Yeah, you don't even hesitate. You take the unpopular case. That's what we do.

**KDR:**

Gary, thank you for taking the time to speak with me. Congratulations on being selected to receive the Profile in Courage Award.

**GW:**

It's an honor to be considered for this kind of award. I think everyone in our community is very courageous because they give so much and they take away from their families and their spouses and what they'd rather do because they're devoted to seeing people get fairness from our system. They put everything else on hold for the most unpopular people in our society and I just think that is so courageous and honorable.

**KDR:**

Well said. Thank you.

**GW:**

Thank you, Katherian. ■

## About Gary R. Wolf



Gary R. Wolf is the 2020 recipient of MACDL's Profile in Courage Award. Gary was a naval officer while he attended law school at Hamline University School of Law. He graduated Valedictorian of his class in 1981. After law school, Gary served as a JAG Officer in the United States

Navy, where he was stationed at Pearl Harbor, Hawaii. In 1992, Gary opened his own law practice in Minnesota. He is admitted to practice law in the State of Minnesota,

military criminal courts worldwide – both trial and appellate courts, the United States District Court for the Districts of Minnesota, Nebraska, and the Middle District of Tennessee, the Eighth Circuit Court of Appeals, and the United States Supreme Court. He is a member of NACDL, MACDL, and the Minnesota Bar Association where he has served as the Chairman of the Criminal Law Section. Gary has been voted a "Super Lawyer" and a "Top 40 Lawyer." His clients have been acquitted in over 15 murder and attempted murder trials.



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# MRT – MORAL RECONATION THERAPY®:

## A SENTENCE MITIGATION STRATEGY

*Pamela L. Green, J.D.*

Trial by jury is what most people envision when they think about the criminal justice system. They see trials portrayed on television – a righteous prosecutor trying to “put away the bad guy” or an equally righteous defense lawyer trying to protect his innocent client – and think that is how the system works. The truth is a much harsher reality.

Over the last fifty years, trial by jury has declined to such a point that it now occurs in less than 3% of state and federal criminal cases.<sup>1</sup> A 2019 Pew Research Center study found that a mere 2% of federal defendants go to trial, and of those who do, most are convicted.<sup>2</sup> While a small percentage of defendants see their cases dismissed<sup>3</sup>, a substantial majority plead guilty.

Plea bargaining is woven into the fabric of criminal defense. Emily Yoffe, in her article for The Atlantic, *Innocence is Irrelevant*, quotes from *Missouri v. Frye*: “‘Horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.’”<sup>4</sup>

For the criminal defendant, then, the primary concern is not his guilt or innocence, as statistically it is almost certain he will plead guilty to the offense with which he is charged,

or to a lesser offense. Instead, the primary concerns of a criminal defendant are, “will I go to prison,” followed by “and for how long?”

When considering whether to impose a prison sentence, most judges consider a variety of factors, including those relating to the defendant’s character, background and likelihood of reoffending. Despite written guidelines in most states and at the federal level, judges still wield considerable discretion when making sentencing decisions. It is therefore up to defense attorneys to present their client as someone who is unlikely to commit future crimes, or, for those clients who are multiple offenders, as someone who has finally taken steps to address and stop their criminal behaviors

## MRT – Moral Reconciliation Therapy®

Clients are often directed to seek counseling to demonstrate that they are committed to making meaningful behavioral change. Conventional therapy typically focuses on the client’s past experiences and how they shape the client’s present circumstances. While longer term therapy may eventually help reform a client’s behaviors and belief systems, most criminal defendants do not have the time

<sup>1</sup> “The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It,” National Association of Criminal Defense Lawyers, 2018.

<sup>2</sup> John Gramlich, Pew Research Center, June 11, 2019.

<sup>3</sup> Ibid.

<sup>4</sup> Emily Yoffe, *Innocence is Irrelevant*, The Atlantic, September, 2017.



before their sentencing to make meaningful progress toward this goal using conventional therapeutic methods.

MRT – Moral Reconciliation Therapy® is an evidence-based, cognitive-behavioral modality designed to alter how offenders think and how they make decisions about right and wrong. It has been used in prisons, jails and treatment programs for over 25 years, and has more recently been implemented as a re-entry tool by courts and probation offices at both the state and federal levels. MRT is used in all 50 states and in 7 countries, and consistently yields positive outcomes for varying populations. Numerous studies have confirmed the program's success at significantly reducing recidivism.<sup>5</sup>

MRT focuses on beliefs and behaviors, not feelings. This requires the participant to address their conduct ("what you did") and not their past ("what happened to you"). MRT has a specific curriculum contained in a workbook that is used by all participants, assuring continuity in the material that is delivered to each group member.

The MRT program is implemented in a small group setting over 24-35 weekly sessions. Each session is approximately 90 minutes. The groups are open-ended, which means participants begin and end the program at different times than other participants. Program completion takes approximately four months.

There are two workbooks utilized with criminal defendants. The original MRT workbook, "How to Escape Your Prison," is designed for individuals at medium to high risk of reoffending and is the workbook used in incarceration settings and in most re-entry programs. A second workbook, "Discovering Life and Liberty in the Pursuit of Happiness" is designed for low risk offenders. Each workbook follows the same basic outline and offers the same basic material.

The MRT curriculum consists of twelve sequential steps, each containing between two and five individual exercises. Step 1 is "honesty;" Step 2 is "trust;" Step 3 is "acceptance;" Step 4 is "raising awareness;" and so on, concluding with Step 11 – "keeping moral commitments; and Step 12 – "choosing moral goals."

Each individual exercise must be accepted by the facilitator or the group in order for the participant to pass that step. Participants are not allowed to work ahead in the workbook and are allowed to present only one step at a time. It is not uncommon for a participant to have to rework a step before it passes, and sometimes a participant must revisit and rework a much lower step in order to reinforce its principles. For example, if a participant is caught being untruthful at Step 4, he may be asked to return to Step 1 – "honesty." The exercises require the participant to follow specific instructions (such as "no blank spaces," and "drawing only, no words"), and are designed to break down the entitlement, denial, defensiveness and blaming that underlies most criminal offenders' belief systems. MRT teaches that beliefs drive behavior and if a participant can change their belief system, a change in behavior will follow.

Most steps involve "testimony" – meaning presentation of their step work to the group – which helps the participant develop and maintain their authentic self. Participants are required to maintain confidentiality about work done in the group, which provides participants with the freedom to share in a truthful and honest manner. To build a sense of community in the group, participants working on higher level steps are asked to assist those working on lower level steps. Community service is also part of the curriculum.

Group facilitators complete a rigorous 32-hour training through Correctional Counseling, Inc., the creator of MRT. Only those who complete the CCI training are permitted to purchase the MRT workbooks and supporting materials.

<sup>5</sup> See, for example, *A Quantitative Review of Structured, Group-Oriented, Cognitive Behavioral Programs for Offenders*, by the American Association for Correctional Psychology as published in CRIMINAL JUSTICE AND BEHAVIOR, Vol. 32 No. 2, April 2005 172-204. See also program description on Wayne County Municipal Court website, [www.waynemunicipalcourt.org/programs/mrt-program](http://www.waynemunicipalcourt.org/programs/mrt-program).

### MRT as a Presentence Strategy

Pamela Green and Kelly Jaedike, the founders of *Phoenix Rise Coaching and Consulting*, are trained and certified to teach the MRT curriculum. Phoenix Rise is offering MRT to those charged with a crime but not yet sentenced. Participation in MRT well in advance of sentencing enhances the client's arguments that he or she is committed to making meaningful change in the thoughts and beliefs that led to their criminal behavior.

Early participation in MRT serves several purposes:

- It allows the client to complete the program in its entirety before sentencing or, if that is not possible, to at least make significant progress in the program to demonstrate that completion is likely.
- It allows defense counsel to approach the prosecutor with demonstrable proof that the client views the charges seriously and is taking pro-active and meaningful steps to address the factors that brought him or her into the criminal justice system. This may persuade the prosecutor to agree to a more lenient outcome in plea negotiations, or to make a more lenient sentencing recommendation to the court.
- It enhances defense counsel's arguments to the court that the client is serious about changes in behavior and so should receive a lesser sentence than would otherwise be imposed. Participation in a behavior modification program with proven long-term successful outcomes is one of the best character references a client can present.

To all clients enrolled in the MRT program, Phoenix Rise will provide the following for use in sentencing:

- For those completing MRT, we will provide a summary of the curriculum as well as an evaluation of the client's personal progress in the program;
- For those still in the program, we will provide a

curriculum summary, a description of steps the client has passed, the client's overall progress in the program thus far, and the steps the client has yet to complete. We will also provide an estimate of how long the client needs to finish the program. This information may persuade the court to either defer sentencing until the client has successfully completed the program, to stay imposition of the sentence, or to order outright probation.

For defense attorneys and their clients, the availability of MRT as a pre-sentence tool is a win-win. It provides the attorney with credible arguments for sentence mitigation – both at the plea negotiation and sentencing stages – and it provides meaningful change in the life of the client.

The Wayne County, Ohio municipal court website has this to say about MRT and its effects on program participants:

*"For the individuals who dedicate themselves for the approximate four months it takes to complete the program, MRT is extremely beneficial....For those who complete the program, they understand that if they make better choices and decisions, their lives will be fuller and their involvement in the 'court system' will no longer exist."*

MRT – Moral Reconciliation Therapy® as a pre-sentence program is only available through Phoenix Rise Coaching and Consulting. Call us today. ■



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# The Special Achievement Award:

## The Defense of K.M.

*Elizabeth Duel, Associate Attorney, Ryan Garry, LLC, and a member of the K.M. v. Brunsville PD Defense Team*

### Introduction

The attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It has long been held sacrosanct, because “in the interest and administration of justice,” full and frank communication between an attorney and her client, without fear of disclosure, is necessary for effective legal representation. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); accord *Upjohn Co.*, 449 U.S. at 389. Four decades ago, our supreme court recognized serious concerns when law-enforcement officers search an attorney’s office pursuant to a warrant:

Even the most particular warrant cannot adequately safeguard client confidentiality, the attorney-client privilege, the attorney’s work product, and the criminal defendant’s constitutional right to counsel of all of the attorney’s clients. It is unreasonable, in any case, to permit law enforcement officers to peruse miscellaneous documents in an attorney’s office while attempting to locate documents listed in a search warrant. Even if it were possible to meet the particularity requirement regarding the place to be searched, the file would still contain some confidential information that is immune from seizure under the attorney-client privilege or the work product doctrine. Once that information is revealed to the police, the privileges are lost, and the information cannot be erased from the minds of the police.

*O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979). Or, as in a Colorado Supreme Court case:

The devastating effect of a law office search is all too apparent when the target of the search is a law office which engages in the representation of the criminally accused. Criminal defense work, by definition, involves litigation in which the government itself is the adversary. Under such circumstances nothing less than a scrupulous avoidance of all unnecessary intrusions into confidential communications by governmental agents is absolutely essential to the integrity of the lawyer-client relationship.

*Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1225 (Colo. 1982) (en banc) (Quinn, J., specially concurring).

Burnsville Police Department (BPD) ignored all of these concerns and made a conscious, calculated decision to obtain and execute a search warrant on a lawyer’s office for the very purpose of seizing client files. BPD – with the tacit approval of both the District Court and the Court of Appeals – ran roughshod over the privilege and, in the process, trampled the rights of both K.M., a Minnesota attorney who practices primarily in the area of criminal defense, and her clients.

### Background

K.M. was duly admitted to the bar in October 2004, and her license is currently in good standing. K.M. practices

largely, though not exclusively, in the field of criminal defense. In the course of her legal practice, she has used a variety of methods to engage in privileged communications with her clients, including letters, e-mails, text messages, telephone calls, and voicemails. She kept both electronic and paper files on behalf of her clients. K.M. – as she is ethically required to do – kept her current and former clients’ files secure, primarily storing them electronically.

On February 26, 2019, Detective Jeff Klingfus of Respondent Burnsville Police Department (“BPD”) sought and obtained a search warrant for K.M.’s home and law office – the same building. The warrant was exceptionally broad, permitting the seizure of both physical items and electronics containing privileged attorney-client and work-product material, including all “computers such as laptops, desktops, and or towers [and any other] Electronic devices which could contain or access files[.]”

BPD executed the search warrant the following day, February 27. It seized some of K.M.’s client files and other physical items, and it also seized K.M.’s computers, hard drives, and thumb drives. These items contained, electronically, approximately 1,500 to 2,000 client files holding privileged information. The files concerned both criminal and civil matters, charged and uncharged cases, and current and former clients. BPD was holding the physical and electronic data. It had digitally copied, at a minimum, the electronic data. And it was searching the client files.

## Procedural Posture

We petitioned in the district court filing a *Motion for Return of Seized Property or Other Relief*, under Minn. Stat. § 626.01, *et seq.* We argued for a TRO, a writ of probation, or some relief to stop the violation of K.M. and her clients. Part of the hearing was held *ex parte* without us, and it was quite some time before we found out what occurred. The district court ultimately denied relief, so we headed to the court of appeals.

Before the court of appeals, we filed two appeals. First,

only two days after the district court denied relief, we filed a *Petition for Writ of Prohibition*. Second, we filed an appeal of the district court’s order denying our request for return of the seized property. John Does 1–4, current and former K.M. clients, joined in the appeal as intervenors. MACDL, NACDL, MSBA Criminal Law Section, and the Minnesota Board of Public Defense petitioned to be *amici curiae*. The court of appeals denied relief, so we then appealed to the supreme court.

K.M. presented two issues in her Petition for Review: (1) whether the Court of Appeals should have issued a writ of prohibition requiring the City of Burnsville to return all of her seized property (including in particular seized client files) and to destroy any and all copies of seized property; and (2) whether further orders are necessary to uphold the constitutional and statutory protections due to K.M. and her clients. We argued that if the lower courts are not reversed, the practice of law and the time-honored belief by lay people that their files and communications are safe with their counsel may be forever changed.

The supreme court allowed the Suburban Hennepin County Prosecutors Association and the Minnesota County Attorneys Association as *amici curiae*. John Does 1–4 were allowed as intervenors. The Minnesota State Bar, the Minnesota Board of Public Defense, NACDL, and MACDL also filed *amici curiae* briefs.

While the appeal was pending, K.M. was criminally charged in state court with one count of theft by swindle.

## Oral Arguments

The court granted oral arguments, which took place on November 4, 2019 at Mitchell Hamline School of Law so students could observe.

During the oral arguments, Jon Schmidt, Assistant Hennepin County Attorney, for BPD, Christopher Madel for John Does 1–4, and Andrew Birrell for K.M. argued. The justices inquired about the procedural posture of the case, asking whether a civil complaint should have initiated



the case. Mr. Birrell responded that the case was filed, a court file number attached, and the district court heard the case. Mr. Birrell stated that this was an emergency situation and “we have an ethical duty to preserve our clients’ confidences and secrets, we have an ethical duty to assert the privilege, and we have to do it as fast as we can. And that’s what we did.” Given the police search of client files, we had to stop the search and to do so, we needed to get the case in front of a judge in any possible way as soon as possible. The justices then suggested that the appropriate venue, given the criminal charge, is criminal court. Mr. Birrell responded that the clients whose files were taken and searched are still being harmed. Thus, the criminal case is not the appropriate venue. And there is nothing to prevent the search of the files from continuing.

Mr. Madel for John Does 1–4 argued that there was no privilege review of the documents; the search was only for relevance. The justices asked what the court could do given that the damage was done. Mr. Madel responded that the damage was not done; the documents were still being accessed, and the files should be returned immediately.

Mr. Schmidt for BPD admitted that they still possessed the files. The justices, clearly concerned, asked why and why they couldn’t return the unrelated files. Mr. Schmidt argued they needed the “original evidence” for trial, claiming that they needed to keep hundreds of thousands of unrelated client files. Mr. Schmidt conceded that a word search was done on all the files; and a computer search is a search, but not a harmful search. He conceded that there would be no violation of the warrant if officers went into an unrelated file to see if the client victims were mentioned. He also conceded that there was nothing in the warrant regarding searching digital devices that prevented law enforcement from reviewing privileged information. He admitted that it was an IT person looking through files and probably got to look at privileged information.

On rebuttal, Mr. Madel asked the justices to consider the plight of his clients. “One privileged document is too many.”

We await the supreme court’s decision. ■

### *About Elizabeth Duel*



Elizabeth is an associate at Ryan Garry, Attorney, LLC. She has been named a Rising Star in 2017, 2018, 2019 and 2020, and she is admitted to practice in the State of Minnesota, the federal District of Minnesota, the Eighth Circuit Court of Appeals, and the United States Supreme Court.



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