

QUANDARIES AND QUAGMIRES

Legal ethics and risk issues as of January 2018



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BAR BUZZ

Law partner/general tapped as technology chief



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JUST THE FAXED

Transmitting document isn't a delivery

By Barbara L. Jones
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Step away from the fax machine, if you still have one. Don't be tempted to fax documents for service to the sheriff's office. That's not the right way to commence a lawsuit under Rule 3.01 (c), MRCP. But if you do fax them, and the sheriff proceeds to personally serve them, that works.

A divided Supreme Court ruled 4-3 in *Cox v. Mid-Minnesota Insurance Co. et al.* that service was effected even though Rule 3.01(c) required the documents to be

"delivered" to the sheriff. A facsimile transmission is not a delivery, wrote Justice David Lillehaug for the court.

Appellant Nichole Cox faxed breach-of-contract lawsuits to two different sheriffs for service on insurance companies after her house burned down on Jan. 9, 2014. North Star Mutual was served by the sheriff on Jan. 14, 2016, and Mid-Minnesota was served on Jan. 19.

The respondent insurance companies moved to dismiss on the grounds that fax transmission does not constitute delivery of the summons under Rule 3.01 (c). The District Court denied the motion, finding delivery adequate. The Court of Appeals reversed.

Complicating the situation but not addressed by the court

Delivery | Page 8

Judge delivers defense verdict in \$72M trade secrets case

By Nancy Crotti
Special to Minnesota Lawyer

Time wasn't on either side of a recently decided intellectual property dispute.

A pair of engineering and product development companies and their principals sued Edina window hardware manufacturer Amesbury Group, Inc. in 2015, claiming that Amesbury breached an unsigned 2007 contract and profited from their intellectual property.

The plaintiffs sought \$72 million in damages for misappropriation of trade secrets and also punitive damages. They lost on the merits as well as being time-barred.

Washington County District Court Judge Susan Miles threw out five of the plaintiffs' claims before the two week bench trial began in July 2017. Following the trial, she dismissed the remaining seven, plus their demand for punitive damages. A plaintiffs' expert witness testified that they lost between \$1.4 million and \$72.8 million because they were unable to commercialize their product.

Plaintiffs Frank Campbell and John Micinski developed the window hardware product, a "lead screw operator" that they believed would be an improvement over the mechanism commonly used to operate casement windows. Campbell and Micinski are engineers

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Data panel forwards 3 measures to Legislature

By Kevin Featherly
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If lawmakers accept the Legislative Commission on Data Practices' advice, there will be tweaks this year to laws related to location tracking warrants, automated license plate readers and recordings of government employees.

The group withheld its guidance on three other big subjects it has studied since August. Those include student and internet privacy reforms and a measure aimed at keeping government records—including electronic correspondence—out in the open.

Two of the measure approved Tuesday—clarifying location track-

ing warrants and a measure to legally classify most recordings of government employees as public data—are already attached to draft bills.

A third requiring law enforcement agencies to offer lawmakers more detail about data captured with automated license plate readers, does not yet exist in draft form. The group nonetheless urged tweaks to Minnesota Statutes Chapter 13.824, that would tighten up law enforcement agencies' LPR auditing and reporting requirements.

Rep. Peggy Scott, R-Andover, is the group's chair. She selected the three

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Keith Carlson, a Minnesota Inter-County Association legislative liaison, speaks to the Data Practices commission Tuesday.

STAFF PHOTO: KEVIN FEATHERLY

Trump seeks to sink 2nd emoluments suit

By Andrew Harris
Bloomberg News

Fresh off a victory in New York, Trump administration attorneys will reprise their argument that the president can't be sued for benefiting from his business interests by people who can't prove they've been harmed.

Last time around, President Donald Trump's lawyers persuaded a New York federal judge to reject claims pressed by an ethics-in-government group. Now, the fight is closer to home as Justice Department attorneys seek to convince a Maryland judge that Trump's ownership of a posh Washington hotel blocks from the White House isn't drawing customers away from tax-paying businesses there and in the District of Columbia.

D.C. Attorney General Karl Racine and his Maryland counterpart Brian Frosh, both Democrats, sued the president in June seeking an order compelling

him to divest his business interests. They accused him of breaching U.S. constitutional provisions barring the nation's chief executive from profiting from his office.

"Previous presidents have taken great care to comply with these core anti-corruption provisions," the AGs said in court papers opposing the administration's request to dismiss the case. "President Trump, however, has done the opposite. He has not only continued to accept financial benefits from governments, but has actively targeted their business, thereby fostering a market for influence over the nation's chief executive."

Accepting the attorneys general's arguments would disqualify the president from serving while maintaining commercial business interests, Trump's lawyers said.

"Those claims falter on threshold grounds: neither plaintiff has alleged an injury" that would allow them to sue, government lawyers said. "In fact, within

the two jurisdictions, the president has an ownership interest in only one active business, the Trump International Hotel."

U.S. District Judge Peter Messitte has scheduled a 5¼-hour hearing for Thursday in Greenbelt for the two sides to make their arguments.

Seth Barrett Tillman — an American law professor who teaches at Ireland's Maynooth University — sided with Trump, arguing in a court filing that business transactions for value don't count as constitutionally prohibited "emoluments."

Twenty-two former government officials, including former U.S. secretaries of state John Kerry and Madeleine Albright — both Democrats — and Republican Chuck Hagel, the defense secretary under President Barack Obama, backed the attorneys general.

The government's argument "would give the president license to engage in a wide range of financial entanglements

that could leave vulnerable even the most important national security and foreign policy interests of the United States," they said in a Nov. 28 submission to the judge.

In November, Messitte ordered 23 Trump businesses, including the Mar-a-Lago Club in Florida, to retain records in response to subpoenas received from the attorneys general. That would preserve evidence if the lawsuit is allowed to go ahead.

Last month, U.S. District Judge George Daniels in New York threw out a lawsuit by the Citizens for Responsibility and Ethics in Washington, concluding they hadn't sufficiently alleged they'd been harmed by the president.

The administration is also seeking dismissal of a Washington federal court case lodged by scores of Democratic lawmakers.

The case is District of Columbia v. Trump, 17-cv-1596, U.S. District Court, District of Maryland (Greenbelt).

Merchant

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with long experience in the window and door hardware industry, according to court documents. Campbell is president of corporate plaintiff Creative Research & Development, Inc., Lake Elmo, and Micinski is president of Rockford, Illinois-based Omniquest Research and Development Corp., the other corporate plaintiff.

Campbell, Micinski and Amesbury officials held a series of meetings beginning in 2005 to discuss the product, on which the plaintiffs held two patents. Amesbury paid them and their companies nearly \$965,000 from 2005 through 2008, but the product was beset with problems, according to court documents.

Amesbury notified the plaintiffs in 2008 that the company was putting the project on hold, and a succession of Amesbury officials declined to sign the 2007 contract. The project remained dormant until 2012, when the parties began to disagree about whether the contract was ever finalized, whether royalties were due, and who had ultimate control and ownership of the intellectual property and patents developed during the project.

A 2015 phone call revealed that Amesbury officials believed that there was no valid contract, according to plaintiffs' attorney Dwight Rabuse of the Minneapolis office of Dewitt Mackall Crouse & Moore. Shortly thereafter, Campbell and Micinski filed suit claiming breach of contract and declaratory judgment, later adding 10 more claims, including primary and equitable estoppel, and violation of the Minnesota Uniform Trade Secrets Act.

In her overview of the case, Miles



Judge Susan Miles

wrote that the parties' situation reminded her of couples who live together with no definite marriage plans.

"In the end, the Court concludes that the relationship was shrouded in significant mutual confusion that neither side adequately clarified in a timely manner," Miles wrote in her Nov. 27, 2017 order.

Not only were all of the claims made too late, but the plaintiffs were unable to prove that Amesbury "acted with some sinister motive and in some illegally dishonest manner to manipulate or control Plaintiffs' technology," Miles wrote. The plaintiffs also unreasonably relied on the unsigned contract, she added.



Tom Leach

The decade that transpired between the parties' initial meetings and the lawsuit made the defense particularly difficult, according to attorney Tom Leach, a partner in the Minneapolis office of Merchant &

Gould, which represented Amesbury. Leach worked on the case with two partners and a senior associate from the firm's Denver office.

"You're talking about people having to reach back into their memories for a decade," Leach said. "A lot of the people who were involved at the time had left Amesbury, moved to other companies or retired... We had to find these people and take discovery from them."

Leach was gratified that the court found that the statute of limitations had run on all of the claims.

"At some point, if you sit on your rights too long, you're barred from asserting them," he said.

The plaintiffs and their attorneys were surprised and disappointed by the decision, according to Rabuse, who brought the case with co-counsel Julie Nagorski. They believed that Miles' decision to allow them to add a claim for punitive damages in July 2016 meant that "the court recognized the strength of the case,"

Rabuse said. An appeal is under consideration.

"On the plus side, my clients are obviously gratified that the litigation, including Judge Miles' decision, makes clear that they are and apparently have always been the owners of the intellectual property which was the subject of the case," he added. "My clients have resumed efforts to commercialize their technology with others than Amesbury."



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—Judge Susan Miles