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**Federal Bar  
Association**  
Minnesota Chapter

# Bar Talk

## District of Minnesota Publishes New E-Discovery Guide for Practitioners

By Kelly Fermoye

The Federal Practice Committee of the U.S. District Court, District of Minnesota released a new guide for electronic discovery at Federal Rule 26(f) conferences for federal practitioners. The guide is intended to assist counsel with discussions with their client in preparation for the Rule 26(f) conference and in conducting the Rule 26(f) conference with opposing counsel. The guide is available on the District of Minnesota's website [here](#).

To support counsel in preparation for the Rule 26(f) conference, the guide provides helpful information for the preservation and collection of their client's ESI, as well as the search and

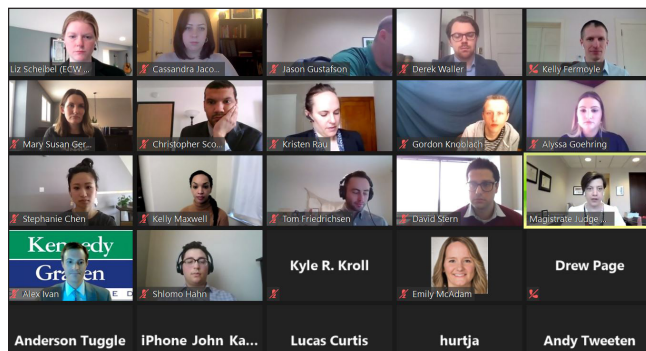
review of the ESI. Rebekah Bailey of the Federal Practice committee describes the guide as "user friendly. It identifies and describes for litigators the kinds of conversations they should have with their clients in preparation for the initial discovery conference, as well as the topics the parties may want to discuss at the Rule 26(f) meeting."

When it's time for the Rule 26(f) conference, the guide encourages parties to "engage in a transparent and cooperative dialogue in hopes of reducing later discovery disputes." The parties should identify their sources of potentially relevant ESI, discuss parameters around their

*District of Minnesota Publishes New E-Discovery Guide for Practitioners, continued on page 2.*

## Magistrate Judge Wright Shares Her "Random" Path to the Law and Insights from Her First Couple Years of Judging

By Kyle R. Kroll



On February 11, 2021, and as part of this year's Newer Lawyers Committee's series of virtual monthly luncheons, Magistrate Judge Wright shared stories about her path from private practice to the bench and experiences since. In addition to sharing her journey, Judge Wright shared useful tips for practitioners of all ages.

From her perspective, Judge Wright's path to the law was "random." In school, Judge Wright was always interested in law and political science, but she didn't have any lawyers in her family, and she thought it was important to choose a field with strong job prospects. She loved math and science, so she pursued those interests instead. After obtaining a master's degree in engineering, she went to work at 3M. Ironically (and fortunately), though, it was math and science that brought her to the law: at 3M, she became acquainted with intellectual property—patents, in

*Magistrate Judge Wright Shares Her Path, continued on page 2.*

*Magistrate Judge Wright Shares Her Path, continued from page 2.*

particular. She then decided to enroll at William Mitchell part-time, and she “loved it from day one.”

Law school nurtured Judge Wright’s love for the law, but she developed a love for justice while clerking for Judge Ericksen. She witnessed how much thought and care goes into decisionmaking and how courts come to the right decisions. And through her work for the Court, she developed a deep amount of respect for the judiciary. After this experience, Judge Wright knew she wanted to be at the Court in the future. And just a couple years ago, she received the call in which she learned she’d been selected for the vacant magistrate judge position. She vividly remembers this moment. She was in her law firm office and immediately felt the tremendous responsibility of her new role.

Since joining the bench, the sense of responsibility hasn’t dwindled, and Judge Wright has greatly enjoyed the diversity of her work. Magistrate judges work on both criminal and civil matters, and a large part of the time is spent in settlement conferences. She says effective advocacy in settlement conferences means being “in the weeds” and conversant with the details. Lawyers who have impressed

her the most are those who have been frank with clients about the weaknesses of their cases, truly earning the title “counselor,” rather than those who treat settlement conferences like oral argument.

That said, Judge Wright also enjoys oral argument. Although she is supportive of newer lawyers presenting oral argument, she removed provisions in her practice pointers specifically encouraging this because she believes the decision of who argues at a hearing should be made by the client and counsel. Still, she permits lawyers to divide oral argument to allow more than one lawyer to argue. Judge Wright encourages lawyers to always be prepared for oral argument, both in their knowledge of the facts and the law, but also in their own professional development. She enjoys hearing from lawyers of all experience levels who have the requisite knowledge and are ready to argue a motion.

The Newer Lawyers Committee thanks Judge Wright for taking the time to share her path to the bench and insights. The next luncheon will be with Judge Loken on March 23. ■

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*District of Minnesota Publishes New E-Discovery Guide for Practitioners, continued from page 1.*

collection of such ESI, consider possible search and review protocols, among other important topics addressed in the guide. A member of the judiciary and a committee member, Magistrate Judge Hildy Bowbeer, stated:

From the court’s perspective, we often find in the initial scheduling conference that counsel have only barely touched on the issue of electronic discovery in their Rule 26(f) conference, even though Rule 26(f)(3) specifically requires it. Sometimes there really isn’t much ESI to think about, and we certainly don’t want them to negotiate over some complicated protocol when it would serve no real purpose. But often, counsel aren’t discussing e-discovery at the 26(f) conference because they simply haven’t thought about it ahead of time. Even more problematic, they may not have talked with their clients in any detail about what relevant ESI their clients might have and how counsel and client are going to work together to preserve it, collect it, review it, and produce it. Similarly, counsel may not have started thinking yet about what relevant ESI the other side may have and the form in which they would like to receive it. If the lawyers haven’t thought or talked about these issues with their clients, they won’t be ready to talk in detail about them with opposing counsel at the 26(f). And if they aren’t ready for that discussion at the 26(f), then it’s going to be virtually impossible for the parties to propose a meaningful discovery plan to the court at the Rule 16 conference. Our hope for this Guide is that it will help to prompt and frame those conversations, with clients and with opposing counsel, so that a practical discovery plan that fits the needs of their specific case can be crafted. ■

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*Kelly Fermoye is an associate at Faegre Drinker Biddle and Reath, specializing in business and intellectual property litigation, and Co-Editor of Bar Talk.*

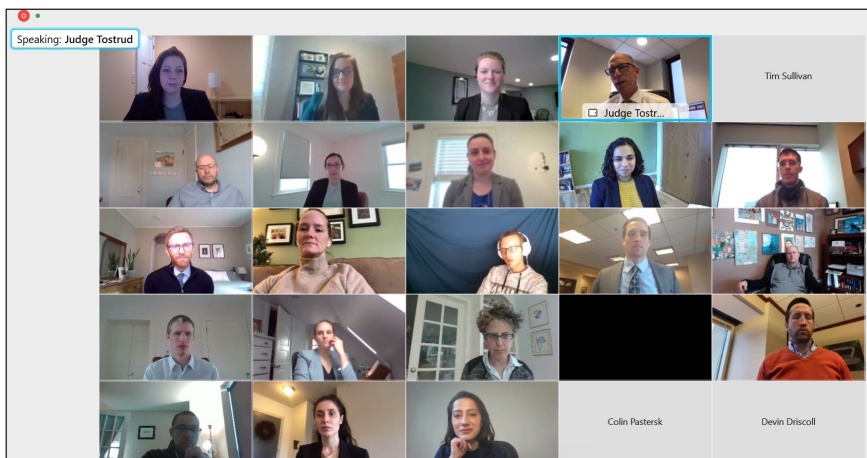
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## Newer Lawyers' December Luncheon Featured Judge Tostrud's Perspective

By Devin Driscoll

The theme of the December 15 Newer Lawyers Committee Luncheon with U.S. District Court Judge Eric Tostrud was *A Litigator-Professor-Judge's Perspective on Judicial Decision-Making and Lawyering*. Judge Tostrud first addressed the question he's most often asked having transitioned from private practice to the academy to the bench: was teaching of any benefit to him in his job as a judge? Or does he mostly rely on his experience as a litigator?

The answer, he says, is that teaching was a net benefit. Although lawyers like to believe they know the law from practice, Judge Tostrud believes that you have to teach the law to truly understand it. This is, he said, in large part because law students—who are intelligent, critical thinkers who have time to reflect on what they're learn-



ing—can spot gaps in knowledge from a long way off. Running a classroom was also a lot like running a courtroom, with oral argument and class discussions focusing on identifying problems and talking through solutions. Where teaching was less helpful is the too-often esoteric nature of

legal scholarship. Too often, Judge Tostrud said, law review articles are too theoretical or too academic to be helpful in the realm of judicial decision making he now inhabits.

That said, Judge Tostrud also acknowledged the important role le-

*Judge Tostrud's Perspective, continued on page 4.*

## Minnesota Chapter Hosts February Monthly Luncheon

By Kelly Fermoye

The Minnesota Chapter of the FBA held its February Monthly Luncheon on February 10, 2021, via Zoom video-conference. The February meeting featured Sybil Dunlop, Amran Farah, and Jenny Gassman-Pines from Greene Espel LLP on the subject of “How bias affects your case from filing through verdict (and how to minimize its effect).”

The presenters discussed a wide array of ways in which bias affects all aspects of litigation, from the disparate effect that the *Iqbal/Twombly* standard has had on minority plaintiffs to the ways in which jury composition may affect case outcome.

The presenters discussed the importance of quantifying decision making because it is difficult (if not impossible) to correct a problem unless it is quantified. A starting point for quantifying one's implicit bias is the Implicit Association Test (“IAT”) available from Project Implicit

at Harvard University. The IAT can bring to light automatic preferences for race, religion, or gender, among others. The presenters also noted that the book *Thinking Fast and Slow* by Daniel Kahneman describes some of the underlying psychological cognitive processes that lead to these automatic preferences.

One of the most discussed ways in which bias affects a case is the implicit bias among jurors, which is especially problematic in criminal trials. In an effort to remedy this, some judges in this district and others, have started showing a video to juries, especially in criminal cases, to educate jurors about their own implicit bias. Many judges have heard from jurors that this video helped jurors confront their own implicit biases before hearing and deciding a case. Another tactic to deal with juror implicit bias is to diversify a jury. Research has shown that jury diversity can cancel out some of the biases, and that such juries take longer to deliberate and reach better decisions. ■

*Kelly Fermoye is an associate at Faegre Drinker Biddle and Reath, specializing in business and intellectual property litigation, and Co-Editor of Bar Talk.*

## Clerk's Corner – March 2021

By Tricia Pepin

I hope that our federal bar continues to be safe and healthy as we enter the 1-year mark with this unprecedented pandemic.

### Court Operations

In-person hearings and in-person jury trials will commence on May 3, 2021. Our in-person intake desks will remain closed through May 2, 2021 to keep our staff safe. Court staff can always be reached Monday-Friday from 8-4:30pm via email, phone, and webchat. We hope that as vaccinations continue to roll out that we can begin planning for more normal operations later this summer. For up-to-date guidance on how the Court is responding to the COVID-19 pandemic, please visit: <https://www.mnd.uscourts.gov/coronavirus-covid-19-guidance>.

### Sealed Documents with Highly Sensitive Information (HSI)

In January, the Court announced that the Judiciary's CM/ECF system was the target of a widespread cybersecurity breach. As of the writing of this article, the Court has issued two orders to address sealed documents with HSI. General Order 1 provides instructions for filing documents that contain HSI and General Order 2 provides instructions for asking the Court to remove documents

with HSI from CM/ECF. These orders may be found on the Court's website at: <https://www.mnd.uscourts.gov/general-orders>. We encourage all attorneys to carefully review these orders and to be familiar with what the Court may consider to be HSI. Clerk's Office staff are available to answer your procedural questions about these orders at the ECF helpdesk.

### Resources for Virtual Proceedings

We created a new quick menu option on the Court's website for virtual hearings. This new page includes ZoomGov guides and background images to use when appearing for virtual hearings. We hope that this new page is useful to our bar.

In January, Chief Judge Tunheim presided over our first virtual civil jury trial. This is an exciting development and provides an additional tool to assist the Court with its trial backlog in the coming months. All our guidance for attorneys for virtual hearings and virtual jury trials is posted at this site: <https://www.mnd.uscourts.gov/virtual-hearings>.

Thank you for your patience as we navigate what has become our new normal. As always, we welcome your feedback on how we can best serve our public and bar. ■

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*Tricia Pepin is the Chief Deputy Clerk at the United States District Court for the District of Minnesota. If you have a question or topic you would like addressed in the Clerk's Corner, please contact Tricia at [tricia\\_pepin@mnd.uscourts.gov](mailto:tricia_pepin@mnd.uscourts.gov).*

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### Judge Tostrud's Perspective, continued from page 3.

gal scholarship can play in the real world. He remembered his time as a research assistant to then-Professor Eric Janus and his work on civil commitment issues around the Minnesota Sex Offender Program. Professor Janus' work was challenging, Judge Tostrud said, but incredibly meaningful in identifying issues that can be improved, changing public perception, and making change. All that happened because of one law professor's tireless scholarship.

Turning to advice on lawyering skills, Judge Tostrud first said there

was nothing more valuable than thinking. "Not pondering the universe but slowing down and considering the problem. Your most valuable time is doing nothing but thinking." He also commended the practice of finding long blocks of time to write over a couple of days—which he acknowledged is hard for younger lawyers, when colleagues and clients expect you to constantly be available. As for writing tips, the Judge had this to say: "IRAC: use it because it works." "Remember what you learned in high school grammar and compo-

sition." And, surprisingly, "Typos are not the end of the world. I don't view them as negatively as a judge as I expected judges would view them while in practice." Do your best, he said, and don't fret the missing third -t in statute if it somehow makes it through to the final filed brief.

Finally, Judge Tostrud emphasized the value of oral argument. It allows lawyers to make a record, to clean up something that wasn't addressed in the brief, and, most importantly perhaps, it gives the client the sense of their day in court. ■

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*Devin Driscoll is an associate attorney at Fredrikson and Byron, and an active member of the FBA Newer Lawyers Committee.*

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## January FBA Luncheon, State of the District with Chief Judge Tunheim

by Zach Schmoll

On January 13, 2021, the Minnesota chapter of the FBA held its first virtual luncheon of the new year. Attendees were again able to network and mingle virtually before Chief Judge Tunheim delivered his State of the District address.

Chief Judge Tunheim outlined many of the highlights as well as obstacles of what was an eventful 2020. Just as practitioners have made adaptations in the last year, so has the Court – from adding safety features to courtrooms and implementing safety policies for in-person proceedings, to holding the first virtual jury trial. The Court has focused on putting the health and safety of everybody involved first while continuing to provide excellent judicial service.

Despite the pandemic, the Court continued its community outreach throughout 2020, including but not limited to being a national leader for the Students Bill of Rights contest, moving forward with a smaller-scale commemoration of the Duluth lynchings (with plans for a larger event in the future), the first-ever posthumous pardon of Max Mason, two new installations of public art in the courthouses, and naturalizing over 9,000 new United States citizens.

The awards and judicial committee involvement of our district's Federal Court judicial officers are many and too long to be listed in this luncheon summary. Judge Tunheim said it best that we have much to be proud of regarding our dedicated bench.

Judge Tunheim highlighted the Court's and the bar's continued work with the Pro Se Project, various court proceeding statistics for the district, an increase in compassionate release motions, and a successful ex-felon voter registration initiative. The Court is looking forward to the addition of a new Article III Judge, as well as the addition of a new magistrate judge to try and fill the large shoes of the late Magistrate Judge Rau – both will be chambered in St. Paul.

2020 was a very different year for the Court as it was for everybody else. While the Court and its practitioners have successfully adapted as needed, the Court optimistically looks forward to resuming more in-person proceedings throughout 2021. Ongoing updates can be found on the Court's website. ■

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*Zach Schmoll is an attorney and the President of Fields Law Firm, whose Federal Court practice focuses on representing individuals in ERISA disability claims.*

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## December Luncheon Features Discussion on Judicial Sealing

By Chad Pennington



On December 9, 2020, the monthly virtual luncheon series continued with an important discussion on the operation of the federal courts and the practice of sealing documents. Dan Levin, author, veteran journalist, and contributor to Reuters' award-winning series *Hidden Injustice: How U.S. Courts Cover Up Deadly Secrets*, provided a presentation focused on lawsuits arising out of the opioid epidemic, and the judicial practice in those cases of sealing important evidence relevant to public health and safety in about half of the 115 biggest defective-product cases consolidated before federal judges in multidistrict litigation, or MDLs. Those cases comprised nearly 250,000 individual death and injury lawsuits, involving dozens of products used by millions of consumers. Levine's presentation suggested that incentives operating on a number of actors

create a serious gap between the governing legal standards, which discourage excessive secrecy, and courtroom practice: Corporate lawyers want to protect their clients' reputations. Plaintiffs' lawyers want to avoid miring their clients' cases in lengthy courtroom wrangling over requests that filings be sealed or redacted. And judges want to keep the business of justice moving. The discussion concludes that a pervasive culture of courtroom secrecy and a tendency to overseal documents undermines public health, public safety, and public access and scrutiny. ■

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*Chad Pennington is an Assistant Federal Public Defender in the District of North Dakota. He is a member of the FBA White Collar Compliance and Criminal Law Committee and a Co-Editor of Bar Talk.*

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## Notable Panel Discusses Practice Pointers for Virtual Depositions

By Chad Pennington

COVID-19 has changed fundamental aspects of legal practice, including taking depositions. On January 26, 2021, a distinguished panel discussed virtual depositions and strategies for using alternative technologies during the pandemic. The panelists included:

- Magistrate Judge Hildy Bowbeer
- Magistrate Judge Kate Menendez
- Keith Pounds, Litigation Insights
- Brian Gudmundson, Zimmerman Reed LLP
- Rachel Tack, Zimmerman Reed LLP
- Matthew Murphy, Nilan Johnson Lewis P.A.
- Jamal Faleel, Blackwell Burke P.A.

The panel discussed preparation and defense during a remote deposition, and the potential pros and cons of different technology platforms. The discussion included a mock remote video deposition to illustrate potential pitfalls in conducting remote depositions. CLE credit was applied for, follow-up questions can be directed to [rory.collins@faegredrinker.com](mailto:rory.collins@faegredrinker.com).

The Mass Tort and Class Action Group hosted the event. ■

*Chad Pennington is an Assistant Federal Public Defender in the District of North Dakota. He is a member of the FBA White Collar Compliance and Criminal Law Committee and a Co-Editor of Bar Talk.*



## Seventh Annual Affinity Bar Meet + Greet

By Chad Pennington

On January 13, 2021, the FBA Diversity and Inclusion Committee and Best and Flanagan hosted the Seventh Annual Affinity Bar Meet + Greet. The Affinity Bar Meet + Greet plays an important annual role in connecting judges and leaders of the Minnesota Chapter of the Federal Bar Association with leaders and members of the local affinity bars. This year, the Meet + Greet event was held by zoom and provided a relaxing, and safe way, for local Affinity Bar members to socialize and network. ■

*Chad Pennington is an Assistant Federal Public Defender in the District of North Dakota. He is a member of the FBA White Collar Compliance and Criminal Law Committee and a Co-Editor of Bar Talk.*

## New Members

**The Chapter welcomes the following new members:**

Tanner Jeffrey Moe - McEllistrem Fargione, P.A.  
 Erin Schutte Wadzinski - Kivu Immigration Law PLLC  
 Amy Gernon - Gernon Law  
 Jacob Petersen  
 Randall P. Ryder - The Ryder Law Firm  
 William Thomas Wheeler - Fredrikson & Byron, P.A.  
 Luke Wolf - Spencer Fane LLP  
 Courtney "CB" Baga - Faegre Drinker Biddle & Reath

Tessa Cuneo - ASK LLP  
 Elham B Haddon - Sandberg Law Firm  
 Jacqueline Mrachek - Littler Mendelson, P.C.  
 Kyle D. Nelson - Lewis Brisbois Bisgaard & Smith, LLP  
 Nirmani Chethana Perera - Fredrikson & Byron, P.A.  
 Donna Reuter - Dorsey & Whitney LLP  
 Jacob Siegel - Ciresi Conlin LLP  
 Mitchell Williams - Carlson Caspers

## 2021 Civil Rights Etouffee Co-sponsored by the Minnesota Chapter

By Chad Pennington

The 2021 National FBA Civil Rights Etoufee CLE event was co-sponsored by the Minnesota FBA Chapter. The Civil Rights Etoufee is an annual conference, usually held in New Orleans, but virtually in 2021, that offers a robust, broad civil rights focus with

panels ranging from implicit bias in policing to LGBTQ rights to Title IX litigation to AI in policing to war stories from the front lines of the USPO election litigation. For example, this year, the opening panel discussion focused on reducing bias in policing and

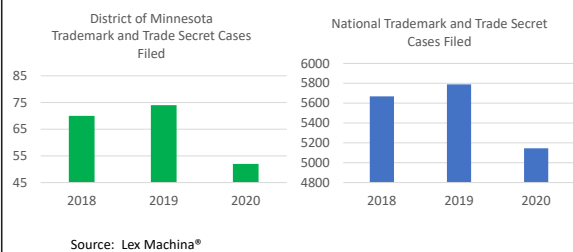
the judiciary. Other panel discussions focused on artificial intelligence and civil rights and environmental justice, among other things. Overall, the event was a great success and the Minnesota Chapter is proud of its co-sponsorship. ■

*Chad Pennington is an Assistant Federal Public Defender in the District of North Dakota. He is a member of the FBA White Collar Compliance and Criminal Law Committee and a Co-Editor of Bar Talk.*

## First Annual District of Minnesota IP Update (2020)

By Chad Pennington

### D. Minn. v. U.S. Trademark and Trade Secret Cases



On February 25, 2021, the FBA District of Minnesota held its first ever IP update. The update included an experienced panel of intellectual property practitioners:

- Sarah Stensland, Patterson Thuent
- Nate Louwagie, Carlson Caspers
- Kyle Kroll, Winthrop & Weinstine

The panel surveyed some of the most impactful and interesting IP decisions affecting the District of Minnesota and Eighth Circuit from 2020. One CLE credit was applied for. Overall, IP and trade secret filings in the District of Minnesota have declined in recent years. Among other notable cases, the panel discussed *Polaris Industries v. TBL International*, No. 19-cv-0291, 2020 WL 1075019 (D.

Minn. Mar. 6, 2020), and the seven factors for determining an award of statutory damages for willful infringement under 15 U.S.C. § 1117(c). ■

*Chad Pennington is an Assistant Federal Public Defender in the District of North Dakota. He is a member of the FBA White Collar Compliance and Criminal Law Committee and a Co-Editor of Bar Talk.*

On Friday, March 5, the Newer Lawyers Committee hosted an in-person, social gathering at Theodore Wirth Park. ►



## Upcoming Events:

**Tuesday,  
March 23, 2021**  
*Newer Lawyers' Luncheon -  
Judge Loken*  
Noon to 1:00 p.m.

**Wednesday,  
April 14, 2021**  
*Monthly Virtual Luncheon*  
Noon to 1:00 p.m.

**Thursday,  
April 29, 2021**  
*Newer Lawyers' Luncheon -  
Judge Brisbois*  
Noon to 1:00 p.m.

**Wednesday,  
May 12, 2021**  
*Monthly Virtual Luncheon*  
Noon to 1:00 p.m.

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*Bar Talk* is the official newsletter of the Minnesota Chapter of the Federal Bar Association, published quarterly by the *Bar Talk* Committee. For any inquiries or article suggestions, please contact **Chad Pennington** ([Chad\\_Pennington@fd.org](mailto:Chad_Pennington@fd.org)) or **Kelly Fermoye** ([kelly.fermoye@faegredrinker.com](mailto:kelly.fermoye@faegredrinker.com)).

A special thank you to **Gerri Rishel**, Courtroom Deputy to Senior United States District Judge Michael J. Davis, for her proofreading expertise, and **Taya Swenson Schmid**, Dorsey & Whitney LLP, for formatting this issue.

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*Want to get involved in the Minnesota Chapter of the Federal Bar Association? Visit <http://www.fedbar.org/Chapters/Minnesota-Chapter/Chapter-Initiatives.aspx> for a full list of committees and information about how to get involved.*

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## Online Registration:

The Minnesota Chapter of the FBA utilizes an online registration system for the monthly Minneapolis Club luncheons. A registration link will be sent to you via e-mail for each luncheon. One feature of the system is the automatic calendar entry; just click "Add to Calendar" from the registration system or your confirmation e-mail. Registration coordinators have the option to register multiple attendees in a single registration.



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