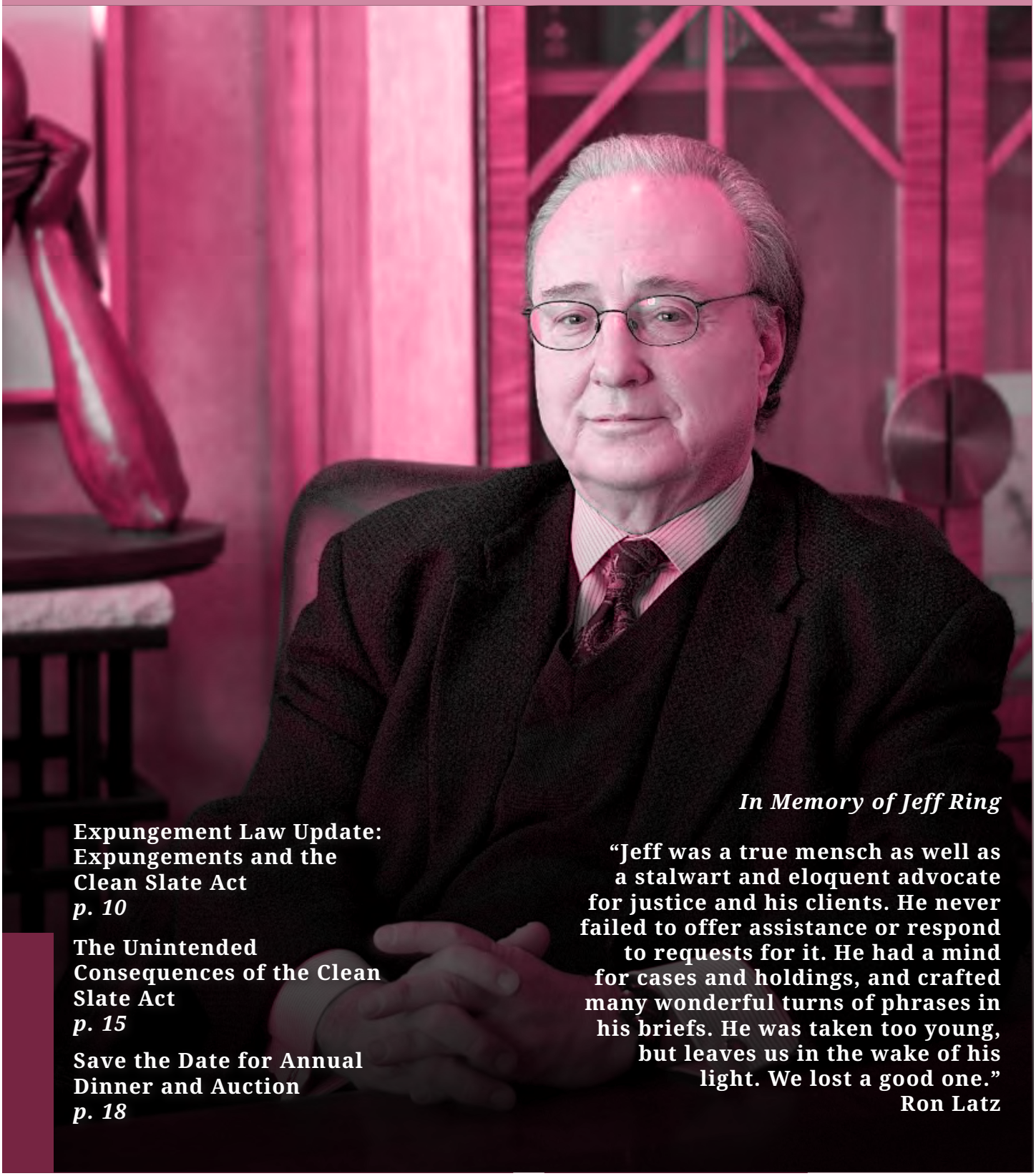
August 28, 2023

MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS



Expungement Law Update: Expungements and the Clean Slate Act
p. 10

The Unintended Consequences of the Clean Slate Act
p. 15

Save the Date for Annual Dinner and Auction
p. 18

In Memory of Jeff Ring

"Jeff was a true mensch as well as a stalwart and eloquent advocate for justice and his clients. He never failed to offer assistance or respond to requests for it. He had a mind for cases and holdings, and crafted many wonderful turns of phrases in his briefs. He was taken too young, but leaves us in the wake of his light. We lost a good one."
Ron Latz

Jill A. Brisbois
Editor

Minnesota Association of Criminal Defense Lawyers
Publisher

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President, MACDL

Jill Oleisky
Executive Director, MACDL

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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MACDL VI Magazine

Features

President's Corner
By David Valentini 3

Editor's Column
By Jill Brisbois 4

MACDL New Board Member Profiles 6

Expungement Law Update: Expungements and the Clean Slate Act
By Kate Polman 10

The Unintended Consequences of the Clean Slate Act
By Satveer Chaudhary 15

Save the Date for our Annual Dinner & Auction! 18

Ethics in Practice: Technology, Flat Fees, and Reporting Obligations
By Aaron Sampsel 21

Career Confrontation: The practical "fine print" of employment through the State
By Andrew Wilson 25

Join a MACDL Committee 28

MACDL Board of Directors 2023 29

Softball Update 30

President's Column

David Valentini

MACDL Members:

Hello everybody! I am honored to be the President of MACDL for 2023- 2024. I joined the MACDL Board of Directors in 2014 and completed my term in 2020 when I became the Secretary of the Executive Committee. I served as Treasurer in 2021 and Vice-President in 2022. During this time period we, as defense lawyers, confronted many issues and challenges. We boldly faced these issues by having a strong organization of criminal defense attorneys - both public and private.

I thank you for your membership in MACDL. Your membership and attendance at our CLEs and the MACDL Annual Dinner provide the funding we need to have representation from our lobbyists and to keep our organization running smoothly. It is critical for MACDL to continue to have a voice, at the Capitol, to advance our agenda through new legislation and amendments to our existing statutes.

I believe we are much stronger together, so my goal during my term as President is to substantially increase our membership. I am making the effort to encourage all Minnesota criminal defense lawyers to join MACDL and I would ask for your help with this task as well. I want to acknowledge and thank our sponsors who contribute generously throughout the year, including Smart Start, Absolute Bail Bonds, Minnesota Lawyers Mutual, and Thomson Reuters, along with The Minnesota Society for Criminal Justice who contributes $8,000-$10,000 per year to the lobbying expenses.

We are in the process of putting together the fall seminar and anticipate it will be November 9, 2023. Details will be coming out soon. ■

Editor's Column

Jill Brisbois, The JAB Firm

As I sat down to finalize this issue, I received the email on our Google Group that told us of Jeff Ring's passing. It was a shock to many of us who saw him recently at the courthouse. I had just seen him in July giving a prosecutor the business about their failure to turn over discovery. He did not let the prosecutor off easy, and presented a clear and detailed record about the discovery violations. The busy courtroom became quiet as he eloquently detailed the same problems that we all have with this particular prosecutor.

In the next issue, we will have a feature about Jeff. We want to take the time to fully capture his life.

In this issue we have a number of helpful articles that outline the new expungement laws along with a counter perspective about a handful of the pitfalls of automatic expungements, an ethics update, and a reminder that LCL is always here for us.

As always, reach out to me if you have a topic that you want to write about for an upcoming issue, or a topic you would like to see an article on. Even if it is not in your wheelhouse, I can generally find someone knowledgeable on the subject.

Lastly, I want to remind you to *please* read the messages from our advertisers and to check out their websites. Our advertisers help make the work of our organization possible and support the needs of our clients. These advertisements are just as important as the substantive content.

I hope you have a great rest of the summer. ■

About Jill Brisbois

For more than 15 years, attorney Jill Brisbois has provided skillful, fearless representation to Twin Cities clients. She defends clients against a vast spectrum of charges, including sex crimes. Because the Minnesota State Bar Association has certified her in criminal defense, other attorneys throughout the state seek her counsel regarding criminal law, family law, personal injury and other civil matters.

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MACDL New Board Member Profiles

Amber Johnson
Amber Johnson's legal career began after she earned a bachelor's degree from Saint Cloud State University and worked in the TV industry for a year in California. After realizing that the TV industry wasn't where she wanted to spend her career, she decided that law was the best fit, and enrolled at the University of Minnesota Law School. After graduating law school in 2009, Amber started off doing civil work. However, when a criminal defense attorney who officed with the attorney Amber worked for needed help covering his former associate's workload, she began her foray into criminal law and her passion for criminal defense was ignited. Amber is now a solo practitioner at Johnson Criminal Defense.

Amber's favorite element of criminal defense work is dealing with people; relating to people from all walks of life and understanding their stories is one of her talents. Everyone has their own story and experiences, and even though sometimes when people are struggling and make poor decisions, those decisions don't always need to be a defining moment of their life. Defense attorneys act as a shield between their clients and overreach by police and prosecutors. Protecting the rights of her clients is another element of criminal defense work that is extremely important to Amber.

As a new board member of MACDL, Amber's goal is to preserve and develop the things that make MACDL such a great organization. Amber's involvement in MACDL has helped her get to know the people in the Minnesota criminal defense community, find solutions to difficult legal problems with the help of her cohorts, and increased her professional knowledge through CLEs specifically for criminal defense attorneys. As a board member, Amber wants to promote the valuable experiences she's had for other members, and foster the "small community in a big city" that is the MACDL. Outside of work, Amber enjoys spending time with her kids, who are 4 and 6. She also loves to spend time at her cabin and fish with her family, knit, and do art projects.

Hannah Martin
Hannah Martin's passion for criminal defense began when she worked as an investigator for the public defender's service in Washington D.C. after graduating with a bachelor's degree from the University of Wisconsin-Madison. During her time at the public defender's service, it became clear to Hannah that the system is stacked against defendants, and she believes in the importance of using her talents to protect them from the inequalities in that system. From that point onward, Hannah knew that she would pursue a career in criminal defense.

Hannah pursued her passion while she was a student at Mitchell Hamline School of Law, and worked as a student attorney for the Anoka County Public Defender's Office, representing clients at bail and pre-trial hearings. Hannah earned her J.D. in 2019, and now is a private criminal defense attorney at Caplan & Tamburino Law Firm. Hannah also represents clients in personal injury cases in addition to her criminal defense clients. Hannah's favorite part of criminal defense work is helping people through challenging times in their lives. Being accused of a crime is stressful, scary, and confusing, and Hannah enjoys guiding her clients through the process and advocating for their interests. She is passionate about due process and the presumption of innocence, and brings that passion to her representation of defendants.

As a new MACDL board member, Hannah is excited to advocate for change in the criminal justice system and

work with the Minnesota legislature to correct some of the inequalities and injustices in the state laws. Her goal as a board member is to be a voice for the organization to the legislature and advocate for the community as well as criminal defendants.

Outside of work, Hannah is passionate about good food, and loves to cook and eat with friends and family. She also likes to spend time outside, and enjoys playing pickleball and gardening. ■

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EXPUNGEMENT LAW UPDATE: EXPUNGEMENTS AND THE CLEAN SLATE ACT

By Kate Polman

During the 2022-2023 legislative session, Minnesota's criminal expungement law in Chapter 609A has undergone many changes.

Petition-Based Expungements

Several changes have been made to petition-based expungements including the ability to expunge eligible stay of imposition offenses, the length of the waiting periods for gross misdemeanor and felony convictions, and the expansion of the list of eligible felonies. The following amendments were effective as of July 1, 2023.

Felony stays of imposition pursuant to section 609.13, Subd. 1, clause (2) are now eligible for expungement if the individual has not been convicted of a new crime for at least five years after the discharge of their sentence. The statute currently states that only the enumerated felonies in section 609A.02, Subd. 3(b) are eligible. However, this is a technical error and the reference to section § 609A.02 subd. 3(b) should be to clause (8), the list of enumerated felony convictions that qualify for expungement. The intent was to overturn *State v. S.A.M.*, which bars expungement eligibility for felony cases where a defendant successfully completes the terms of the stay of imposition and the conviction is then deemed a misdemeanor pursuant to section 609.13, Subd. 1, clause (2). The statute should read that all felony stays of imposition pursuant to section 609.13, Subd. 1, clause (2) are eligible for expungement, as long as the defendant has not been convicted of a new crime for at least five years after the discharge of their sentence. This technical error is in the process of being corrected.

Additionally, gross misdemeanor stays of imposition pursuant to section 609.13, Subd. 1, clause (2) are now eligible for expungement if the individual has not been convicted of a new crime for at least three years since discharge of the sentence for the crime.

Further, the waiting periods for gross misdemeanor and felony convictions have been amended. Gross misdemeanor offenses now have a waiting period of three years, instead of four years. The waiting period for eligible felony convictions pursuant to Minn. Stat. § 609A.02, Subd. 3(b) has been reduced from five years to four years.

Lastly, there are new additions to the list of eligible felony offenses. Now, third degree controlled substance possession, fourth degree controlled substance possession, possession of shoplifting gear, third degree burglary, and possession of burglary or theft tools are eligible for expungement.

Automatic Expungement Relief

Effective January 1, 2025, Minnesota will begin the automatic expungement process. Representative Jamie Long, House Majority Leader, who is limited in the number of bills he can author, chose to prioritize this bill after several years of work on these second chance issues. He has crafted a bill that will simplify the expungement process for those seeking a clean slate, and

expungement practitioners are looking forward to seeing this bill in practice.

An automatic expungement does not require a petition, application, or other written request. Instead, the Bureau of Criminal Apprehension has been tasked with going through the criminal record history for the entire state of Minnesota and determining whether they qualify for an automatic expungement. To do this, the BCA has created an entirely new department. The BCA claims that this process will take 18 months to expunge all the records that qualify.

However, unless the department is working around the clock, this may be a stretch. It is estimated tens if not hundreds of thousands of records may qualify.

Moving into the future, the BCA will make an initial determination of a record's eligibility within 30 days of the end of the waiting period. If the offense is not yet eligible for automatic expungement because the person has had a new offense within the waiting period, the BCA will make subsequent annual eligibility determinations. In making their determination, the BCA will identify individuals that are eligible through fingerprints and thumbprints. If fingerprints and thumbprints are not available, the BCA will identify individuals utilizing their name and date of birth. Once that individual's record is deemed eligible, the BCA will seal their records and notify court administration and law enforcement agencies to seal any records in their possession. The expungement will take effect 60 days after the BCA sends notice to the district court. If the court finds that the record is not eligible for expungement, the court will issue an order prohibiting the sealing of the record.

Defendants will be notified by the court that their offense is eligible for automatic expungement if the matter is a qualifying offense. For individuals in diversion, prosecutors, defense counsel, and supervisors of a diversion program will notify the individual regarding their eligibility.

It is important to note automatic expungement does not seal records from every agency permanently. A record that has been sealed through automatic expungement may be opened for the purpose of a background study conducted by the Department of Human Services and the Professional Educator Licensing and Standards Board. To include these agencies in the expungement, an individual must file a formal petition for an expungement to seal the record from those agencies and go through the regular hearing process.

Automatic Expungement Qualifying Records

Only specific offenses qualify for automatic expungement.

First, an individual is eligible for automatic expungement if they have successfully completed the terms of a diversion program or stay of adjudication. However, the offense has to be a qualifying, non-felony offense. See Minn. Stat. § 609A.015, Subd. 3(b). Further, the individual cannot be charged with a new criminal offense for one year immediately following completion of the diversion program or stay adjudication.

Second, certain convictions are eligible for automatic expungement. To qualify, the person has to be convicted of a qualifying offense, cannot be convicted of a new offense other than a petty misdemeanor during the applicable waiting period, and cannot not charged with an offense other than a petty misdemeanor in Minnesota before the waiting period ends.

Petty misdemeanor offenses are eligible unless the petty misdemeanor relates to the operation of a motor vehicle or parking of a motor vehicle. Misdemeanors and gross misdemeanor offenses are eligible unless they are specifically excluded in the statute. The non- qualifying offenses include but are not limited to, assault offenses; domestic abuse offenses including the violation of an order for protection, no contact order, or harassment restraining order; and DWIs. Gross misdemeanors deemed to be a misdemeanor pursuant to section 609.13, Subd. 2 are not eligible for automatic expungement.

Third, felonies that are eligible for expungement under

the current law now qualify for automatic expungement. However, although possession of a third degree and fourth degree controlled substance have been added to the list of eligible felonies, these offenses are not eligible for automatic expungement. Further, interference with privacy involving a subsequent violation or minor victim and escape from civil commitment for mental illness are not qualifying offenses. Felony offenses that are sentenced as a gross misdemeanor or misdemeanor offense pursuant to section 609.13, Subd. 1 (stays of imposition) are not eligible for automatic expungement.

Additional proceedings that are eligible for automatic expungement include individuals that were arrested and there was a dismissal of the charges, unless the matter was dismissed due to the defendant's incompetency; if the person received a dismissal and discharge of the case pursuant to section 152.18, Subd. 1, for violation of section 152.024, 152.025, or 152.027 (statutory stay of adjudication); or if the matter was resolved in the favor of the person, meaning there was no plea or finding of guilt.

Waiting Periods

Similar to petition-based expungements, individuals need to abide by a waiting period before an individual's record is eligible for automatic expungement. The waiting periods for petty misdemeanor, misdemeanor, and gross misdemeanor convictions are analogous to the newly updated expungement waiting periods. However, the automatic expungement wait period for felony convictions is five years, whereas the petition-based expungement wait period for felony convictions, not including felony stays of imposition, is four years. Further, the wait period for a felony violation of section 152.025 has a four-year waiting period.

Mistaken Identity

If a prosecutor determines that a defendant was prosecuted as a result of mistaken identity, the prosecutor must dismiss the action and state in writing or on the record that is the reason for the dismissal. Following the dismissal, the court, without a petition for an expungement, must issue and distribute an expungement order and cite this section as the reason for the order. This order restores the person to their status held before the arrest or prosecution.

Gun Rights

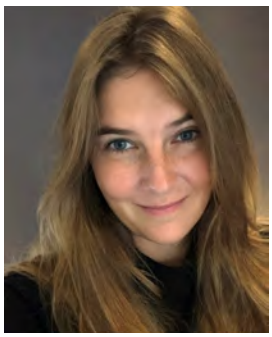
Expungements do not restore gun rights. There will be issues in the automatic expungement process when it comes to gun rights because individuals may assume that if the record is expunged, their gun rights are restored. Further, because the records are sealed, it will make it more complicated for individuals to obtain the necessary documentation to either restore their firearm rights, or to provide documentation that they are not prohibited from possessing firearms.

Pardons

The pardon process has undergone many notable changes of its own. No longer does a pardon applicant need a unanimous vote in favor to be granted a pardon from the board. Instead, the pardon applicant now only needs a majority decision as long as one of those in the majority is the governor. Further, individuals granted a pardon will no longer have to seek a petition-based expungement to seal the record. Starting August 1, 2023, the court must issue an expungement order sealing all records related to the court file and serve that order to each government agency whose records are affected.

With these changes, individuals have more opportunities to start over, to get a second chance. It is to be expected that, in practice, there may be bumps along the way. However, the changes to petition-based expungements and the creation of the Clean Slate Act will only benefit our clients seeking a clean slate. ■

About Kate Polman



Kate is an associate attorney at Keegan Law Office. Kate discovered her passion for criminal defense through personal experiences and finds fulfillment in assisting clients navigate the criminal process. Prior to joining Keegan Law Office, Kate worked as an associate attorney at a Twin Cities law firm. There, she worked with clients facing a variety of state and federal criminal charges, including criminal sexual conduct, assault, murder, and drug offenses. Kate has prepared and helped conduct jury trials, which have resulted in an acquittal of Domestic Assault by Strangulation and a hung jury in a First Degree Criminal Sexual Conduct case. Previously, she clerked at the United States Federal Defender's office, as well as the Washington County Public Defender's office. She is a member of the Minnesota Association of Criminal Defense Lawyers.

A big thank you to our summer CLE speakers, Darcy Sherman, Abigail Cerra, Sarah Koziol, and Alicia Granse. These four attorneys shared their invaluable knowledge on all things Brady, including how to draft creative and effective motions to compel, their litigation success in Hennepin County and brainstormed new ways to challenge prosecutors in the wake of the DOJ's report on then Minneapolis Police Department.

Lawyers Concerned for Lawyers is Here for You: 24/7/365

On August 1, 1976, the XXI Summer Olympic Games officially closed in Montreal, the US celebrated its bicentennial, and a small group of Minnesota lawyers formed Lawyers Concerned for Lawyers (LCL). Fast forward 47 years to 2023, and LCL has become the nation's oldest continuously operating Lawyer Assistance Program. Times and technology have changed since LCL's founding, but one thing remains the same—LCL's commitment to providing help and hope to the legal profession. This commitment fuels LCL's mission to encompass a broad range of issues facing the legal profession, including mental health, substance use, stress and exposure to trauma, and well-being.

We all had to react quickly when the Governor issued his emergency Covid order. It was stressful and difficult, but we had many examples to follow and nearly everyone was doing the same. There is strength and comfort in numbers. We drew upon what Dr. Ann Masten calls "surge capacity." This is how we adapt, mentally and physically, to deal with acutely stressful situations that are short-term. Somehow we managed while serving in a profession that is on the front lines of every crisis and challenge in our society, including the murder of George Floyd in our own backyards. And we did this while we grieved and were impacted by the trauma all around us.

As we have come out of these unprecedented times, we have learned from these experiences to achieve many positive changes, but we're also still feeling the aftereffects. Clients and parties are more stressed, and we feel it. Our profession has always been at risk for secondary trauma, and we have experienced the traumatizing effects of the past three and a half years. Lawyers tend to want to be seen as knowing how to handle a situation, and at the same time we are trained to look for the worst eventuality because that helps us to identify solutions. When we feel a loss of control, we may believe we are the only one. Situational uncertainty exacerbates this.

Research shows that one of the most effective ways to mitigate the impact of trauma is to decompress with colleagues or a trusted confidant. Remote work has made this more difficult and we may have to relearn those old habits that were helpful. Where can you have open conversations with people who know what it is like to do what you do? If you haven't seen a counselor, it's never been more acceptable to use that resource. Find those safe places and use them.

Lawyers Concerned for Lawyers provides free, confidential, peer and professional assistance statewide to legal professionals and their immediate family members on any issue that causes stress or distress. This includes up to four free counseling sessions, a 24/7 hotline, support groups, referrals to resources and more. LCL has a fund to help support additional mental health and treatment support for lawyers who could otherwise not afford it. LCL also offers programs throughout the profession on well-being, addiction and other impairment, trauma, stress management and other topics.

Our profession has seen tremendous growth in well-being information and resources. These efforts are important and while they can reduce your risk, the fact remains that we are still at risk. The fact also remains that LCL will always be here when there is a crisis or serious issue. But you need not wait until there is a crisis and you certainly need not wait until you think you have the time. There's always someone to talk to. LCL helped over 400 new clients last year. You're not alone.

Joan Bibelhausen, Executive Director
LCL may be reached at www.mnlcl.org, help@mnlcl.org, or 651-646-5590.

The unintended consequences of the Clean Slate Act

By Satveer Chaudhary

The question of the Clean Slate Act is not whether expungement of criminal records is good. The question is whether a system of automatic expungements has been crafted to prevent unintended harm to those who actually benefit from access to their own criminal records.

Who are some of these people?

First, in almost every immigration application, noncitizens have an affirmative duty to disclose any arrest and provide certified records of any arrest, charge, conviction, probation, probation completion, and in many instances court transcripts—regardless of final disposition. This is the case even if a matter is dismissed or even a conviction that that doesn't disqualify a noncitizen of some immigration benefit (green card, naturalization, e.g.). If their records are automatically expunged, Minnesota statute now requires noncitizens to make a motion in court to unseal their records, and request the records remain as such, in order to retrieve required documentation. This assumes the individual still recalls the file number. Omission of even one record will result in an immigration denial. Furthermore, in-custody deportations present even greater challenges. These cases are expedited, sometimes within a month or two, so the new law leaves no time to even unseal records especially if there are multiple matters. Access to records that demonstrate a noncitizen was exonerated, or that even present equities toward a discretionary decision, can make or break a noncitizen's life in America as well as that of their families.

Second, military applicants. Similar to immigration applications, applicants to service branches must be truthful about prior arrests regardless of end result. If the answer to "have you ever been arrested" is "yes," she can be denied the chance to serve our country because neither she or the military will be unable to locate any proof of she's still eligible. I confirmed with three defense counsel who are veterans that this is particularly concerning when service members seek a security clearance. Furthermore, many people believe that since employment laws, as well as §152.18 dispositions, entitle them to deny a matter ever existed. They may now believe all situations allow them to deny they were charged with a crime. This would be fatal with both military and immigration applications.

Third, firearms purchasers. Expungement does not cure a derogatory record on NICS. One of my clients was once denied a firearm purchase because of a prior conviction. When I successfully vacated and sealed the conviction, he still failed the background check because the FBI only had the prior derogatory record in its file. Because of the expungement, NICS could not access the court file to see he was now eligible. Before you ask, I provided a certified copy of the court order vacating the conviction but it was deemed inadequate. The matter was then unsealed and my client was allowed the purchase. The case must remain unsealed lest he be denied again. This goes for concealed carry applications as well, where sheriffs have been known to deny such licenses if a matter was expunged.

Fourth, post-conviction matters. It is common for individuals (citizen or not) to challenge convictions after experiencing collateral consequences. This is a significant portion of my practices for noncitizens, but

other matters are relevant too such as medical or driving licensure. Perhaps the consequences stemmed from that conviction, perhaps it stems from multiple past events. I need to access the record, especially transcripts, to merely assess the case, and if needed to challenge the conviction. People do not know the importance of acquiring transcripts until they need them later on, which is after some negative consequence has already occurred.

Fifth, those concerned about libel and slander. Every defense attorney seeks exoneration for their clients in one form or another as a case allows. What if you're successful? Wouldn't your client want evidence that a criminal charge was the result of false accusations, shoddy investigation, and/or bad judicial rulings? Maybe not, but a lot of times they would. It should be the individual's choice. After all, who would believe a defendant, acquitted of child molestation charges, that they were the actual victim of an imperfect system? Without access to records, someone's treatment by neighbors or employers is left to conjecture, and a rumor is relied on rather that fact. After all, expungement never seals negative media attention.

Sixth, the legal community. Every defense attorney has come across the need to assess a case based on prior records, whether relevant or not. It is an essential part of our due diligence and professional responsibility requirements at the least. I would like to know if I'm telling the truth when I tell a judge my client has no criminal history whatsoever. If it's not the truthful, am I reportable? Also, records of low-level convictions, as well as outright dismissals, often serve as mitigating factors not only for future charges but applications for future licenses and benefits. Every defense practitioner has, as one time or other, argued in favor of a client that a prior matter was dismissed or reduced for various equitable reasons. There is no quick way to unseal a record to make this known.

I fear that, in the rush to claim "historical accomplishments," and entranced by a catchy-titled bill, policymakers and advocates have forgotten that criminal records can provide benefit as much as harm.

What are other potential chilling effects of the new law? If a low-level conviction now has the certainty of expungement, will the dynamics of plea negotiations be altered? Will the state now consider higher level charges that they know won't be expunged? With possibility of a record being sealed, are we removing the tool of a reduced charge from a higher-level offense?

I have listed a number of communities who need their records accessible, even when charges are dismissed, and who would be harmed if the records don't remain so. Have the advocates of the Clean Slate Act enumerated situations where dismissed charges, which generally don't show up on employment and housing checks, are so necessary to expunge that the law doesn't even ask if the defendant would like them sealed?

Why is the government removing access to peoples' own records without even asking them? It is telling that the Clean Slate Act requires a number of notifications prior to automatic expungement occurring, such as the victim. But at no place is the person most affected, the defendant, asked if they would like their record sealed. At minimum, the process could notify a defendant of impending expungement, with an advisory consult an attorney on best options, and allow the opportunity to decline.

Of course, automatic expungement of criminal records will benefit a fair number of people. However, professional policy-makers have a duty to create laws that don't exacerbate problems, particularly for the very people the policy hopes to assist. I think the new Clean Slate Act as it is written will indeed exacerbate problems for as many people as it helps. ■

AARON SAMPSEL

The legal ethics rules shouldn't be intimidating. Aaron proactively advises other lawyers on legal ethics to inform their practice and, when necessary, defend them in disciplinary proceedings.

Aaron is an experienced ethics attorney and litigator. He relies on his litigation skills and prior prosecutorial experience to get to the heart of his clients' ethics issues using a practical and open-minded approach.

Lawyers and law firms call on Aaron to work through ethics questions, defend against ethics complaints, and develop best practices. He understands that lawyers may be well-versed in their practice area, but resolving ethics questions, or responding to ethics complaints, often requires lawyers to take a step back—and that is where Aaron steps in.

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Paul Engh

Paul Engh started out in the practice of criminal defense as a law clerk with the Beltrami County Public Defender's office. He worked with the renowned Douglas W. Thomson before establishing his own firm in 1982. He has served as an Assistant State Public Defender, a conflicts lawyer with the Hennepin County Public Defender's Office, a CJA conflicts lawyer for the Federal Defender's Office, and as a Senior Associate Independent Counsel, Washington D.C.

Mr. Engh has litigated through final jury verdict and secured not guilty verdicts on behalf of clients with all manner of criminal charges and engaged in civil and criminal litigation on behalf of the Roman Catholic Church, Priest sexual misconduct. As lead counsel, he had scores of arguments before the United States Court of Appeals for the Eighth Circuit, and before the Minnesota Court of Appeals and Minnesota Supreme Court.

He is humbled by and most appreciative of the MACDL's Distinguished Service Award.

Special Achievement Award Recipient:

State Senator Ron Latz for his outstanding work in the MN Legislature benefitting criminal defense lawyers.

Ron Latz practices law in the fields of criminal defense and employment discrimination, serves as a MN State Senator representing St. Louis Park (SLP), Hopkins and part of Edina, chairs the Judiciary and Public Safety Budget and Policy Committee and also serves on the Senate Commerce Committee. Mr. Latz previously served in the MN House of Representatives and on the SLP City Council. He served as a MN Assistant Attorney General in the Public Safety and Human Services divisions.

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Ethics in Practice: Technology, Flat Fees, and Reporting Obligations

By Aaron Sampsel

As an ethics attorney who represents other attorneys, many of my clients will freely acknowledge that their heart skips a beat when they receive an email from me, even when that email has nothing to do with ethics. Our obligations under the Rules of Professional Conduct can seem intimidating, but it shouldn't be that way. If anything, we should view the rules as a resource that informs our practices. Below are a few trending areas that, as an ethics attorney, I am frequently asked about, and having perspective about these trends can inform your criminal defense practice.

ChatGPT & AI

Back to the Future: Part 2 made a number of assumptions on where technology and society would be by 2015. Some predictions were closer than others: the Cubs finally won a World Series (2016); flying cars haven't quite arrived (but there have been efforts); hoverboards are really just battery-powered skateboards that don't actually hover (and sometimes spontaneously combust); and (thankfully, for our job security) lawyers haven't been abolished. Yet.

Artificial intelligence in the legal field is nothing new—a number of companies have been trying to enter the AI-generated legal research and writing industry for years. The proliferation, however, of chatbot tools, like ChatGPT, has generated new interest in the concept of having someone (or something) doing the work of a lawyer. There are a number of chatbots and automation tools available that provide lawyers an opportunity to improve their efficiencies—from automating the client intake process, to streamlining conflict checks, to generating legal memoranda. If you haven't taken a look at the plethora of tech tools available, I encourage you to do so. We have implemented a number of tools in our practice and, for the most part, they are pretty slick to use.

But the proliferation of tech tools is not without a potential for pitfalls. As a recent example, two attorneys in New York are under scrutiny for relying on ChatGPT to generate a legal argument that, at least at first glance, appeared to cite legitimate past cases. The problem? The cases ChatGPT cited weren't actually real. The bigger problem? The attorneys didn't bother performing any due diligence to ensure that the cases were legitimate.

When considering the use of new tech tools to automate and improve your practice, or the use of chatbots to jump start your creative legal writing process, attorneys should always have the ethics rules in mind. The first rule that comes to mind deals with competence. A lawyer relying on technology to assist in their practice needs to be competent in the capabilities (and limitations) of that technology: "[A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…." Rule 1.1, cmt. 8, MRPC. It's one thing to want to implement tools to improve your practice; it's a whole other thing to do so without appreciating what those tools can and cannot do. Not understanding the limitations of those tools, particularly in the representation of a client, can give rise to an ethical violation under the rules.

Along the lines of what tech tools cannot do, this is probably a good spot to revisit the diligence rule.

"A lawyer shall act with reasonable diligence and promptness in representing a client." Rule 1.3, MRPC. For the two New York attorneys who relied on ChatGPT to write their legal argument, whether intentional or just sloppy, their failure to confirm the propriety of ChatGPT's citations is a prime example of why attorneys need to be wary of solely relying on tech to do their job for them. Rule 1.3, MRPC, requires attorneys to take whatever lawful and ethical measures are necessary to zealously advocate the client's cause, including understanding that the arguments advanced on the client's behalf have merit (shoutout to Rule 3.1, MRPC, too). Creating efficiencies in your practice is great, but don't blindly accept the outcome of those tools—we still need to ensure that the result is accurate, otherwise we're merely cutting corners.

Other ethics rules with potential implication include: Rules 1.6, 3.1, 3.3(a), and 8.4(c) and (d). Rule 1.6, MRPC, prohibits an attorney from revealing any information about the representation of a client unless one of the enumerated exceptions in Rule 1.6(b), MRPC, apply. Relying on chatbot tools to generate legal writing almost always requires some form of prompt that the attorney enters—background information and parameters—to generate the work product. Attorneys relying on these types of tools need to be mindful of the amount of client-specific information that they input, how the tool stores/encrypts that information (if at all), and whether providing that information falls within one of the enumerated exceptions under Rule 1.6(b), MRPC.

Rule 3.1, MRPC, prohibits an attorney from bringing or defending a proceeding, or asserting or controverting an issue, when there is no basis in law or fact for doing so. Relying on fictitious cases generated by a chatbot to advance an argument could give rise to a violation of this rule. Meanwhile, Rule 3.3(a)(1), MRPC, prohibits an attorney from *knowingly* making a false statement of fact or law to the tribunal. The knowledge requirement of this rule would result in a violation where the attorney relied on a chatbot to draft their legal writing and became aware that the cases are fictitious—or at least aware that the chatbot is limited in its ability to perform research of caselaw—and submitted the legal briefing anyways without vetting the propriety of the cited authority. Doing so could also give rise to a violation of Rule 8.4(c), MRPC, where the conduct involved an element of dishonesty. And, of course, there is the catch-all provision within the ethics rules for wasting the court's time: Rule 8.4(d), MRPC, which prohibits conduct prejudicial to the administration of justice.

In sum, know the capabilities and limitations of your tech tools and perform the requisite amount of diligence to ensure that your work product has legal and factual support.

Flat Fee Agreements

Minnesota's rule that allows attorneys to charge a flat fee for legal services changed in 2011, but still is one of the most common rule violations resulting in discipline. This rule, to some degree, may affect criminal defense attorneys more so than any other practice area. So, what gives?

Attorneys who are disciplined for improper flat fee agreements are, more often than not, attorneys who have been using the same flat fee agreement that they've had in place since before the rule change. Please, save yourself the headache and review Rule 1.5(b)(1)(i)–(v), MRPC, and your flat fee agreements, particularly if it's been a while since you have done so.

Generally, Minnesota allows you to receive flat fees in advance of rendering services without having to put those funds into your trust account, but only when certain disclosures are made to the client. A lawyer may charge a flat fee as complete payment for legal services in advance, where the agreement is signed by the client, and notifies the client: (i) of the nature and scope of services; (ii) of the total amount of the fee and payment terms; (iii) that the fee will not be held in trust until earned; (iv) that the client has the right to terminate the relationship; and (v) that the client will be entitled to a refund of all or a portion of the fee if the services are not provided. Rule 1.5(b)(1)(i)–(v), MRPC.

Your flat fee agreement needs to have these specific disclosures to the client contained within the agreement, and the client needs to sign the agreement. If your flat fee agreement is missing any one of these required disclosures, and/or isn't signed by the client, you cannot put the client's flat fee into your operating account—the fee needs to go into your trust account until it is earned. *See* Rule 1.15(c)(5), MRPC.

Another issue related to flat fee arrangements involves flat fees that contemplate filing fees and other third-party costs. While Rule 1.5(b)(1), MRPC, allows you to accept as a flat fee and bypass the trust account the fees for your legal services, it does not allow you to bypass the trust account for things like court costs (filing fees, etc.). This is because filing fees are not "fees" to be earned by the attorney for services rendered. They are costs intended for a specific purpose and not part of the attorney's fee; therefore, the attorney cannot place advance payments for filing fees and other court costs into their operating account—these costs need to go into the trust account or should be paid separately by the client.

In a similar vein, Minnesota does not allow "non-refundable" fee arrangements. If your fee agreement makes any reference to a "non-refundable" fee, you're asking for discipline. *See* Rule 1.5(b)(3), MRPC. Don't do that. All fees paid in advance are subject to a refund of all or a portion of the fee if the contemplated services are not provided in full. *Id.*

One last thing to be mindful of: even a flat fee arrangement must be reasonable and comply with Rule 1.5(a), MRPC. A flat fee arrangement that complies with the disclosures of Rule 1.5(b)(1) can still run afoul of Rule 1.5(a), MRPC, if the fee itself is unreasonable under the circumstances.

Reporting Others

Another common question attorneys ask is, "Do I need to report another attorney's misconduct?" Or, oftentimes attorneys will say, "I'm reporting Attorney John Doe because of my obligations under the rules of professional conduct." What are those obligations?

Rule 8.3(a), MRPC, requires that a lawyer "who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that *raises a substantial question* as to that lawyer's *honesty, trustworthiness, or fitness* as a lawyer in other respects, shall inform the appropriate professional authority." (Emphasis added). So, first the attorney contemplating the report should have actual knowledge of the violation—hunches or suspicions aren't enough to trigger the reporting obligation. Second, the conduct at issue must raise a substantial question as to the lawyer's honesty, trustworthiness, or fitness to practice. In other words, the reporting obligation isn't triggered unless the underlying conduct creates a genuine concern about that lawyer's honesty or fitness to practice law. Run of the mill discovery disputes, or disagreements over a factual contention or legal basis of an issue in a case seldom rise to the level necessary to trigger an attorney's reporting obligation. That's not to say that an attorney can't report another for those types of issues, it just likely isn't required under the rules.

Last, another common question attorneys ask is whether they have an obligation to self-report their own conduct. Generally, the answer is "no." There is no duty to self-report, unless the attorney has been publicly disciplined by a professional authority in another jurisdiction, in which case, Rule 12(d), RLPR, imposes a notice obligation: "A lawyer subject to such charges or discipline shall notify the Director."

Beyond the obligation to report public discipline from another jurisdiction, there are some limited instances where self-reporting other misconduct may make sense, but in most instances, it does not. ■

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Career Confrontation: The practical "fine print" of employment through the State

By Andrew Wilson

Another attorney called me recently, seeking insight into the prospects of quashing an increasing volume of criminal subpoenas that their client—a former analyst with the Minnesota Bureau of Criminal Apprehension—had received since resigning. After years working with the BCA, the client had secured a new line of employment and was excited about the new venture, but had reportedly still averaged receiving 2 or 3 criminal subpoenas *per week*, the vast majority of which were from city and county prosecutors. In exchange for the client's mandatory testimony, the client could receive up-to a whopping $100.00 per day (plus reasonable travel reimbursement).

Most of the subpoenas were served by mail, with a cover letter advising the client to sign and return the enclosed acknowledgment of service by mail form to avoid being personally served by a law enforcement officer. Within about a week, the client, who lived in the metro area, had received subpoenas mandating their in-person attendance at upcoming hearings and trials in a wide swath of counties throughout all of Minnesota.

The client wanted out. They'd quit their job, been hired on elsewhere, and were excited about the new frontier. They were also in the midst of starting on with a new employer and were concerned about their many obligatory absences harming the new employment relationship. Unfortunately, it seems the client hadn't read what was ostensibly very fine print on their employment paperwork with the BCA.

It had to have been in there somewhere, right? The fine print that cited to Minn. Stat. § 634.15, subd. 2, *Crawford*, *Melendez-Diaz*, *Bullcoming*, and the related Minnesota appellate cases? Those cases that, collectively, foreclose much wriggle room in terms of avoiding a continuing obligation to testify at those hearings, short of a stipulation or a waiver. The client was quickly realizing that their former position with the BCA carried with it a continuing obligation to defend their work for (potentially) years after their departure.

The United States Supreme Court's *Crawford* opinion reinvigorated the Sixth Amendment right to confrontation, holding that the Confrontation Clause bars the admission into evidence of out-of-court statements made by witnesses that are deemed "testimonial," unless the witnesses are unavailable and the defendant had prior opportunity to cross-examine them. *See generally Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

Following *Crawford,* in 2009, the United States Supreme Court issued *Melendez-Diaz*, reinforcing *Crawford* and holding that affidavits—in lieu of live testimony—of analysts who tested alleged controlled substance evidence fell squarely within the "core class of testimonial statements" covered by the Confrontation Clause. *See Melendez-Diaz*, 557 U.S. 305, 310 (2009) (quoting *Crawford*, 541 U.S. at 51).

Two years later, in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the United States Supreme Court held

the same with regard to the introduction of a forensic laboratory report containing a testimonial certification, made for the purpose of proving a particular fact, through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. In other words, surrogate testimony was insufficient to skirt the requirement for confrontation.

Minnesota's jurisprudence post-*Crawford, Melendez-Diaz,* and *Bullcoming*, generally aligns with the United States Supreme Court precedent with some exceptions.[1] In Minnesota, however, there is also relevant statutory authority.

> Under Minn. Stat § 634.15, subd. 2:
>
> Subd. 2. **Testimony at trial.** (a) Except in civil proceedings, including proceedings under section 169A.53, an accused person or the accused person's attorney may request, by notifying the prosecuting attorney at least ten days before the trial, that the following persons testify in person at the trial on behalf of the state:
>
> (1) a person who performed the laboratory analysis or examination for the report described in subdivision 1, paragraph (a), clause (1); or
>
> (2) a person who prepared the blood sample report described in subdivision 1, paragraph (a), clause (2).
> If a petitioner in a proceeding under section 169A.53 subpoenas a person described in clause (1) or (2), to testify at the proceeding, the petitioner is not required to pay the person witness fees under section 357.22 in excess of $100.
>
> (b) If the accused person or the accused person's attorney does not comply with the ten-day requirement described in paragraph (a), the prosecutor is not required to produce the person who performed the analysis or examination or prepared the report. In this case, the accused person's right to confront that witness is waived and the report shall be admitted into evidence.

Not to dispute the importance of vindicating a criminal defendant's constitutional rights, but it's interesting to consider the practical impact that the vindication of those rights has on the forensic scientist (or doctor, or nurse, or law enforcement officer) who applied for and accepted a job because they appeared qualified and were interested in the subject matter. Those legal authorities appear to tie individuals to their former employers long after the employee has sought exodus.

Compromising a defendant's constitutional rights and permitting surrogate testimony as a matter of convenience is no reasonable remedy. But neither does relatively inflexible and almost indefinite availability as a witness for a flat fee of up-to $100.00 seem equitable.[2] Among other things, the required testimony might be significant, the subpoena may trigger an obligation to prepare in advance, travel time may be significant, and the obligation to testify may interfere with the individual's relationship with their new employer.

1 *Compare State v. Caulfield*, 722 N.W.2d 304, 310 (Minn. 2006); *State v. Weaver*, 733 N.W.2d 793 (Minn. Ct. App. 2007) (laboratory test results that had been destroyed in accordance with hospital policy, but which were offered through medical expert's testimony to prove the cause of death in murder trial, were testimonial); *State v. Johnson*, 756 N.W.2d 883 (Minn. Ct. App. 2008) (an autopsy report is testimonial in nature) *with State v. Ziegler*, 855 N.W.2d 551 (Minn. Ct. App. 2014) (machine-generated data that do not contain the statements of human witnesses are not testimonial statements that implicate a defendant's right to confrontation); *Andersen v. State*, 830 N.W.2d 1 (Minn. 2013) (marketing material that showed several types of manufacturer's bullets, and was used by state's firearm and bullet expert to help explain his testimony, was not "testimonial" under Confrontation Clause).

Ultimately, the client opted to weather the storm, seeing little traction in the prospects of a motion to quash. Perhaps a start of the solution is to increase notice, increase the witness fee, and to bolden the fine print. ■

About Andrew Wilson

Andrew C. Wilson is the managing attorney at Wilson & Clas, where he defends individuals in criminal, appellate, Title IX, and harassment matters. He earned his undergraduate degree from St. Olaf College, in Northfield, MN, and graduated magna cum laude with a law degree from Mitchell Hamline College of Law in St. Paul, MN. Andrew first contributed to the Minnesota DWI Deskbook in 2018.

Join a MACDL Committee

Much of MACDL's work is done at the committee level. You do not need to be a member of the Board of Directors to help our organization and its mission by serving as either a chairperson or on the committee. In fact, we need your help. Below are our committees and a brief description of our work. Please contact the committee chair or our executive director if you are interested in volunteering your time.

- **Amicus Committee – Shauna Kieffer**
    - Review requests for amicus memorandums and advise the Board on whether the organization should petition the court to weigh in on an issue before the court.
    - Write or recruit writers for amicus briefs.
- **Annual Dinner – Chairperson David Valentini**
    - This is MACDL's biggest fundraiser that supports the work of the organization.
    - Plan the annual dinner which includes:
        - *Selecting the date and location*
        - *Coordinating with the vendors that assist with the dinner*
        - *Soliciting donations*
        - *Setting up before the event*
- **Clemency – JaneAnne Murray**
    - The Committee focuses on building the MACDL State Clemency Project which aims to recruit and train volunteer lawyers to represent clients seeking commutations and pardons before the Minnesota State Board of Pardons. The Committee will develop materials, run trainings, recruit volunteer lawyers, recruit volunteer advisory lawyers to assist the petition writers and identify candidates needing representation.
- **Communications – Chairperson Jill Brisbois**
    - VI
        - *Recruit writers for substantive articles*
        - *Assemble content for publication*
        - *Recruit advertisers*
        - *Work with content designer to assemble publication*
    - GoogleGroup
- **Continuing Legal Education – Chairperson needed, contact Shauna Kieffer if you are interested.**
    - Develop CLE and the MACDL Annual Seminar topics
    - Recruit speakers and presenters
    - Apply for CLE credits
- **Legislative/Policy – Chairpersons Ryan Else and Hannah Martin**
    - Participate in an annual roundtable discussion with members to get ideas for legislative agenda, then work to finalize that agenda with the lobbyists based on what they see as realistic.
    - During the legislative session which starts in January, spend an average of 3-5 hours a week in communication with lobbyists, negotiating with other stakeholders, meeting with lawmakers, and either testifying yourself or coordinating with MACDL members to testify
- **Membership - Chairpersons Laura Prahl and Andrew Garvis**
    - Organizing social events for the organization
    - MACDL Softball Team

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SOFTBALL UPDATE

The MACDL softball team ended the season on a high note with a commanding win over Larson King on July 18th. They closed out the season with an overall record of 4-6, and had a great time regardless of a few tough losses. Some highlights included Andy Garvis' heroic dive resulting in an out at home that he still may be limping from; Ben Koll's literal tree top home run; some amazing slide/falls resulting in lots of blood from Chelsea Knutson; Nickey Kettwick's sweet hits thanks to her batting glove; Greg Young and Justin Duffy's awesome outfield catches; Allie Chadwick's stellar pitching skills and so many more. A special shout out to Lizzy Karp who stepped up and took over being team captain when Laura Prahl was home with baby and Amanda Brodhag the incredible team manager and bookkeeper. We were also lucky enough to accrue a super fan base who made sure we had lots of cheering and plenty of fun at all the games! Great job everyone we are looking forward to next year!

Finally a huge thank you to Paul Beseman from Absolute Bailbonds, our team sponsors for the jerseys, bringing a fully stocked cooler, and making this softball season possible!