



Bar Talk

March 16, 2011

www.fedbar.org/Chapters/Minnesota-Chapter.aspx

Judge Nelson Begins New Position, Recognizes Courts as 'Where People Meet the Promise of This Nation'

On December 17, 2010, Susan Richard Nelson was confirmed as a United States District Court judge for the District of Minnesota. Initially recommended by Senator Amy Klobuchar in November 2009, President Barack Obama nominated Judge Nelson on April 21, 2010, to fill the Seventh Judgeship previously held by Judge James M. Rosenbaum. Judge Nelson is the thirty-fourth lawyer and fourth woman to serve as an Article III judge in this District.

At her investiture ceremony on February 25, 2011, Judge Nelson received glowing praise from colleagues, mentors, and friends including Senator Klobuchar, Eighth Circuit Judge Diana E. Murphy, District of Minnesota Chief Judge Michael J. Davis, Judge Ann D. Mont-



Photo by Sheila Ryan

(L to R) Tom Nelson (husband), Michael Nelson (son), Judge Diana E. Murphy, and Senator Amy Klobuchar look on as Chief Judge Michael J. Davis installs Judge Nelson as the newest Article III judge at her investiture ceremony on February 25, 2011.

gomery, and Judge Donovan W. Frank. All spoke of their confidence in Judge Nelson being an excellent district court judge. Maury Poscover, a former member of the American Bar Association Standing Committee on the Federal Judiciary that awarded Judge Nelson its highest rating, also recognized Judge Nelson for her enormous breadth of experience and solid judicial temperament.

Following the well-deserved accolades, Judge Nelson spoke of her judicial philosophy. Acknowledging her judicial duty to be "impartial, thorough and prompt," Judge Nelson further recognized the court as "where people meet the promise of this nation." She explained that equal access to the courts and a "patient and respectful judge" ensures that justice is served.

Judge Nelson, who served as a United States Magistrate Judge for the last decade, did not dream of being a lawyer or a judge. Growing up in upstate New York, life "was

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Photo by Kari Hainey

Judge Nelson speaks at her investiture.

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Judge Nelson

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much like the stereotypical 1950s" with "life centered around high school athletics, plays, music and dances." A budding cellist, Judge Nelson contemplated a career in the arts, but her focus changed when she left for college.

"In 1969, the world started to change dramatically for me and all of us—and it culminated in the death of the Kent State students in the spring of 1970," she explained. "At that point I started to think about a world and the future in a totally different way. When I left Buffalo, I only knew three women who had careers outside the home, other than as nurses or teachers. I was profoundly influenced by them . . . [and thus] the seed was sown."

Judge Nelson's four years at Oberlin College were life changing for her and left her an idealist, committed to a career and a meaningful life. She vowed to pursue a professional career, believed that a legal career would allow her to make a positive mark on the world, and capitalized



Photo by Sheila Ryan

(L to R) Judge Nelson, Senator Amy Klobuchar, Judge Ann Montgomery, and Annamarie Daley.

on the social changes that made it possible for a young woman to do so. She enrolled at Pittsburgh Law School, which at the time had only one woman professor and a class that was overwhelmingly male.

Following graduation, she practiced in Pittsburgh and eventually joined the Robins, Kaplan, Miller & Ciresi L.L.P. firm in 1984. Not surprisingly, her most memorable experience in practice was working on the litigation

team representing the State of Minnesota and the Blue Cross/Blue Shield Insurance Company in an action against the tobacco companies. "I was very proud of our work on the tobacco team, because, in addition to being driven by excellence, it served a worthwhile goal. In the back of my mind, I started to aspire to being a judge, although it seemed like a pipe dream at the time."

Her pipe dream has become reality. As a magistrate judge, Judge Nelson was well known for pulling the proverbial rabbit out of the hat—settling the impossible cases. She was also known for being empathic and respectful to the parties and their counsel, yet thorough and resolved in her decision-making. Her commitment to the ideals of the legal profession was recognized numerous times. She received both the Myra Bradwell Award from Minnesota Women Lawyers and the Judicial Professionalism Award from the Hennepin County Bar Association.

Judge Nelson looks forward to the new challenges and responsibilities she will face as a district court judge:



Photo by Sheila Ryan

(L to R) Megan O'Hara, Mayor R.T. Rybak, and Judge Nelson.

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Open Doors to Federal Courts Receives ABA Outstanding Law Day Activity Award

On February 11, 2011, the American Bar Association presented one of three 2010

Outstanding Law Day Activity Awards to the United States District Court for the District of Minnesota for its Open Doors to Federal Courts program. Rebecca Fanning, National Outreach Manager for the Federal Courts, Administrative Office of the U.S. Courts, chose the District of Minnesota's program as the only federal court program to be nominated for this award.

The Open Doors program is the culmination of twelve years of program development by the Honorable Donovan W. Frank and his Judicial Assistant, Rebecca Baertsch, who, with the assistance of volunteers from throughout the District have created an annual program that encourages young people from rural and inner city areas to pursue careers in the justice system. Each year the District of Minnesota brings together diverse students from small, rural schools and large, urban schools to participate in a mock trial and a career showcase. The 2010 program attracted 40 justice system volunteers and 60 high school students, bringing the number of participants over the past 12 years to more than 400 volunteers and nearly 800 students.

Judge Frank, Assistant U.S. Attorney Ann Anaya, and Assistant Federal Defender Manny Atwal have con-

tributed their talents as faculty members for many years and Becky Thorson, Annie Huang, Assistant

explained Judge Frank. "The Open Doors to Federal Courts program strives to show students the best of

the civil and criminal justice system. All participants encourage the students to follow their dreams. This is the mission of the District of Minnesota's Open Doors to Federal Courts program and I am pleased that the District has received national recognition for its efforts in this regard."

Assistant U.S. Attorney Ann Anaya echoes the same sentiments: "It has been a true pleasure to be involved in the program and witness the sparks of interest in legal careers brighten the eyes of the participants."



Photo by Brenda Schaffer

(L to R) Training Specialist Charlie Cree, Assistant U.S. Attorney Ann Anaya, Judge Donovan W. Frank, Assistant Federal Defender Manny Atwal, and Judicial Assistant Rebecca Baertsch.

U.S. Attorney David Steinkamp, and Assistant Federal Defender Kate Menendez have also participated as faculty in past years. For the past two years, Magistrate Judge Jeanne J. Graham and Training Specialist Charlie Cree have shared their talents as screen writers to write and tweak our scripts. Courthouse volunteers from both chambers and the Clerk's Office serve each year as greeters and escorts throughout the program, enabling the students to come face-to-face with a variety of careers throughout the courthouse.

"It is critical to the diversity of the judicial system that we open the doors to our courthouses to future generations and encourage young people from rural and inner city areas to serve as future jurors and to pursue careers in the justice system,"

There are a countless number of other attorneys and staff who have volunteered to serve as witnesses for the mock trials, and each year there are approximately five interactive career showcase presenters ranging from Pretrial Services and Probation Officers, Secret Service Agents, FBI Agents, Deputy U.S. Marshals, State Troopers, police officers, and court reporters. It is thanks to the numerous volunteers that the District of Minnesota is able to put on such a high quality program deserving of this award. Thank you to everyone who has participated in the Open Doors to Federal Courts program over the past 12 years!

Rebecca Baertsch is the Judicial Assistant to The Honorable Donovan W. Frank.

Magistrate Judge Rau's Many Mentors, Family, Varied Career Prepare Him for Joining Bench

Although only a month into his position as the District of Minnesota's newest Magistrate Judge, Steven E. Rau has neither the time nor the inclination to rest on his laurels, having inherited the full docket assigned to the Honorable Susan Richard Nelson before she moved to her new position as a District Court Judge. Judge Rau, a "self-professed law nerd," describes his new work as "a little bit like going back to law school," which equates to "great fun."

His background encompasses an especially broad spectrum of experience: clerking for both state district court and appellate court judges, working as an in-house corporate attorney and as a trial lawyer at various firms, and even the year before law school, which he spent as a construction worker—all experiences which will no doubt stand him in good stead in his new endeavor.

Judge Rau describes his family and career history as the opportunity to "taste a little bit of everything." He was the oldest of four children. His father, a career officer in the U.S. Air Force, took his family with him while he served as a military attaché in Ka-

bul, Afghanistan, from 1966 to 1968. Rau's father then served a tour of duty in Southeast Asia, after which the family moved to Bellevue, Nebraska, the location of the Air Force's Strategic Air Command headquarters.



Photo provided courtesy of Magistrate Judge Rau

(L to R) Magistrate Judge Rau, the late Minnesota Supreme Court Chief Justice Douglas K. Amdahl, and Chief Judge Michael J. Davis.

During Judge Rau's sophomore year of high school, his mother enrolled in law school, graduating with her law degree around the same time her son was graduating from high school. She went on to become one of the first named female partners in a major Nebraska law firm. Judge Rau proudly recalls his mother debating conservative activist Phyllis Schlafly on the subject of the ratification of the Equal Rights Amendment—a debate that was featured on Nebraska television. Rau's father also entered law school during his son's senior year of high school, graduated, and entered a second career as a practicing lawyer.

Following high school, Judge Rau attended Carleton College in Northfield for his undergraduate studies. After the aforementioned year working on construction projects, he attended William Mitchell College of

Law, first as a full-time student for a year, then transferring to the evening program and working full time while completing his J.D. Among his early legal work experience was clerking for Ramsey County Judge Roland Faricy (now retired) and working with Charles T. Hvass, Sr., at the firm of Hvass, Weisman & King.

Judge Rau also worked as an in-house attorney at Control Data Corporation before going to work as a clerk for the late Chief Justice Douglas K.

Amdahl at the Minnesota Supreme Court. Following his Minnesota Supreme Court clerkship, Judge Rau also worked at the firm of Lindquist & Vennum, PLLP. Prior to his appointment to the bench, he was a partner at the firm of Flynn Gaskins & Bennett.

Judge Rau expresses gratitude to the many mentors, from both the bench and bar, who shaped his legal ideals. He recalls with warmth his days as a clerk to one of his personal heroes, the late Chief Justice Amdahl, and deeply regrets that Justice Amdahl

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Magistrate Judge Rau

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passed away a month before Judge Rau was notified of his selection for the Magistrate Judge position. Judge Rau describes “priceless” times, when as a law clerk, he would arrive at around 7:15 a.m. and “just sit in chambers and talk” with Justice Amdahl, who would have arrived even earlier. Judge Rau recalls Justice Amdahl’s humility and respect for individuals, such as the time he spent patiently and respectfully answering correspondence from prisoners in Stillwater prison, and his recognition of the dignity and humanity inherent even in the criminals he sentenced from the bench. Judge Rau also recalls the collegiality of the Minnesota Supreme Court justices and their willingness to teach and mentor all of the law clerks, not just their own. He credits time spent with Justice Rosalie E. Wahl and the late Justice Mary J. Coyne for enriching his career as a law clerk. He notes a similar sense of collegiality among his colleagues on the federal bench.

Speaking of his longstanding involvement with the FBA, Judge Rau describes the nationally-recognized *Pro Se* Project and the Pekin Project (see sidebar regarding both Projects) as the association’s “crown jewels.” He also vividly remembers early Minnesota Chapter luncheons, held in the basement of the Radisson Hotel, where attendees heard from speakers such as Judge Paul A. Magnuson and ate brown-bag lunches. Judge Rau continued his involvement with the Chapter, eventually serving as President of the Minnesota Chapter of the FBA from 2008 to 2009. The Minnesota Chapter looks forward to his continued contributions to the federal judicial system in his new role as a Magistrate Judge for the U.S. District Court, District of Minnesota.

Kerri Nelson is an attorney at Holstein Law Group.

The FBA Diversity Committee invites representatives of all legal diversity organizations and initiatives and all interested parties to the:

First Annual Diversity Summit: Introducing the Minnesota Diversity Waves of the Future Resource Webpage

Guest Speaker: **Chief Judge Michael J. Davis**

Hosted by: Leonard, Street and Deinard, P.A.

April 28, 2011, 3:30-5:30 p.m.

Please join us to make connections and share food and drink.

FBA Projects of Pride for Magistrate Judge Rau

The Federal Transportation Program (a/k/a the “Pekin Project”)

The Pekin Project is a program set up by the Minnesota Chapter and administered by the Volunteers of America (“VOA”), to provide quarterly bus transportation for children of mothers serving time in the federal prison at Pekin, Illinois (no federal prisons existed for women in Minnesota at the time, but one in Waseca has now opened). Often, children of these women have little or no chance to see their moms otherwise. Originated by Chief Judge James M. Rosenbaum, the program got its official start during now-Chief Judge Michael J. Davis’s tenure as Chapter President. Fortified by the Chief Judge’s instruction that “I want this to happen,” the Chapter formed a committee to get the program up and running. Judge Rau was a member of that committee, along with a number of other Chapter members, to whom he readily gives credit. Today, the project serves children from age 1 to age 14. The bus trip also includes a counseling component, both before and after the children’s visits, to help deal with the emotions involved. Judge Rau has travelled to the prison a total of four times. He notes that the benefits of the program extend far beyond its initial goals; several previous inmates have been so impressed by the program that they offered to volunteer for the program after the completion of their sentences.

The Pro Se Project

Judge Rau recalls the *Pro Se* project originating in 1994 or 1995 during the “mini-recession,” which was likely responsible for a spike in *pro se* employment law litigants. The *Pro Se* Project is a collaborative effort between the Minnesota federal court and the Minnesota Chapter of the FBA. The project seeks to reduce challenges posed to the court system by *pro se* civil litigants by connecting litigants with volunteer attorneys. During Judge Rau’s tenure as President of the Minnesota Chapter, the project underwent some important changes, including bringing the coordination of the project within the ambit of the Chapter itself. Daniel E. Gustafson of the firm of Gustafson Gluek, PLLC, one of the developers of the project, served as the initial volunteer coordinator of its current incarnation. The *Pro Se* Project recently reached another milestone when it hired Tiffany Sanders as its Coordinator.

Judge Tunheim's Work in Kosovo Passes 10-Year Mark, High Hopes for Future

In early 2000, Judge John R. Tunheim first began observing and participating in the development of the rule of law in Kosovo, a former Serbian province and seventh new country to emerge from the former Yugoslavia. Numerous overseas trips, international conferences, and draft reports later, Judge Tunheim's efforts have contributed significantly to creating a stable legal regime with a new constitution.

Judge Tunheim got involved in Kosovo by chance. District of Minnesota Judge Paul A. Magnuson heard of a need for judges to help rebuild Kosovo's legal system, and recommended Judge Tunheim because he knew Judge Tunheim could likely tolerate potentially intemperate winters there. "It was as similar to winter camping as I've ever had," explained Judge Tunheim.

In January of 2000, Judge Tunheim took his first trip to the war-torn region. Many buildings were de-



Judge Tunheim with Dr. Hajrdin Kuci, Chairman of the Kosovo Constitution Commission in 2008.

stroyed and the existing judges had only empty rooms in which to work. Judge Tunheim and others quickly began writing a "judicial assessment report" to gauge the immediate

needs of Kosovo's judicial system. With the help of contacts at the State Department, Judge Tunheim leveraged federal money to get basic judicial needs, like computers, phones, and metal detectors. He also helped restart a bar exam, as previous classes of Kosovo Albanians had attended law school but had been unable to become lawyers.

Within a year or two, Judge Tunheim started working with an international group to restructure the jurisdiction of Kosovo's courts, which had been quite complicated. Prior to this work, municipal courts had some trial and appellate jurisdiction, separate district courts had some trial and appellate jurisdiction, and the supreme court heard some appeals from both. In addition, a "high court for minor offenses"—which Judge Tunheim likened to a "supreme court for traffic tickets"—heard less significant cases. Judge Tunheim and a group of other international judges recommended a more simplified system, with fewer trial courts, regional courts of appeals, and one supreme court, which is being implemented.

Since 2005, one of Judge Tunheim's biggest projects was drafting a new constitution, which he has described as "intensive and difficult, but satisfying." Among other provisions, the constitution created a new constitutional court, whose duties included giving advisory opinions and deciding whether public officials violated the constitution. Though the process was slow and difficult at times, Judge Tunheim noted that after sixteen months in operation, the court's ruling last December resulted in the Kosovo president's resignation. "There's a long way to go before the



The ceremony during which the Kosovo Constitution was presented to the President and Prime Minister of Kosovo in 2008.

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Judge Tunheim

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system is truly professional," Judge Tunheim explained, but he expressed optimism that the new constitutional court would be a "shining light" in creating a system of "supervised independence," where American and international forces draw down legal and judicial support while Kosovo takes on those obligations.

When asked how federal law has impacted his role in drafting Kosovo's constitution, Judge Tunheim was circumspect. "They have a much more detailed constitution than ours," he explained, "with equal influences from American and international law." The constitution has the same basic components as ours, but reflects international covenants on subjects like human and political rights. He did appreciate how his time as a federal judge helps him "anticipate problems" likely to arise in Kosovo. For example, one provision he helped draft required government entities to consider the environmental impacts of their actions. This, he hoped, would "build in an environmental conscience for decision-making," similar to some federal environmental statutes.

Ten years later, Judge Tunheim plans to continue his work in the country. While significant progress has been made, Judge Tunheim sees several recurring problems on the horizon, including poverty and an unstable economy. Yet, Judge Tunheim notes that the Kosovo Albanians "truly love America," and that he has high hopes for Kosovo's future. By using America's influence "correctly and progressively," he hopes to leave a lasting impact and create an increasingly stable rule of law in Kosovo.



Judge Tunheim with a local judge in Ferizai in rural Kosovo in 2000 at the first detention hearing following the NATO bombing campaign.

Jeff Justman is a law clerk to The Honorable Diana E. Murphy.

All photos were provided courtesy of Judge Tunheim.

Judge Nelson

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Now that I have been on the bench for ten years as a magistrate judge, I better appreciate the critical importance of our work as judges in this court. The stability of our nation and all nations depends upon the people's confidence in a fair and independent system of justice. It is an honor to be a part of that system, to make it accessible to all, to ensure that those who appear before us feel like they have had their day in court, have been fully heard, and have been treated with kindness and a measure of compassion.

As a district court judge, Judge Nelson will preside over dispositive motion practice and civil and criminal trials. She anticipates criminal sentencing proceedings to be the most difficult part of her new job, but her colleagues have no doubt that she will oversee sentencing proceedings

just as she has carried out her other judicial duties—with patience, compassion, and fairness.

Judge Nelson starts her new position with great enthusiasm and vigor. In addition to handling a full and challenging caseload, she will attend "Judge School" and sit by designation on the Eighth Circuit Court of Appeals in March. In May, she will attend a seminar sponsored by the Sentencing Commission and attend the second phase of "Judge School." "It will be a busy year," she said, "but it is simply thrilling to have the opportunity to serve."

Molly Borg Thornton is a shareholder at Briggs and Morgan, P.A.

Kari Hainey is a shareholder at Nilan Johnson Lewis, P.A.

Law Students Connect with Bench and Bar at Reception

Leonard, Street and Deinard, P.A. hosted the 2011 Minnesota Chapter of the FBA's law student reception on February 24, 2011. The well-attended event gave law students an opportunity to connect with members of the bench and bar.

Chapter President, The Honorable Donovan W. Frank, spoke about the energy and diversity that law students add to the Chapter. He encouraged students to get involved in the FBA to further the Chapter's commitment to equal access to justice.

Law School Liaison Karin Ciano noted that students at William Mitchell College of Law, Hamline University School of Law, and the University of St. Thomas School of Law formed FBA groups in the past year. Ciano also announced the partnership between the *Pro Se* Project and the Minnesota Justice Foundation to allow students to work with a federal practitioner on a *Pro Se* Project case.

Todd Winter is a law clerk to The Honorable David S. Doty. All photos were also taken by Mr. Winter.



(L to R) Law School Liaison Karin Ciano introduces the officers of the student chapters: Erica Davis (U of M, President), Paige Stradley (U of M, Vice President), Briana Perry (WMCL, Secretary), Abigail Wahl (WMCL, Vice President), Sarah Broughton (UST, President), Alison Ovenden (UST Activities Committee), Kate Lowe (UST, Vice President), and Sabrina Go (UST, Secretary). *Not pictured, but present:* Chelsea Sommers (WMCL, Treasurer) and Dmitriy Bondarenko (Hamline, Vice President).



(L to R) Marcus Tibesar, Nathan Davis, Adine Momoh, and Chief Judge Michael J. Davis.



(L to R) Briana Perry, Magistrate Judge Jeanne J. Graham, and Abigail Wahl.



(L to R) Elizabeth Walker, Erica Davis, and Enrique Tellez.

Pro Se Project Update

Partnership with Minnesota Justice Foundation

The *Pro Se* Project recently partnered with the Minnesota Justice Foundation (MJF) to provide volunteer law students to assist attorneys who accept *Pro Se* Project referrals. MJF's goal of providing law students with opportunities to help meet the legal needs of the low-income community aligns with the *Pro Se* Project's work in our federal courts (see the referral numbers below). MJF students from the four area law schools are available to work on all aspects of a *Pro Se* Project referral. As Janine Laird, Executive Director of MJF, explains, "This partnership provides benefits for the lawyers, the students, the clients, and the court. MJF hopes more lawyers will be encouraged to take on a *Pro Se* Project case knowing they have a law clerk to help them. With more lawyers taking *Pro Se* Project referrals, clients are better served and the judicial process is made more efficient. The students benefit from the opportunity to sharpen their interviewing, researching, and writing skills while becoming more familiar with the federal court system. This is an exciting initiative and MJF is pleased to partner with the Federal Bar Association *Pro Se* Project."

As a kickoff for the newly formed partnership, The Honorable Michael J. Davis and the Honorable Franklin L. Noel recently hosted a luncheon for the MJF volunteer-students. Chief Judge Davis, Judge Noel, Kristine Wegner, Cathy Orlando, and Tiffany Sanders discussed the important role of the *Pro Se* Project in making justice more accessible to the underserved, and the benefit to our District Court. Chief Judge Davis and Judge Noel expressed their appreciation to the MJF law students and commended each of them on their important volunteer efforts. Law students who are interested in participating in MJF's partnership with the *Pro Se* Project should contact Sara Schwebs at hamline@mnjustice.org.

FBA Luncheon – Access to Justice

At the February FBA lunch, The Honorable Donovan W. Frank moderated a panel discussion on access to justice with Jerry Lane, past Executive Director of Mid-Minnesota Legal Assistance, The Honorable Jay M. Quam, Hennepin County District Court Judge, and Tiffany Sanders. The panel discussed the growing need of *pro bono* legal service providers for low- and middle-income individuals to have equal access to justice, and the vast impact *pro se* litigants have on many levels. Judge Quam's point that individuals without health insurance are not required to go to a "self-help" center for medical services, yet *pro se* litigants must do so in our legal system, resonated with the audience members. The inclusion of the *Pro Se* Project in the panel discussion provided additional



Photo by Karin Ciano

(L to R) Judge Donovan Frank, Judge Jay Quam, Jerry Lane, and Tiffany Sanders spoke on a panel at the Chapter's February monthly luncheon, entitled "Justice for All: A Panel Discussion About Innovations and Challenges in Providing Access to the Courts for Underserved and *Pro Se* Litigants."

exposure of the needs of *pro se* litigants in federal court and the benefits of the volunteer attorneys' efforts on their behalf. The access to justice panel served as a fitting precursor to the upcoming *Pro Bono-Pro Se* Bar Summit.

Pro Bono-Pro Se Bar Summit

The U.S. District Court, District of Minnesota's First Annual *Pro Bono-Pro Se* Bar Summit will occur on March 17 at the Minneapolis courthouse. Members of various legal aid clinics, *pro bono* legal service providers, law librarians, law firm *pro bono* coordinators, and law school clinics have received invitations to attend. Chief Judge Davis and Judge Frank will provide opening remarks and comment on the efforts of our federal court to make justice more accessible to begin the Summit dialogues.

Daniel Gustafson will moderate a panel discussion to explore how individuals initially find out about *pro bono* legal service providers and the role of technology in getting the word out. Susan Ledray, Director of the Self Help Center, Hennepin County District Court, John Freeman, Staff Attorney at the Minnesota Legal Services Coalition, and Galen Robinson, Litigation Director, Mid-Minnesota Legal Assistance will be panelists. Tiffany Sanders will moderate a second panel to discuss very different legal service providers' efforts to collectively make justice more accessible. Liz Reppe, Law Library Manager, Dakota County Library, Andrea Jepsen, Staff Attorney, Southern Minnesota Regional Legal Services, and Ellen Sampson, Shareholder, Leonard Street and Deinard, will be panelists. Jerry Lane will be the featured guest speaker for the luncheon, sharing his vast knowledge and expertise on access to justice issues. Throughout the Summit, audience participation

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Grant Committee Recommends Award Recipients

Giving back to the legal community is a long-standing tradition of the Minnesota Chapter of the Federal Bar Association. For more than two decades, the Minnesota Chapter has awarded grants to support programs and institutions which have a connection to the federal judicial system. The grants are funded by your participation in FBA events such as the monthly luncheon chapter meetings, the Judges' Dinner Dance, Golf Tournament, and Federal Practice Seminar.

The Minnesota Chapter Grant Committee's mandate is to identify, evaluate, and recommend potential grant recipients. Those recipients should promote and support legal research and education, advance the science of federal jurisprudence, facilitate the administration of justice, or foster improvements in the practice of federal law, including elimination of bias and promotion of diversity in the federal system. The grants generally range in size from a few hundred dollars to a few thousand dollars.

Beginning in 1999, the Minnesota Chapter has participated in the National FBA Foundation, which permits our Chapter to give donor-advised contributions to the national foundation which are, in turn, paid back to our Chapter's selected recipients. The strong tradition of member and law firm participation in these FBA events has made it possible for the Grant Committee to award more than \$200,000 in grants to applicants since we joined the National FBA Foundation in 1999. The January 2011, issue of *The Federal Lawyer* recognized the National Foundation 2010 donors and the our Chapter was at the top of the list with the largest donation, earning a place in the Earl Kintner Circle for a donation of more than \$10,000.

The applicants for grants in 2011 are currently under consideration by the FBA Grant Committee, which includes co-chairs James Simonson and Catherine McEnroe, and committee members Shannon O'Toole, Doug Elsass, Barbara Berens, Allen Slaughter, Clay Halunen, Dulce Foster, Tara Norgard, and Marlee Jansen. If you know of organizations which fit the profile for a grant, please submit those names to any member of the committee. We are always looking for new groups who can be invited to submit an application.

2010 Grant Recipients

The Innocence Project of Minnesota	\$3,000
Books for Africa	\$500
The Immigrant Law Center of Minnesota	\$2,000
Minnesota Justice Foundation	\$4,500
Mid-Minnesota Legal Assistance	\$2,500
Anishinabe Legal Services	\$2,500
The Advocates for Human Rights	\$2,000
Minnesota Landmarks	\$1,250
Loan Repayment Assistance Program of MN	\$2,000
Southern Minnesota Regional Legal Services	\$2,000
Volunteer Lawyers Network, Ltd.	\$500
Volunteers of America of Minnesota	\$2,000

Catherine McEnroe is an attorney at Berens & Miller, P.A., and Co-Chair of the Grant Committee.

Pro Se Project

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will be encouraged and key to a collaborative experience on these important issues.

Pro Se Project in Duluth

On March 16, The Honorable Leo I. Brisbois will speak at the 11th District Bar Association monthly luncheon in Duluth. With an increasing number of *pro se* litigants in Duluth, Judge Brisbois plans to discuss the *Pro Se* Project, introduce Tiffany Sanders to the Duluth Bar, and encourage more Duluth area volunteer participation in the *Pro Se* Project.

Pro Se Project Referrals

Since the court began tracking cases referred to the *Pro Se* Project in May 2009 through January 2011, 117 cases have

been referred to the *Pro Se* Project. The majority of the referrals fell into three categories of cases: 1) Civil Rights: Jobs; 2) Civil Rights: Other; and 3) Social Security. In 111 referrals, the *pro se* individual was eligible to apply for *in forma pauperis* status (IFP). Of the eligible *pro se* individuals, 90 applied for IFP status, or 81 percent. The court granted IFP status in almost 75 percent of those cases (the determination of a small percentage of IFP status is still pending). Where the case was not voluntarily or summarily dismissed, the court granted 92 percent of the applications for IFP status. In 44 cases, volunteer counsel entered a notice of appearance.

Tiffany Sanders is the *Pro Se* Project Coordinator. She can be reached at proseproject@q.com or (612) 965-3711.

WANTED: Musicians

- Who:** Any FBA member who is musically inclined and can play well with others
- What:** Federal Judges' Dinner-Dance
- When:** May 14, 2011
- Where:** Minikahda Club, Minneapolis
- Why:** To show off your amazing spirit, talent and just for the fun of it!
- How:** Two bands will be formed from our talented musicians. Each group will play two songs during the evening as "guest" musicians to our hired house band—Lynhurst.

If you are interested in this exciting opportunity to perform with your peers, please contact Clayton Halunen at: halunen@halunenlaw.com or (612) 605-4098.

Save the Dates

Saturday, May 14, 2011

The Federal Bar Association's Annual Federal Judges' Dinner-Dance

Minikahda Club

Social Hour 6:00 p.m. - 7:30 p.m.
Dinner 7:30 p.m. - 8:30 p.m.
Entertainment 8:30 p.m. - midnight

For more information, please contact:
Clayton Halunen (halunen@halunenlaw.com)

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Tuesday, June 28, 2011

37th Annual Federal Practice Seminar

Guthrie Theater

For more information, please contact:
Arthur G. Boylan (arthur.boyland@leonard.com)
Tracey Holmes Donesky (tracey.donesky@leonard.com)



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Refusal to Hire Due to Bankruptcy Does Not Violate Anti-Discrimination Provisions of Bankruptcy Code

An individual who looks to employment to overcome financial hardship may discover that some employers are unwilling to hire or retain a worker who has filed a bankruptcy petition.¹ Indeed, some employers believe that people who have filed for bankruptcy relief are incapable of handling financial matters, are not trustworthy, or will hurt the employer's public image.² But hidden in plain sight in the Bankruptcy Code is a cause of action for employment discrimination, although plaintiffs face a high bar to prevail on such claims.

Title 11 U.S.C. § 525 codifies a 1971 Supreme Court case, *Perez v. Campbell*, in which the Court declared unconstitutional an Arizona law allowing the state to suspend an individual's driver's license for failing to

satisfy a car-accident judgment regardless of whether the debt had been discharged in bankruptcy.³ The Court held that the law violated the Supremacy Clause because it conflicted with the Bankruptcy Act's discharge provisions.⁴

As initially drafted, § 525 prohibited governmental units from discriminating against a person "solely because" of his or her bankruptcy, pre-bankruptcy insolvency, or failure to pay a dischargeable or discharged debt.⁵ It specifically made it unlawful for a governmental unit to "deny employment to, terminate the employment of, or discriminate with respect to employment." Congress's purpose in enacting § 525 was to prevent governmental units from interfering with the "fresh start" afforded to debtors by the discharge of their debts in bankruptcy.⁶ However, the statute

did not prohibit discriminatory acts by private entities.⁷

In 1984, Congress expanded § 525 by adding § 525(b), which provides that private employers may not "terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title [. . .] solely because" of the individual's status as a debtor under the Bankruptcy Code, pre-petition insolvency, or failure to pay a discharged or dischargeable debt.⁸ Despite its facially broad applicability, however, § 525(b) is not without limits.

For example, courts have interpreted the phrase "is or has been" to mean that where an employer fires an employee it believes is about to file for bankruptcy but the employee has not yet actually filed, the termination is

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¹ Job losses or interruptions may contribute to as many as two thirds of all personal bankruptcy filings. Elizabeth Warren, *Financial Collapse and Class Status: Who goes Bankrupt?*, 41 Osgoode Hall L.J. 115, 127 (2003).

² See, e.g., *In re Hopkins*, 66 B.R. 828, 831-32 (Bankr. W.D. Ark. 1986); *Hicks v. First Nat'l Bank of Harrison (In re Hicks)*, 65 B.R. 980, 982 (Bankr. W.D. Ark. 1986).

³ *Perez v. Campbell*, 402 U.S. 637, 9 S. Ct. 1704 (1971).

⁴ *Id.* at 652, 9 S. Ct. at 1712.

⁵ 11 U.S.C. § 525 (1976).

⁶ S. COMM. ON THE JUDICIARY, BANKRUPTCY REFORM ACT OF 1978, S. Rep. 95-989, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867 (1978); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934) (the Bankruptcy Code is "of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."). For a detailed discussion of the legislative history of § 525 as originally enacted and later amended, see generally, Robert C. Yan, Note, *The Sign Says "Help Wanted, Inquire Within" – But It May Not Matter If You Have Ever Filed (Or Plan To File) For Bankruptcy*, 10 Am. Bankr. Inst. L. Rev. 429, 437-43 (2002).

⁷ See, e.g., *N. Energy Prods., Inc. v. Better Bus. Bureau of Minn., Inc. (In re N. Energy Prods.)*, 7 B.R. 473, 474 (Bankr. D. Minn. 1980) ("[Better Business Bureau of Minnesota] is a private corporation, and is not a governmental unit under § 525 of the Bankruptcy Code which protects a debtor against discriminatory treatment by a governmental unit, and said section is not applicable to [it].").

⁸ 11 U.S.C. § 525(b).

⁹ *Leonard v. St. Rose Dominican Hosp. (In re Majewski)*, 310 F.3d 653 (9th Cir. 2002); *Kanouse v. Gunster, Yoakley & Stewart, P.A. (In re Kanouse)*, 153 B.R. 81 (Bankr. S.D. Fla. 1993), *aff'd*, 168 B.R. 441 (S.D. Fla. 1994), *aff'd*, 53 F.3d 1286 (11th Cir. 1995).

¹⁰ *Tinker v. Sturgeon State Bank (In re Tinker)*, 99 B.R. 957, 960 (Bankr. W.D. Mo. 1989) ("While the Court believes the prospective bankruptcy was a factor in the Bank's decision, the Court does not believe it was the sole factor and certainly does not fulfill the 'solely' requirement of 11 U.S.C. § 525(b)."). Arguably, an employer would not violate § 525(b) by terminating employment based on an employee's low credit score even if the low credit score could be related to a bankruptcy filing and discharged or dischargeable debts.

¹¹ The statute does not provide for punitive damages, attorney's fees or costs. See, e.g., *Leary v. Warnaco Inc.*, 251 B.R. 656, 659 (S.D.N.Y. 2000) (statute does not provide for damages or attorney's fees); *Hicks*, 65 B.R. at 984-85 (ordering reinstatement as remedy

Bankruptcy Code

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not actionable because the employee was not a debtor at the time of the adverse action.⁹ Also, due to the language “solely because of,” § 525(b) does not permit “mixed-motive” claims.¹⁰ Hence, an employee asserting a § 525(b) claim faces the difficult burden of demonstrating that bankruptcy was the *only* reason for the employer’s conduct. Even where an individual possesses one of the rare § 525 (b) cases that might survive a motion to dismiss, successful plaintiffs are likely limited to equitable relief.¹¹

On the surface, § 525(b) appears to prohibit an employer from *refusing to hire* an applicant solely because the applicant had filed a bankruptcy petition, because the statute seemingly prohibits *all* adverse employment actions. Yet that understanding has been almost universally rejected, most recently by the Third Circuit in *Rea v. Federated Investors*.¹²

Rea applied for a job at Federated In-

vestors and received an offer of employment that was contingent on passing background and credit checks.¹³ After Federated learned that Rea had filed a bankruptcy petition seven years earlier, it told him the bankruptcy was a “deal killer” and refused to hire him.¹⁴ Rea then sued Federated in federal district court.¹⁵ Federated filed a motion to dismiss, which the district court granted. Rea appealed, arguing that when Federated refused to hire him on the basis of his bankruptcy, it had “discriminate[d] against him] with respect to employment.” Not so fast, Federated argued, because § 525(b) must be read together with § 525(a), the section pertaining to governmental discrimination. Like § 525(b), § 525(a) contains the language “discriminate with respect to employment.” However, it also contains the language “deny employment to,” which is absent from § 525(b).¹⁶

The Third Circuit agreed with the district court and Federated “that § 525(b) does not create a cause of

action against private employers who engage in discriminatory hiring.”¹⁷ The court concluded, “It is abundantly clear that Congress modeled § 525(b) off of § 525(a) and that any differences between the two are a result of Congress acting intentionally and purposefully.” Accordingly, it held that private employers are not prohibited from refusing to hire an applicant on account of his or her bankruptcy, even if the bankruptcy is the sole reason for the refusal.¹⁸

The take-away is this: a private employer can refuse to hire an applicant on the basis of a bankruptcy filing, but cannot fire or otherwise discriminate against a current employee solely because the employee has filed a bankruptcy petition, was insolvent prior to filing a bankruptcy petition, or has failed to pay a discharged or dischargeable debt.

Erin Knapp Darda is a law clerk for The Honorable Robert J. Kressel, U.S. Bankruptcy Judge and Chief Judge of the 8th Circuit Bankruptcy Appellate Panel.

for violation of 11 U.S.C. § 525(b) but denying request for attorney’s fees and costs). *But see Sweeney v. Ameritrust Co., N.A.* (In re *Sweeney*), 113 B.R. 359 (Bankr. N.D. Ohio 1990) (awarding back pay).

¹² 627 F.3d 937 (3d Cir. 2010). *But see Warnaco, supra* note 10, at 659 (“Plaintiff’s claim is for discrimination with respect to employment. This includes by its plain meaning all aspects of employment including hiring, firing and material changes in job conditions.”); Douglass G. Boshkoff, *Bankruptcy-Based Discrimination*, 66 Am. Bankr. L.J. 387 (1992) (arguing for the more liberal interpretation of § 525(b)).

¹³ 431 B.R. 18, 20 (W.D. Pa. 2010).

¹⁴ *Id.*

¹⁵ See 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). Bankruptcy courts have also exercised jurisdiction to hear § 525 cases as core proceedings under 28 U.S.C. § 157(b)(2)(o). See *Hicks, supra* note 2, at 981; *Hopkins, supra* note 2, at 831-32.

¹⁶ *Rea*, 627 F.3d at 938.

¹⁷ *Id.*

¹⁸ *Id.* at 940.

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Calendar of Upcoming Events

March 18, 2011 | 8:15 a.m.-3:45 p.m.

St. Thomas Law Journal Symposium

University of St. Thomas School of Law, Schulz Grand Atrium

April 13, 2011 | 12:00 p.m.

Newer Lawyer Lunch: Trial Practice

The Honorable David S. Doty

Minneapolis Courthouse, Courtroom 14W

April 15, 2011 | 5:00-6:00 p.m. with reception to follow
How Do You Plead? - Civil Pleading Standards

Two Years After Iqbal

Panelists: Suzette Malveaux, Hon. James M. Rosenbaum, Mark S. Olson, and Seth Leventhal; moderated by Bradley G. Clary
 University of Minnesota Law School,
 Lindquist & Vennum Conference Room

April 19, 2011 | 6:00-8:15 p.m.

Health Care Reform in America:

Is the Federal Mandate Constitutional?

Hamline University School of Law, Kay Fredricks Ballroom

April 20, 2011 | 12:00 p.m.

Monthly Luncheon: Local Rules Panel

Minneapolis Club

April 28, 2011 | 3:30 - 5:30 p.m.

Diversity Summit: Introducing the Minnesota Diversity

Waves of the Future Resource Webpage

Leonard, Street and Deinard, P.A.

May 11, 2011 | 12:00 p.m.

Newer Lawyer Lunch: Bankruptcy Topic

The Honorable Gregory F. Kishel

St. Paul Courthouse, Courtroom 2A

May 14, 2011 | 6:00 p.m.

Judges' Dinner Dance

Minikahda Club, Minneapolis

May 18, 2011 | 12:00 p.m.

Monthly Luncheon: The Honorable Susan Richard Nelson

Minneapolis Club

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 To sign up for **Monthly Luncheons**, please contact **Tara Norgard**
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A special thank you to **Rebecca Baerstch**, Judicial Assistant to The Honorable Donovan W. Frank, and **Patricia May** of Robins, Kaplan, Miller & Ciresi for their proofreading expertise.

Bar Talk is the official newsletter of the Minnesota Chapter of the FBA. It is published quarterly by the Communications Committee. For any inquiries or article suggestions, please contact:

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