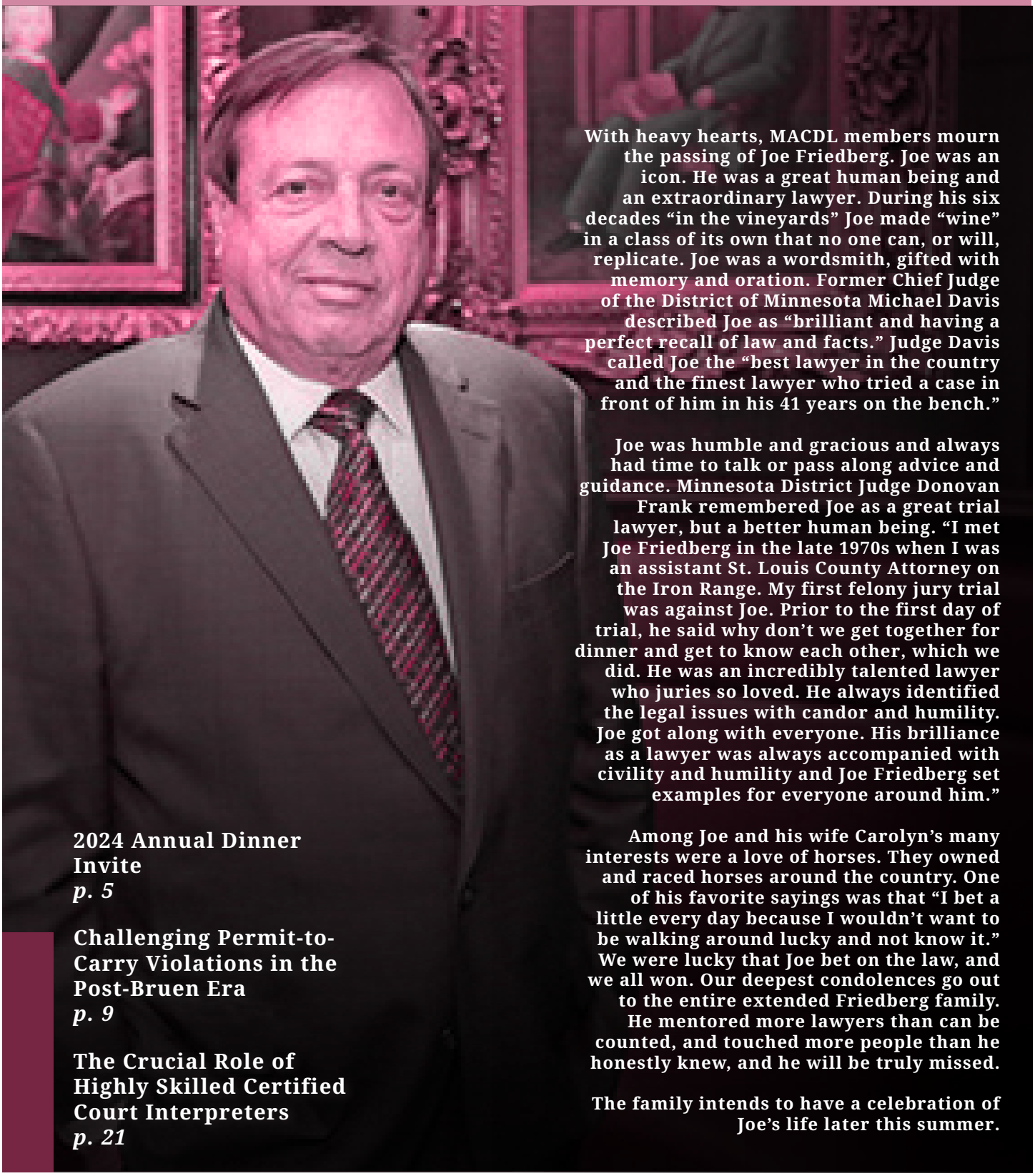
MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS



With heavy hearts, MACDL members mourn the passing of Joe Friedberg. Joe was an icon. He was a great human being and an extraordinary lawyer. During his six decades "in the vineyards" Joe made "wine" in a class of its own that no one can, or will, replicate. Joe was a wordsmith, gifted with memory and oration. Former Chief Judge of the District of Minnesota Michael Davis described Joe as "brilliant and having a perfect recall of law and facts." Judge Davis called Joe the "best lawyer in the country and the finest lawyer who tried a case in front of him in his 41 years on the bench."

Joe was humble and gracious and always had time to talk or pass along advice and guidance. Minnesota District Judge Donovan Frank remembered Joe as a great trial lawyer, but a better human being. "I met Joe Friedberg in the late 1970s when I was an assistant St. Louis County Attorney on the Iron Range. My first felony jury trial was against Joe. Prior to the first day of trial, he said why don't we get together for dinner and get to know each other, which we did. He was an incredibly talented lawyer who juries so loved. He always identified the legal issues with candor and humility. Joe got along with everyone. His brilliance as a lawyer was always accompanied with civility and humility and Joe Friedberg set examples for everyone around him."

Among Joe and his wife Carolyn's many interests were a love of horses. They owned and raced horses around the country. One of his favorite sayings was that "I bet a little every day because I wouldn't want to be walking around lucky and not know it." We were lucky that Joe bet on the law, and we all won. Our deepest condolences go out to the entire extended Friedberg family. He mentored more lawyers than can be counted, and touched more people than he honestly knew, and he will be truly missed.

The family intends to have a celebration of Joe's life later this summer.

Jill A. Brisbois
Editor

Minnesota Association of Criminal Defense Lawyers
Publisher

Andrew Garvis
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

A message from our President, Andrew Garvis

I am honored to be President of MACDL for 2024-2025. When I joined the MACDL Board in 2016, I had no aspirations to be President, but I have always believed in our core values and our mission statement:

- To foster, maintain and encourage the integrity, independence, and expertise of the defense lawyer in criminal cases;
- To promote the proper administration of criminal justice, including the protection of sacrosanct individual rights;
- To advance the knowledge of law in the field of criminal defense by seminars, publications, and engagement both off- and online; and
- To represent and lobby on behalf of MACDL before the powerful legislative, executive and judicial bodies which determine policy for the state and federal governments, and to do so in a manner consistent with MACDL's goals.

That mission, to me, is accomplished through collaboration—whether that be advice, encouragement, or heartfelt congratulations or condolences on the email listserv, amicus briefing, continuing legal education, VI magazine, and our lobbying efforts to pass meaningful legislation for our clients. I truly believe that we all are better lawyers, and a stronger and more effective organization, when we work together.

I am particularly proud of MACDL's lobbying and amicus work over the past several years. In 2023, substantial legislation was passed that benefited our clients and carved new landscapes into the law. Among these were the legalization of cannabis, reforms to the felony murder aiding-and-abetting law, restrictions on no-knock search warrants, the reduction of gross misdemeanor maximum sentences to 364 days, automatic expungements provided for many offenses, a cap of five years on probation for most offenses, the chance for prosecutor-initiated sentencing adjustments, early release opportunities for juvenile offenders after serving 15 years, reforms under the Veteran's Restorative Justice Act, modifications allowing interlock to satisfy conditional release requirements, and the elimination of DWI plate impoundment for vehicles not involved in the commission of the offense. These were some, but not all, of the laws passed in 2023 that MACDL championed, and which took years to pass through the legislature. The support of all MACDL members, and the substantial efforts of many former and current members, living and having passed on, helped bring about these just reforms. Much gratitude is due to all those who were involved, and a special thanks to current Board member Hannah Martin, who leads our lobbying efforts.

In 2023–24, we have already submitted over a dozen amicus briefs in support of legal issues relevant to our

clients. We continue to strengthen our commitment to amicus briefing, and I greatly appreciate current Secretary Shauna Kieffer's spearheading of MACDL's amicus work, along with Vice President Jill Brisbois and Board member Barry Edwards. I also thank all the other members that have contributed over the past few years and made possible what we do.

As 2024 continues, MACDL is working to relaunch a "strike force" to help members confronted by the perils of the threat of contempt, disqualification or service of subpoenas or search warrants for privileged information or attorney work product. I hope that members are willing to volunteer in their locales, and the Board calls on all members to step up and help those colleagues when they are imperiled.

As we move towards our annual dinner on September 7, 2024, I hope that you will join me in celebrating our successes and each other. The dinner and the auction are how MACDL helps to fund our lobbyist and Executive Director, Jill Oleisky.

Thank you all for your membership and continued support of MACDL and precious justice, as only the criminal defense bar can ensure. ■

Join us for the

Annual MACDL Dinner & Auction!

SATURDAY SEPTEMBER 7, 2024

The Town & Country Club

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St. Paul, MN 55104

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5:00 pm - Outdoor Cocktail Party

7:00 pm - Dinner & Program

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Join a 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 – Chairperson 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 – Chairperson 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 – Chairperson 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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Challenging Permit-to-Carry Violations in the Post-Bruen Era

By: Natalie Cote & Kaitlyn Falk

Several years ago, the Supreme Court issued a landmark 6-3 decision in *New York State Rifle & Pistol Association v. Bruen*, striking down New York's century-old carry licensing law and announcing a radical new framework for evaluating Second Amendment challenges. The Court's decision has led to an unprecedented number of challenges to firearm laws across the United States, many of which have been successful.

Before *Bruen*, courts had almost universally applied balancing tests to Second Amendment challenges, weighing the government's public safety interests that support reasonable gun laws against an individual's Second Amendment rights. Writing for a six-justice majority, Justice Thomas rejected these balancing tests, and instead announced the following two step approach in *Bruen*:

> First, courts must determine whether the plain text of the Second Amendment covers the conduct regulated by the government. *New York State Rile & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2125 (2022). Second, courts must determine whether the government can demonstrate that the regulation is "consistent with this Nation's historical tradition of firearm regulation." *Id.*

Stated another way, courts must first interpret the Second Amendment's text, as informed by history. And when the plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' *Id.* at 2130.

The statute at issue in *Bruen* made it a crime for the citizens of New York to carry a firearm for self-defense outside of the home without first obtaining an unrestricted license. In order to obtain a license to carry, New York citizens were required to prove that "proper cause" existed to issue the license. New York courts defined "proper cause" as a "special need for self-protection distinguishable from that of the general community." *Id.* at 2123. Applying its newly established framework, the *Bruen* Court held that the Second Amendment protects the right to carry a handgun outside the home for self-defense, ultimately finding New York's "proper cause" requirement to be unconstitutional.

Less than a year later, in *Worth v. Harrington*, the Eighth Circuit declared that Minnesota's firearm permitting regulation which required that a person be at least 21 years of age to receive a permit to publicly carry a handgun in Minnesota unconstitutional. *Worth v. Harrington*, 666 F. Supp. 3d 902 (D. Minn. 2023).

In relevant part, Minn. Stat. § 624.714, subd. 2(b)(2) provides:

> ". . . a sheriff must issue a permit to an applicant if the person is *at least 21 years old* and a citizen or a permanent resident of the United States."

Applying the *Bruen* framework, Judge Menendez concluded that Minn. Stat. § 624.714, subd. 2(b)(2)'s age requirement violates the Second and Fourteenth

Amendment rights of individuals 18-20 years old for the following reasons: (1) "the people" refers to all Americans who are a part of the national community which includes 18–20-year-olds; (2) neither the Second Amendment text nor other provisions within the Bill of Rights include an age limit; (3) the inclusion of the "people" elsewhere in the Bill of Rights supports the inclusion of 18-year-olds; and (4) founding era militia laws includes 18-to-20-year-olds. *Worth*, 666 F. Supp. 3d at 913-15. Judge Menendez further found that the defendants failed to identify analogous regulations that demonstrate the historical tradition of depriving 18-20-year-olds the right to carry publicly. *Id.* at 916-20.

Constitutional challenges to statutes prohibiting citizens convicted of a felony from possessing a firearm have also been successful under a *Bruen* analysis. For instance, in *Range v. Att'y Gen. United States of Am.*, the Third Circuit held that the Nation's historical tradition did not support depriving a citizen of their Second Amendment right to purchase a firearm after a fraud conviction. *Range v. Att'y Gen. United States of Am.*,69 F.4th 96, 98 (3d Cir. 2023).

The petitioner in *Range* was prohibited from possessing a firearm under 18 U.S.C. § 922(g)(1). After serving a probationary sentence, Range tried to buy a firearm but was denied as a result of his conviction. Range subsequently brought a civil suit seeking a declaratory judgment that 18 U.S.C. § 922(g)(1) violated his Second Amendment right to bear arms. The Third Circuit agreed.

In applying *Bruen*, the Third Circuit determined that the plain text of the Second Amendment covered Range's conduct as a putative gun purchaser, reasoning that "the people" referenced in the Second Amendment was not reserved for "law-abiding citizens," but instead presumptively belonged to "all Americans." *Id.* at 103. The Third Circuit further determined that the Government did not demonstrate that a lifetime disarmament for all felons was consistent with the Nation's historical tradition of firearm regulation, and explicitly pointed out that the current federal felony ban differs considerably from historical tradition of disarming those convicted of a certain subset of violent crimes. The Court therefore remanded the case and ordered that a declaratory judgment be entered in favor of Range.

The Eighth Circuit has not yet adopted this reasoning. Days before the Third Circuit issued its opinion in *Range*, the Eighth Circuit held that 18 U.S.C. § 922(g)(1) was constitutional as applied to the defendant in *United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023).

Jackson had two prior felony convictions in Minnesota for sale of a controlled substance, and was sentenced to 78 months' imprisonment for the first conviction, and 144 months for the second. Nearly four years after his release from prison, a federal grand jury charged him with unlawful possession of a firearm as a previously convicted felon after law enforcement officers located a handgun in his pocket upon responding to a report of shots fired near Brooklyn Park, Minnesota.

Despite Jackson's argument that § 922(g)(1) was unconstitutional as applied to him, because his drug offenses were non-violent and do not show that he is more dangerous than the typical law-abiding citizen, the Eighth Circuit denied Jackson's motion to dismiss the indictment. In explaining its logic, the Court stated that our Nation has a history of placing restrictions on possession by certain groups of people and Jackson was not a law-abiding citizen and had demonstrated disrespect for legal norms of society. *Id.* at 502.

Nevertheless, a number of courts across the Nation, including the Fifth Circuit, have declared statutes prohibiting persons subject to domestic abuse restraining orders facially invalid under *Bruen*. In *United States v. Rahimi*, the defendant had been involved in a series of violent incidents in Arlington, Texas, including multiple shootings and a hit-and-run. Rahimi was under a civil protective order for alleged assault against his ex-girlfriend, which explicitly prohibited him from possessing firearms. Police searched his home and found a rifle and a pistol, leading to Rahimi's indictment for violating federal law 18 U.S.C. § 922(g)(8), which makes it unlawful for someone under a domestic violence restraining order to possess firearms.

Despite pleading guilty, Rahimi subsequently appealed his conviction and challenged § 922(g)(8) as a violation of his Second Amendment right to bear arms in light of *Bruen*. The Fifth Circuit agreed, reasoning that Second Amendment rights belong to all Americans, not just "law-abiding, responsible citizens." *United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir.), cert. granted, 143 S. Ct. 2688, 216 L. Ed. 2d 1255 (2023). Accordingly, it held that individuals who are subject to a domestic violence restraining order are still afforded constitutional protection. *Id.*

The fate of the Fifth Circuit's holding in Rahimi hangs in the balance as the Supreme Court has not yet issued its opinion with oral arguments having occurred on November 7, 2023. Regardless of the Court's decision, one thing is clear – Second Amendment challenges are here to stay. ■

About the Authors

Natalie R. Cote is an associate attorney at Goetz & Eckland P.A., where she defends individuals in criminal, appellate, and personal injury cases. She earned her undergraduate degree from Luther College in Decorah, Iowa, and graduated cum laude with a law degree from the University of St. Thomas School of Law.

Kaitlyn C. Falk is also an associate at Goetz & Eckland P.A., where she defends individuals and corporations in civil litigation matters. She earned her undergraduate degree from the University of Wisconsin-Madison, and graduated cum laude with a law degree from the University of Minnesota Law School.

How Many Crimes Have You Committed Today?

By: Barry Edwards

In early 2018, I published an opinion piece in the St. Paul *Pioneer Press* advocating mailing citations rather than pulling vehicles over for minor equipment violations, thus reducing the number of dangerous face-to-face encounters between police and citizens. It wasn't well-received. Here are the unedited reader comments (I left out one for length):

"RJDubois" wrote:

> *Good reasoning Barry. Why stop there? Let's just mail citations and criminal complaints to everybody. That will be super safe. Of course what Barry misses is that people stopped for broken taillights don't shoot at the police because of the fix-it ticket, they shoot at the police because they just committed a robbery, have an illegal gun in the car, have a kilo of cocaine, have felony arrest warrants etc. etc. Of course arresting people for the warrants they now have because they were mailed their citations and failed to show up for court is also dangerous. Maybe we can have the defense attorneys go arrest them....*

"TrueAmerican" wrote:

> *Barry obviously wants to be an advocate for criminals. Only criminals are scared when they're pulled over!*

Opinionated wrote:

> *Now I guess I've heard it all. Why doesn't this Barry guy know that many major drug and alcohol related violations are caught during "minor" violation. Of course it could be Mr. Edwards is just an idiot and knows nothing of what he writes.*

"AFrankKen" wrote:

> *So it appears that the Pioneer Press Release is now allowing "ambulance chasing" disguised as an "Editorial" that treats the writer's adversaries as all bad guys.[. . .]*
>
> *Maybe Barry should advocate for sober citizens at home. In order to avoid jury duty we could just "Mail IN" our guilty verdicts for the drunk offenders he keeps on our roads through his "attacks" on evidence and the police.*

And "inappropriatescreenname" wrote:

> *Hilarious! Should probably disconnect that 911 thingy too, so the police dont have to get calls from people, then have to go deal with them.*
>
> *I noticed the byline at the bottom of the article, Mr Edwards is a minneapolis criminal defense attorney, he must not like his job, as many of the clients he represents and the wages he is payed are possibly a direct result of many a minor nuisance violation traffic stop. He should be thankful police are out there doing their jobs.*

Obviously, people who comment on opinion pieces in the newspaper are not representative of the population at large. It is not a poll. Comment writers are a self-selected group of outraged people who spend their time engaging in quasi-anonymous rants. But none

of the comments were positive. Not a single one. Nevertheless, just over a year after I wrote that piece, the Minneapolis police implemented that very policy. The article announcing the change generated similar outrage.

"Jakl1000" wrote:

> *This is a "do gooder" farce. If they can't afford a light bulb, do you think their car won't have bald tires and worn out brakes? Plain and simple, some people shouldn't drive or own a car. They should find a job they can take the bus or walk to.*

"Giantbuger" wrote:

> *Gonna be a can of worms!*
>
> *Before you know it low-income blacks also won't have to pay for annual license fee tabs simply for the race card because I can't afford it? Why stop there? How about a new law all gas stations must provide free gas to those low-income minorities who can't afford it? Or better yet, car dealers must provide free new vehicles every 10 years to those who can't afford it? Just have the white tax payers flip the bill and problem solved.*

It's worth noting here that there is no racial element to the new law. The writer assumes that poor people will be minorities, which speaks to a much larger social problem, especially in Minneapolis. But back to the comments:

"M231231":

> *Why own a car when u can't afford it like buying a headlite? Another reason to avoid Mpls. Never enter the city.1*

At last check, that article had over five-hundred and fifty comments, almost all predicting chaos, criminals run amok. One more, from "GopherGew": *"The continual lower of the bar of expectations is terrible for society. You know this list will grow. And it will continue to send the message to criminals that law and order doesn't matter...do what you want."* Other police departments have made similar policy changes.[2]

Again, I don't presume that the self-selected group of people who write comments in response to newspaper articles are representative, but I can confidently say with over twenty years in the profession of defending people accused of crimes that these attitudes are more common than not. "How can you defend those people" is a ubiquitous refrain. But note how the comment writers conflate petty misdemeanants (people with minor equipment violations) with anti-social, irredeemable, hard-core criminals even while there can be no doubt that any one of them may have driven with a burned-out tail- or headlight. Few drivers inspect all of their lights before driving, and all lights eventually burn out. But these writers immediately and unanimously conflate someone who dares to drive with a burned-out bulb or broken mirror with the worst of the worst. "Criminals" are in one category, and "we" are in another.

In *Three Felonies a Day*, however, Harvey Silverglate challenges this comfortable dichotomy. He asserts that "[t]he average professional in this country wakes up in the morning, goes to work, comes home, eats dinner, and then goes to sleep, unaware that he or she has likely committed several federal crimes that day."[3] Pointing out the ubiquity of laws people don't even know about, Paul Rosenzweig of the Heritage Foundation points out that, "[e]stimates of the current size of the body of federal criminal law vary[, but i]t has been reported that the Congressional Research Service cannot even count the current number of federal crimes."[4]

> The American Bar Association reported in 1998 that there were in excess of 3,300 separate criminal offenses. More than 40 percent of these laws have been enacted in just the past 30 years, as part of the growth of the regulatory state. And these laws are scattered in over 50 titles of the United States Code, encompassing roughly 27,000 pages. Worse yet, the statutory code sections often incorporate, by reference, the provisions and sanctions of administrative regulations promulgated by various regulatory agencies under congressional authorization. Estimates of how many such regulations exist are even less well settled, but the ABA thinks there are "[n]early 10,000." The

> appetite for more federal criminal laws is driven principally by political consideration, and not by any consideration of whether particular laws are intrinsically federal in nature.

These estimates are based on the federal criminal code. The Code of Federal Regulations contains ten times as many provisions that can put someone in prison. Georgetown University Law Professor Rosa Brooks writes, "At the federal level, there are now some three hundred thousand laws whose violation can lead to prison time. . . ."[5]

The Founders actually anticipated this problem. In the Federalist Papers, "Publius" (probably James Madison) wrote, "[i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow."[6]

If that seems attenuated, who, after all, is going to violate an obscure provision of a federal regulation, take a concrete example: have you ever picked up a feather while taking a walk? The Migratory Bird Act makes it a felony (punishable by a fine of $250,000 and two years in prison) to possess the feather of any migratory bird.[7] "More than 800 species are currently on the list, including the Bald Eagle, Black-capped Chickadee, Northern Cardinal, American Crow, Canada Goose, Mourning Dove, Barn Swallow, Cedar Waxwing, Barn Owl, and more. That means that so much as holding (possession) a feather of one of these birds is forbidden."[8] A blogger at The Bruce Museum in Connecticut writes that, "[t]echnically, a child with a collection of colorful cardinal and blue jay feathers would . . . be considered a lawbreaker."[9] But the law is not a technicality at all; people have been prosecuted under this law.

Even given the exceptions for traditional native cultural practices, indigenous persons have been prosecuted. Dale N. Smith, of Edgewood, N.M., a member of the Lakota/Sioux Tribe of the Hunkpapa Band of Lakota, who sold native arts and crafts, plead guilty and was sentenced to five months in federal custody for violating this law, a fact proudly displayed at the New Mexico U.S. Attorney's website nearly a decade later.[10] When Archie Cavanaugh was alerted by federal agents that his native art violated federal law by including feathers of migratory birds, he immediately took down the offending website . . . and was told that in doing so, he had committed the additional crime of tampering with evidence.[11] Whether drivers are pulled over for minor traffic violations takes on added significance when they have a "dream catcher" with a migratory bird feather hanging from their rear view mirror.

Some of these thousands of laws (and codes and regulations with criminal consequences) seem silly. For example, it is it a crime to sell "Turkey Ham" as "Ham Turkey" or with the words "Turkey" and "Ham" in different fonts.[12] Most of these are "blue laws" that are virtually defunct, like the Michigan law prohibiting "willfully blasphem[ing] the holy name of God, by cursing or contumeliously reproaching God."[13] According to Rosenzweig, though, more than three thousand people are criminally charged each year with such byzantine violations of regulatory laws.

State laws have mushroomed recently, too. Rosa Brooks, writing about her experience training as (and becoming) a D.C. reserve police officer, says,

> at the state level, a recent study found that Michigan legislators created an average of sixty new crimes a year during the six-year period the study looked at, while Oklahoma created forty-six new crimes a year, and South Carolina created forty-five new crimes a year. But [police training does not] talk about why so many trivial forms of misbehavior—particularly trivial forms of misbehavior more common among poor people of color than among affluent whites—were punishable by jail time, or about the potential relationship between our national fondness for inventing new 'crimes' and the nation's skyrocketing incarceration rates."

The police cannot reasonably be expected to know the

scores of new crimes that legislatures and agencies promulgate every year. Neither can we, even attorneys.

It's no wonder that the United States incarcerates six times as many people as other western democracies. In fact, the American way is to criminalize and incarcerate. To stigmatize, segregate, and brutalize. With 4.5% of the world's population, the United States has 25% of the world's prisoners.[14]

Any reader of this essay could be next. As could the people writing comments to the newspaper articles hoping for more police intervention. ■

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[1] "Minneapolis police to scale back low-level traffic stops," Star Tribune, Aug. 12, 2021 (avail at https://www.startribune.com/minneapolis-police-to-scale-back-low-level-traffic-stops/600087423/ last accessed Mar. 16, 2024).

[2] "New guidelines: Lansing police won't stop drivers solely for minor violations," Lansing State Journal, July 2, 2020 (avail at: https://www.lansingstatejournal.com/story/news/local/2020/07/01/new-guidelines-lansing-police-wont-stop-drivers-solely-minor-violations/5357206002/ last accessed Mar 16, 2024); "These Cities Are Limiting Traffic Stops for Minor Offenses," Bloomberg News, Feb. 2, 2022 (avail at https://greensboro.com/news/greensboro-police-halt-minor-traffic-stops-in-response-to-racial/article_42d2dfc7-ed33-5a96-9d33-c797ce0d4905.html last accessed Mar 16, 2024).

[3] Harvey Silverglate, Three Felonies a Day: How the Feds Target the Innocent (NY: Encounter Press, 2011), xxxvi.

[4] "The Over-Criminalization of Social and Economic Conduct," Paul Rosenzweig, Heritage Foundation, April 17, 2003.

[5] Rosa Brooks, Tangled Up in Blue: Policing the American City (Penguin Press, 2021) at 124.

[6] Federalist 62.

[7] The Migratory Bird Treaty Act of 1918 (MBTA), 16 U.S.C. §§ 703–712.

[8] Timothy Martinez Jr., "Bird Myths: Picking Up a Bird Feather is Illegal," Jan. 29, 2015, avail at https://shorturl.at/EGOQ8 (last accessed Oct. 15, 2023).

[9] Bruce Museum, "Conservation Topics: Why Your Bird Feather Collection Might Be Illegal," June 4, 2018, avail. at https://shorturl.at/JRTVW (accessed Oct. 15, 2023).

[10] U.S. Department of Justice, "Edgewood Man Sentenced for Violating Federal Wildlife Laws Prohibiting Sale of Eagle Feathers," Sept. 4, 2014, avail. at https://shorturl.at/muIKO (accessed Oct. 15, 2023).

[11] "Tlingit artist told he violated law for using raven, flicker feathers in art," The Oregonian, Oct. 16, 2012 (avail. at https://www.oregonlive.com/pacific-northwest-news/2012/10/tlingit_artist_told_he_violate.html last accessed Mar. 16, 2024).

[12] 9 CFR § 381.171 (with reference to 21 U.S. Code § 461).

[13] MCL 750.102

[14] Michelle Ye Hee Lee, "Does the United States Really Have 5 Percent of The World's Population And One Quarter Of The World's Prisoners?" Washington Post, April 30, 2015. Available at https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/ (checked Mar. 24, 2022).

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What would you do if a lawyer told you that their opposing counsel, a colleague at your law firm, smelled of alcohol and slurred her words at a deposition? What would you do if one of your paralegals was concerned about a newer lawyer with an important deadline? When an impatient supervisor came looking for a document, the paralegal knocked on the attorney's door and went into the office. He was staring at the same place on the same piece of paper she had seen an hour before and yelled at her to leave him alone. You know you must act. Now what? What if the lawyer being described is you? Lawyers Concerned for Lawyers is ready to help with free and confidential assistance.

While the US celebrated its bicentennial in 1976, a small, quiet group of committed lawyers and judges founded Lawyers Concerned for Lawyers (LCL). Fast forward 48 years to 2024, 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 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. This isn't a "can you top this" conversation, but honest sharing about an impact on you. Where can you have open conversations with people who know what it is like to do what you do? Remote work has made this more difficult, and we may have to relearn those old habits that were helpful. 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. These programs can be offered for mental health, elimination of bias, or ethics credit.

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. ■

On Consolation and the Practice of Criminal Defense

By: Paul Engh

On October 27, 1861, Professor Charles Hodge delivered sermon XXXII to his students at the Princeton Theological Seminary. The text discusses not only religious themes, but describes what a lawyer is supposed to do and, if properly represented, just how the client should view that effort. Sermon XXXII offers up what the leading theologian of his day thought of our professional aspirations.

Hodge's *Princeton Sermons* were published by Charles Scribner's Sons in 1879, and reprinted by Forgotten Books in 2015. Though written more than one-hundred years before *Gideon v. Wainwright*, 372 U.S. 335

(1963), the message of Sermon XXXIII still rings true today, in its description of the emotional and spiritual undercurrents of the attorney/client relationship. The empathy required of the lawyer. The client's transference that should occur.

The role of the lawyer, Hodge wrote, is "twofold," i.e., "to vindicate an accused person from the crimes laid to his charge, to secure for him the verdict of not guilty. In other words, it is to save him from the infliction of the penalty with which he is threatened." *Id.* at 49. Also "[i] t is to establish the claims of his client, to secure for him the quiet enjoyment of his inheritance or property." *Id.* The lawyer as advocate must have knowledge of the law, a "sufficient plea to offer on his behalf." *Id.*

What Hodge wanted to talk about, though, was the emotional dialectic that develops between the lawyer and the client. "The former personates the latter; puts himself in the client's place." *Id.* at 48. "It is while it lasts, therefore, the most intimate relation." *Id.* The client is thus "lost in his advocate, who for the time being is his representative." *Id.* at 49.

Hodge posited the relationship between the lawyer and accused has to be symbiotic. For that reason, he listed the "[d]uties of a client to his advocate." *Id.* at 50. How the client must "commit his case into his hands without reserve, and not depend on himself for any one else," and how there must be "trust and confidence," coupled with "gratitude and love." *Id.* With these duties and obligations satisfied, the relationship between the lawyer and client becomes "*a perpetual and overflowing source of consolation.*" *Id.* at 50 (Emphasis added).

Hodge's message has not been forgotten. In *Forgive* (Viking 2022), theologian Timothy Keller re-visits Sermon XXXIII and views the attorney/client dynamic with curiosity. "What is this *relationship* like?" he asks. *Id.* at p. 155 (Emphasis added).

Keller interprets Sermon XXXIII this way: "Hodge writes that the relationship of an advocate to a client should be one of great intimacy and power. If your defense attorney is brilliant in court, your case is brilliant. If she is eloquent in court, your case is eloquent. Whatever your attorney does is imputed to you." *Id.* at 155. In Keller's interpretation, the transference is meant to be complete. The lawyer's words become the client's voice.

For the practitioner, Hodge's descriptions may well be intuitive. New, though, is his phrase describing the attorney/client relationship as an "ever flowing source of consolation." What does this phrase mean? And does its meaning have current import?

The answers are found in Michael Ignatieff's *On Consolation, Finding Solace in Dark Times* (Metropolitan Books 2021). "Consolation is possible only if hope is possible," he writes, "and hope is possible

only if life makes sense to us." *Id.* at p. 9. "The hope we need for consolation depends on faith that our existence is meaningful or can be given meaning by our efforts. This is the faith that allow us to live in expectation of recovery and renewal." *Id.*

Ignatieff argues that "[c]onsolation depends on faith and is thus an unavoidably religious idea, even if as we shall see, the meaning that gives us hope can take nonreligious and even anti-religious forms. Yet it is with religious search for the meaning of suffering that we must begin. Religions fulfill many functions, but one is to console, to explain why human being suffer and die and why, despite these facts, we should live in hope." *Id.*

A religious consolation offers "the certainty that others have felt exactly as we have done, and that we are not alone, in our rage and despair, and our longing for better days." *Id.* at 20.

In the secular world, notes Ignatieff, "[c]onsolation depends on this recognition. To console someone is to say, over and over: I know, I know. We share what we have suffered so others will know they are not alone. It is the most essential and difficult exercise of solidarity that ever falls to us." *Id.*

For Ignatieff, the embrace of consolation becomes the ultimate measure of a successful life:

> [A]t the end of this journey, you finally understand . . . that you have to take ownership of the entire person you once were, take some pride in what you tried to do, and take responsibility only for those portions of your failure that were yours alone. In this slow, circuitous, barely conscious way, you come to be consoled. You can even learn to be grateful for what failure has taught you about yourself.

Id. at 257-58.

The word consolation implies, then, a certain humility about our place in society, and for criminal defense lawyers our station in the larger practice of law. Ignatieff acknowledges as much:

> Failure is the great teacher, and so too is aging. As I have grown older, at least one false consolation has dropped away. Of all the advantages that loving parents, class, race, education, and citizenship conferred on me, the most incorrigible entitlement was existential: That I was somehow special. I had been given an all-access pass that gave me free passage through life. This was absurd, of course, but it was an illusion that sustained a great deal of what I tried to do. Failure and age gradually teach most of us otherwise. You shed any illusion of a special status that confers immunity from folly and misfortune and come to accept, willingly or otherwise, that you are like everyone else, prey to delusion, self-deception, and all the ills that flesh is heir to. You realize that the all-access pass will have to be handed in, and that in any case there is a door ahead that it will not open.

Id. at 258.

Ignatieff addresses the community of criminal defense lawyers when he observes that "You may not be special, but you do belong. This is not so bleak or so difficult to accept. It might even make you a little more attentive to the misfortunes and calamities of others and more alive to the ancient wisdom that has always been there to warn us not to be so vain and foolish." *Id.* at 258.

For our context, Ignatieff defines consol as "to find solace together." *Id.* at p. 1. Which is why he urges a rejection of aloneness and isolation. "It is not doctrines that console us in the end, but people: their example, their singularity, their courage and steadfastness." *Id.* at 259. "It is people we need, people whose examples show us what it means to go on, to keep going, despite everything." *Id.*

The work of Hodge and Ignatieff can be merged. Hodge's observations are timeless. We are here to "vindicate the accused . . . from the infliction of the penalty with which he is threatened." To have, in turn, the client become "lost in his [or her] advocate," to gain the defendant's "trust and confidence," so that, when the case ends, we will have earned feelings of "gratitude and love," and will become a "perpetual and everflowing source of consolation."

Adds Ignatieff, "Consolation is always a gift, a form of grace we do not always deserve, but which, when we

receive it, for fleeting instant, makes our lives worth living." *Id.* at 261.

Ignatieff concludes his book by describing a friendship. He visits Czeslaw Milosz, who was awarded the Nobel Prize in literature (1980). Milosz will soon return to his native Poland after decades of teaching at Berkeley, and Ignatieff will never see him again. Milosz is 87, "a small man with unforgettable deep-set blue eyes beneath bushy eyebrows," and who had "an irresistible charm that belied his age." *Id.* at 260.

At this last visit, Milosz is asked to read aloud and he chooses "Gift," a poem that, according to Ignatieff, describes "what it is to feel consoled, to be reconciled to one's losses, to have come to terms with one's shame and regrets, and to feel, despite everything, alive to the beauty of life." *Id.* at 261. The poem makes "plain how much consolation remains the work of a lifetime, constantly recommenced, though it can be savored in a single moment." *Id.*

Here now is Milosz's "Gift," to be read aloud over and over again, after each win, each defeat, each criticism fair or not, with the celebration of each new case and client. For being able to start over.

A day so happy.

Fog lifted early, I worked in the garden.

Hummingbirds were stopping over honeysuckle flowers.

There was no thing on earth I wanted to possess.

I knew no one worth my envying him.

Whatever evil I had suffered, I forgot.

To think that once I was the same man did not embarrass me.

In my body I felt no pain.

When straightening up, I saw the blue sea and sails.

New and Collected Poems 1931-2001

(Allen Lane, The Penguin Press 2001). ■

The Crucial Role of Highly Skilled Certified Court Interpreters

By: Esparanza Lopez-Dominguez, Quality Interpretations, LLC

In the diverse landscape of Minnesota's legal system, the role of court interpreters stands as a crucial pillar in ensuring fair and effective communication for all participants, particularly in criminal proceedings. With the doubling of interpreted events in Minnesota courtrooms in the last two years due to changing demographics, the need for proficient interpretation services has never been more pronounced. In the courtroom, where the stakes are high, and every word matters, accurate communication is paramount. Court interpreters play a pivotal role in this environment, ensuring that defendants have equal footing with native English speakers to comprehend the legal proceedings against them, effectively communicate with their legal counsel, and have their voices heard.

Criminal defense lawyers rely on these skilled professionals to bridge linguistic gaps, safeguarding the rights of defendants, and promoting equal access to justice.

The Minnesota Judicial Branch (MJB) implemented a new court interpreter policy on January 8, 2024. Many of you are aware that since that date, the majority of Minnesota court interpreters with whom you have worked over the last couple of decades decided that they had had enough! To draw attention to their many concerns with MJB's court interpreter policy, they engaged in a work stoppage. What are the interpreters' concerns?

Equal Access to Justice

In 1993, MN Supreme Court Justice Alan Page surveyed ethnic minority court users and was surprised to find users were satisfied with all services-except court interpreting. Consequently, at his behest, the MJB became one of four states leading the nation in the establishment of interpreter programs and standards. This led to the development of the Code of Professional Responsibility and the certification exams, currently adopted by 36 states.

The Americans with Disability Act and the Civil Rights Act of 1964 prohibit discrimination based on disability and national origin, respectively, and require the provision of competent interpretation for court users. Before the establishment of programs and standards, not only was there dissatisfaction, but cases were overturned on appeal due to incompetent interpretation. Minnesota interpreters are raising the alarm about standards erosion and the downward trajectory to equal access to justice.

In the 90s, upon the establishment of the Court Interpreter Advisory Committee, the MN Court Interpreter Program was formed. The Committee, in conjunction with the MJB, developed a cutting-edge program that paved the way for other programs across the nation. Today, the Court Interpreter Program is a shell of its heydays; the Advisory Committee is a thing of the past.

Conflict of Interest

Across the nation, legislatures have handed over control of both standard setting and compensation policies for court interpreters. This is not true for any other profession. The MJB does not decide who is qualified to practice as an attorney, a psychologist, or a court

reporter, but it does determine who is qualified to work as a certified court interpreter.

With its firm grip on the purse, the Judicial Branch controls compensation terms, leaving no negotiating power to contract interpreters.

The minimum passing score for a certified court interpreter was reduced from 80% to 70% to allow for more interpreters to become court certified. The passing score is the direct reflection of the record accuracy, level of language access, and engagement of all court users - defendants, jurors, judges, and you.

In the last few years the MJB removed policy language that mandated "diligent effort" to place certified interpreters for court events, and amended it to "reasonable effort". In doing so, the MJB has carte blanche to keep standards low to attract those willing to accept eroding compensation and fill the void of highly skilled certified interpreters who can no longer afford doing business with the Branch. This has happened even though the demand for interpreters has doubled in the past two years.

Qualified and experienced interpreters are abandoning the MJB as a viable client.

Court Interpreters' Peers

When determining the compensation rate for court interpreters, the MJB compares them with their peers in other government agencies such as the Department of Health and Human Services, and industries that do not require certification, the vast knowledge and acquired skills for legal interpreting, or taking an oath.

A comparison with other state court interpreter program policies is equally flawed. The Judicial Branches in all states oversee their court interpreter programs, from credentialing the interpreter to setting the rates, thus creating a conflict and unfair business practices.

Highly skilled certified court interpreters can only be compared to their counterparts in the private sector. Likewise, their compensation can only be matched to retain these professionals. Although the MJB does not employ this metric, the MN Court Administrator directly ties the private market rate discrepancy to the Branch's historically high turnover rate and inability to retain professional staff.

These circumstances lead to certified court interpreters seeking more lucrative work in other markets. The MJB lowers standards instead of raising pay, because they control the entirety of the process from A to Z.

Compensation Policies

In 1997, the MN Judicial Branch was paying spoken language interpreters $50/hour with a two-hour minimum, including travel time over 35 miles. A full-day trial would pay for eight hours. For the next 19 years, that rate remained unchanged, whilst inflation and ever-changing economic realities ate up more and more of the hourly rate value. Meanwhile, courts started booking trials for six and a half hours, shaving off half an hour from the start time and lunch hour the interpreter has no control over.

As of January 8, travel time is no longer paid. This provision is particularly felt among American Sign Language/Certified Deaf (ASL/CDI) interpreters, who had better tracking with inflation over the years.

ASL is a 3-D language and is not best suited for remote appearances, while deaf/blind court users can't communicate via Zoom. Without travel time, court users outside of the metro area who communicate through ASL will be without interpreters and a lawsuit is sure to follow.

Likewise, with the 2024 policy, ASL/CDI interpreters saw a decrease in the hourly rate from $93 to $86 per hour. These highly sought-after professionals have left for greener pastures.

The new policy also reduced the remote rate for spoken language interpreters from $145 to $65. A two-hour minimum has been added with a "booking exception" that enables the courts to squeeze in hearing after hearing after hearing. This practice goes fundamentally against established best practices for court interpreters.

Since 1997, in person spoken language interpreters have seen a 30% increase in the hourly rate, and ASL/CDI have seen an increase of 63%. In the same period, the federal minimum wage has increased by 110.6%,

forensic psychologists' compensation has increased by 66% with a proposal currently before the legislature to bring that increase to 200%, and public defenders have seen an increase of 157.1%.

Court interpreters are independent contractors, paying their full social security taxes, receiving no benefits, and having no organizational structure to manage the business administration of their work. They prepare for hearings and trials on their own time. Their billable hours are far fewer than the time they dedicate to their work.

A Voice at the Table

When the Minnesota Court Interpreter Program was established, it included a voice at the MJB table in the form of a Minnesota Supreme Court Interpreter Advisory Committee that was earlier established and was composed of judges, attorneys, interpreters, etc. The current court administrator has offered to select some interpreters to meet and talk with him quarterly in response to the demand by court interpreters to re-establish this Council. This is a meaningless distraction with no real power.

In Conclusion

As Minnesota's legal landscape continues to evolve, the need for court interpreters in criminal defense proceedings will only continue to grow. However, until the MJB recognizes the true

value of court interpreters, proactively funds the court interpreting program, and provides them with the respect and compensation they rightfully deserve, criminal defense attorneys may experience difficulties providing access to a fair and impartial legal process to their non-English speaking clients.

Minnesota Court Interpreters have suspended the coordinated work stoppage. However, many of the most qualified interpreters have chosen to work with other clients who show them greater respect, which is reflected in many ways, including but not limited to compensation.

Equal access to justice requires that deaf/deaf blind and hard of hearing court users and those with limited English proficiency can access everything that is said in their hearings and trials in a language they can understand. The courts need to hear everything they say. For this to happen, the courts need highly skilled certified court interpreters who adhere to strict codes of ethics and professional standards, including confidentiality and impartiality. This requires a robust court interpreter policy free of conflicts of interest, a true commitment to excellence, and the will to adequately fund the program. ■

About the Author

Esparanza is certified as a Spanish court interpreter through the State of Minnesota and the United States Courts. She travels around the country to the different states that currently do not have Federally cerfitified court interpreters. She has been part of the faculty that teaches the court interpreting orientation, one of the steps required to become a State certified court interpreter in Minnesota since 1998. She has also taught at the University of Minnesota in the translation and interpretation department.

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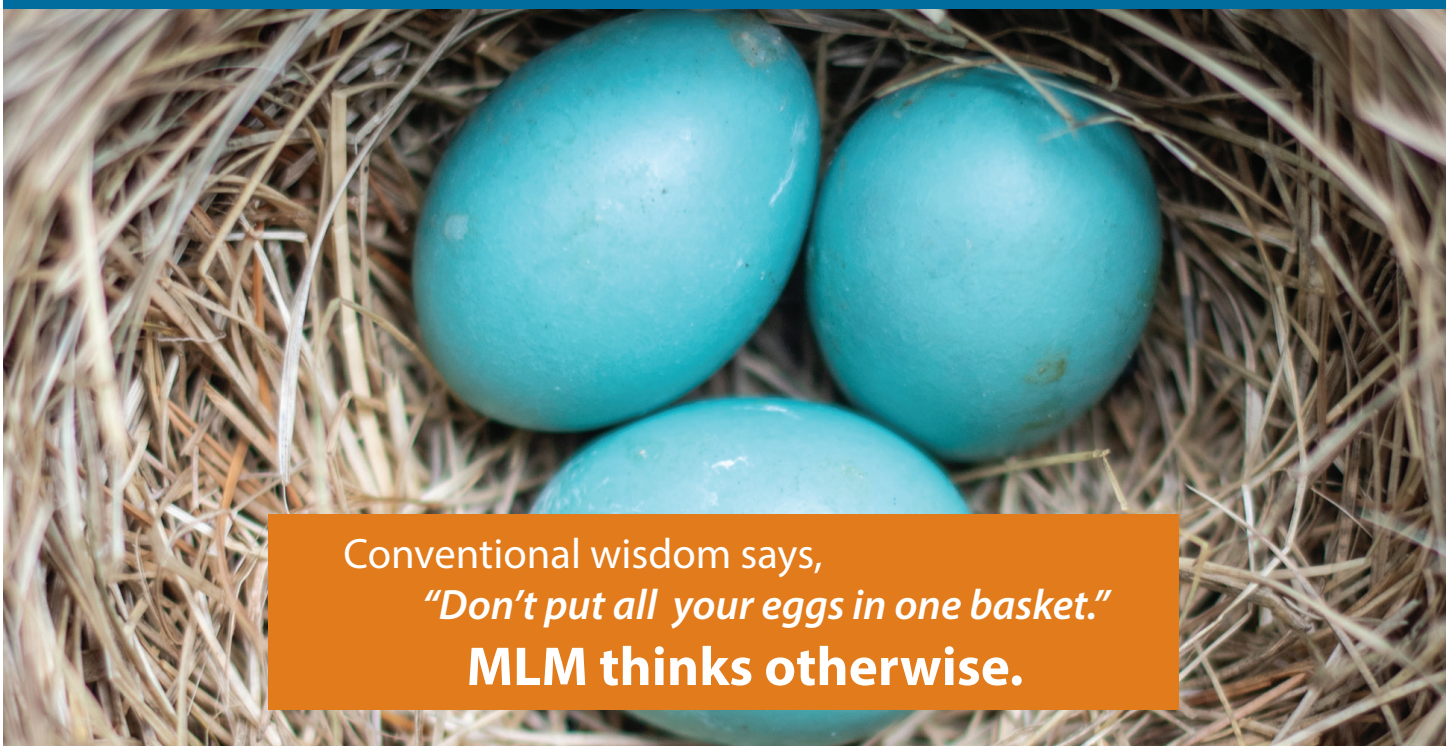

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Legislative Recap: Hylden Advocacy & Law

By: Natalia Madryga, Government Affairs Specialist

In 2024, MACDL was a critical expert voice in the development of legislative proposals that would have a direct impact on the criminal justice system in Minnesota. Hylden Advocacy & Law (HAL) identified opportunities for MACDL to participate and engage in the legislative process. In partnership MACDL and HAL prepared testimonial letters on the following:

- removing felony drug/controlled substance from the crime of violence definition;
- the establishment of a criminal forfeiture process;
- prohibiting admission of certain custodial statements in judicial proceedings when such statements are prompted by false representations by authorities; and
- proposed changes to the ignition interlock statute for nonalcohol substance abuse.

HAL also prepared MACDL to testify in favor of increasing access to Brady material and opposing limiting exculpatory information provided to domestic abuse advocates. HAL provided legislators with accurate information from the field to halt progress on bills that jeopardize criminal defendant's access to due process and individual liberties. ■

Judiciary and Public Safety Omnibus Chapter 123

- Article 1, Sec. 2, $500k for a competitive grant program for courthouse safety and security improvements
- Article 1, Sec. 3, $20 million for psychological and psychiatric examiner services
- Article 1, Sec. 3, $1 million for forensic examiner payment rates increase
- Article 1, Sec. 3, $5.5 million to expand access to court interpreters
- Article 1, Sec. 3, $2.3 million for jury programs
- Article 1, Sec. 4, $9.5 million for crime victim survivors
- Article 1, Sec. 6, $990k for clemency review commission
- Article 1, Sec. 7, $150k to Office of Addiction and Recovery for Task Force
- Article 1, Sec. 17, $500k in grants to Anoka, Hennepin, and Ramsey County for youth support services
- Article 2, Sec. 2, End-of-confinement review committee changes
- Article 3, Sec. 1, Police must inform vehicle's operator for reason for the stop and cannot ask vehicle operator to identify the reason
- Article 3, Sec. 5, Police may not use cannabis odor as sole basis for vehicle or person search
- Article 3, Sec. 6, Independent investigations required for police-involved deaths
- Article 3, Sec. 9, Prohibition of police training in excited delirium
- Article 4, Sec.1, Identification of collateral consequences
- Article 4, Sec. 4, DNA cannot be collected from a minor without parental or custodial consent, warrant, or court order
- Article 4, Sec. 13, Adds reckless driving resulting in great bodily harm to exceptions from automatic expungements (Clean Slate Act)
- Article 4, Sec. 15, Crim Sex changes for Mentally Incapacitated for not conscious complainants
- Article 4, Sec. 16, Confession by Juvenile is inadmissible when deception is used
- Article 4, Sec. 20, Eligibility of relief notification for previous felony aiding and abetting charges
- Article 5, Sec. 1, DWI Search warrant definition changes for adjacent state
- Article 5, Sec. 18, Task Force on Domestic Violence and Firearm Surrender
- Article 6, Sec. 7, Veteran's Restorative Justice changes
- Article 6, Sec. 27, Felony Fictitious Emergency
- Article 7, POR changes