



By David P. Jendrzejek



David P. Jendrzejek practices employment law with an emphasis on litigation. He represents businesses in lawsuits alleging discrimination and other employment based claims and in the prosecution and defense of related business claims involving trade secrets, covenants not to compete and other matters. He can be reached at jendrzejek@moss-barnett.com or 612.877.5280.



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APPROACHES TO HANDLING INTERMITTENT LEAVE

Joe, one of your employees, is afflicted with migraine headaches and often needs to take a day of sick leave because he is incapacitated. Another employee, Mary, is pregnant and wants time off for the birth of her child. Cindy's parents are in failing health and she is often called to help with an emergency or needs time off to take them to their medical appointments.

Under the Family and Medical Leave Act ("FMLA"), each of these employees is entitled to up to 12 weeks of unpaid leave in a 12-month period to address these issues. In many cases, such as the birth of a child or surgery or other treatment for an illness or injury, this time off is taken in one segment. In other cases, however, the leave may be taken "intermittently." Requests for intermittent leave present difficult and frustrating issues for employers. While entitlement to intermittent leave has been a great help to employees dealing with serious health conditions, such leave may be abused by employees who see it as an easy way to secure a three or four-day weekend. This article highlights some of the strategies employers may use to combat such abuse.

Conditions Necessary for Intermittent Leave

Employees eligible for FMLA leave may take it intermittently when "medically necessary" because of their own serious health condition or to care for a family member with a serious health condition. Employees like Joe or Cindy may find this necessary in their situations. Employers may also grant intermittent leave for the birth, adoption, or placement of a child,

but are not required to do so. Intermittent leave is considered a single leave of absence taken in separate blocks rather than discrete leaves of absence.

Intermittent leave is "medically necessary" when there is a "medical need" for leave and the need is best accommodated through intermittent leave. Instances in which a chronic medical condition might require intermittent leave may include an employee with asthma who must stay home because of the onset of an asthma attack or an employee with chronic low back pain who cannot work from time to time. As noted above, Joe's migraine headaches and the demands on Cindy for the care of her parents may also require intermittent leave.

If an employee has proper certification from a healthcare provider, he or she can take intermittent leave, even if those absences occur without advance notice. If an employee's need for intermittent leave interferes with the employer's operations (e.g., the position held by the employee must be manned at all times), the FMLA allows employers to reassign the employee to an alternative position to accommodate the need for intermittent leave. However, the alternative position must have equivalent pay and benefits and must better accommodate the need for the intermittent leave. But it is often difficult for employers to cope with unexpected absences due to intermittent leave, even with reassignments.

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PROTECTING YOUR VALUABLE INTELLECTUAL PROPERTY

Businesses often discover that intellectual property (“IP”) law can help to protect what truly differentiates them from their competitors, whether it be an innovative product, a new process that provides a significant manufacturing advantage, a valuable new use for a product previously marketed in another field, or a trademark that truly resonates with customers in the marketplace. Having taken the technical and financial risk to develop a valuable IP asset, why leave it unprotected for a competitor to copy?

Attorneys in our IP practice group help our clients correctly identify their IP issues and provide them with creative and appropriate solutions. These solutions have included:

- Preparing and filing patent applications to protect inventions by our clients within the chemical, mechanical, electrical, biotech, medical, agricultural, and business method fields and, with the assistance of carefully selected foreign patent firms, prosecuting patents in both the U.S. and internationally.
- Advising clients on the selection and registration of trademarks, service marks, and domain names, both in the U.S. and internationally, and providing advice concerning the appropriate usage of trademarks to build and protect rights in a mark and to avoid infringement of trademarks belonging to others.
- Assisting clients in the management of large trademark portfolios and with monitoring and enforcement of trademarks.
- Counseling clients on copyright issues relating to business, including “work-made-for-hire” issues with respect to contractors and suppliers who may be involved in the development of products or processes.
- Determining whether certain products are entitled to copyright protection, including computer software, training materials, manuals and marketing copy, and assisting clients in registering copyrighted materials.
- Counseling regarding the steps necessary to protect trade secret information, such as through confidential agreements, document and infrastructure security, and employee education.
- Assisting clients with IP transactions, usually by preparing confidentiality, license, research, joint development, or consulting agreements. Our IP attorneys also assist attorneys in our business law practice group with merger and acquisition transactions where IP assets may represent a substantial portion of the value of the deal.
- Partnering with members of our litigation practice group to defend clients against patent, trade secret, trademark, or copyright infringement claims and to enforce the rights of our clients in their IP assets.

Back row (left to right):

Martha I. Skogquist (P)
David L. Biek (A)
Tyanne K. Pauluik (LA)

Front row (left to right):

Lee C. Jacobson (LA)
Cynthia C. BJORAKER (LA)
Glen E. Schumann (A)
Marsha Stolt (A)
Gregory L. Koeller (A)

A = Attorney
P = Paralegal
LA = Legal Assistant





From left to right: Mona Longtin, Marcy Frost and Mathew Meyer

SUPPORTING THE TROOPS

Marcy R. Frost, an attorney with our employment law practice group, and **Mathew M. Meyer**, an attorney with our litigation practice group, serve as volunteer Ombudsmen for the Employer Support of the Guard and Reserve (ESGR). ESGR is a program of the Department of Defense that promotes cooperation and understanding between uniformed service members and their civilian employers and assists in the resolution of conflicts arising from an employee's military commitment.

As Ombudsmen, Marcy and Mathew work directly with Minnesota service members who have complaints or questions about workplace treatment and with employers who have concerns about the law. They educate both the service members and their employers about their rights and obligations under the federal Uniformed Services Employment and Re-employment Rights Act and work with the parties to resolve issues regarding required absences from civilian employment and the return to work following military training or service.

Ramona M. Longtin, a paralegal in our litigation practice group, is a unit leader/volunteer with Operation Minnesota Nice. This organization pairs each of its volunteer members (currently approximately 1,100) with soldiers in Iraq, Afghanistan, and Kuwait. Every three or four weeks, these volunteers send boxes containing small reminders of home and simple necessities to their "adopted" service person, together with a letter. Operation Minnesota Nice does not take a position on where or why the troops are deployed, but focuses on providing support on an individual basis.

FUND FOR THE LEGAL AID SOCIETY

The Fund for the Legal Aid Society, founded by a group of concerned lawyers in 1981, raises funds to support the programs of The Legal Aid Society of Minneapolis. The Legal Aid Society provides free or low-cost legal services to poor and disadvantaged persons and to persons with disabilities in areas such as housing, family law, health and issues faced by seniors and persons with physical and mental disabilities. Jim O'Brien, a member of our business law practice group, has served on the Fund board for many years.



Pictured at the 2007 Law Day Dinner, an annual event of the Fund, are (back row, left to right) Eleanor Kragseth (Assistant Hennepin County Attorney), Michael Persellin (attorney with the Senior Law Project of the Legal Aid Society), and Moss & Barnett attorney Tim Gustin (front row, left to right) Moss & Barnett attorneys Tom Sheran, Tom Shroyer, Patricia O'Brien (spouse of Jim O'Brien), Jim O'Brien, JoAnne Parsons (spouse of Chuck Parsons) and Chuck Parsons.



ELECTRONIC DISCOVERY: BE CAREFUL OF WHAT YOU DELETE

By Thomas J. Shroyer

Trial lawyers have always pursued the other side's "smoking guns" through investigation and court discovery procedures. Before the digital age, this quest often led to the organization, production, and inspection of reams and reams of paper ("box car discovery"). Indeed, one of my first assignments as a lawyer was to spend months in a warehouse in San Jose, California, reading and organizing millions of pages of literally moldy and disintegrating business records in a cold storage warehouse in what proved to be a futile search for evidence of fraud.

Today, document discovery infrequently requires extensive travel or time out of the office, as information is increasingly and exclusively stored electronically, and even hard copy documents are efficiently and effectively scanned into electronic media for examination on CD, hard drive, or through an application software provider on the internet. Electronic key word and subject matter searches have also replaced the laborious and extraordinarily costly process of human inspection of each scrap of paper. The digital age, however, has come with a price: More and more harmful information is being kept in an ever increasing number of locations and it is virtually impossible to eliminate. Thus, there is even more incentive to search for the proverbial smoking gun, and efforts by clients to discard (or even cover up) harmful information has itself become the focus of scrutiny.

Invoking the old adage that the lie to cover up is far worse than the underlying crime, trial attorneys now routinely search electronic databases for evidence of tampering or destruction of information. This is because the act of covering up a wrong naturally leads to the conclusion that the underlying act was reprehensible and because our courts have recently imposed draconian sanctions on parties caught hiding, altering, or destroying electronic and other information. Perhaps the most high profile such case involved the prosecution of Arthur Andersen in the wake of Enron's collapse. A year ago, a federal judge assessed liability and punitive damages against parties alleged to be responsible for the failure of Sunbeam Corporation – without a trial – based solely upon the efforts of the defendants to hide or destroy evidence.

Clients are sometimes tempted to think that by hitting the "delete" button, they eliminate potentially incriminating evidence, such as email. The fact is that the delete function merely hides the data on a relatively inaccessible part of the hard drive, leaving it fully exposed to routine forensic examination. Even the application of sophisticated, national security quality "scrubbing" software programs leaves evidence of its application, and state-of-the-art forensic software can often reconstruct virtually all of the purportedly scrubbed information. Further, laypersons often forget that their PDAs (e.g., Blackberry, Treo) retain email on their drives – even after they are officially "deleted." Attorneys and investigators now routinely request the production of PDAs for forensic examination.

The federal courts have now offered some guidance to parties and their attorneys, in the form of new rules of discovery that took effect on December 1, 2006. While the new rules hold much technical interest for lawyers, the key points for clients are:

- A party who does not retain electronically stored information due to the "routine, good faith operation of an electronic information system" may not be assessed with court sanctions unless "exceptional circumstances" are present.

Thomas J. Shroyer counsels and advocates for clients on a wide range of legal issues and is certified by the Minnesota State Bar Association as a Civil Trial Specialist. He can be reached at ShroyerT@moss-barnett.com or 612.877.5281.

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- A “litigation hold” needs to be placed on information that would normally be lost due to the “routine operation” of an electronic information system as soon as a party is aware of pending or “reasonably anticipated litigation.”

As a practical matter, the new rule means that clients should have an internally adopted policy governing the backup, storage, and retention (or loss) of electronically stored information in the ordinary course of business operations. That policy should include a clear mandate to “lock down” all information pertinent or likely to be pertinent to the subject matter of a reasonably anticipated or just commenced lawsuit. It almost (but not quite) goes without saying that these policies must be strictly and consistently followed. While it would be tempting to suggest that these protocols are limited to federal court lawsuits, history shows that courts of virtually all states quickly follow suit in adopting the federal rules of court procedure.

The new federal rules governing electronically stored information reflect both the increasing importance of that information and the need to more closely regulate the storage and production of that information for court proceedings. While the new rules themselves will doubtless occasion controversy and more jurisprudence, they are a useful first step toward the governance of this increasingly important focal point of modern litigation.

TIM GUSTIN PARTICIPATES IN CAREER DAY

Timothy L. Gustin, an attorney in our real estate law practice group, recently participated in a Career Day for sixth graders at Crest View Elementary School, in Brooklyn Park, Minnesota. The participants met with approximately 60 students and answered questions about their careers, such as what a typical day is like and how much schooling is required.



WE'VE ADDED SIX NEW ATTORNEYS IN 2007

Anthony M. Marick, a graduate of the University of Michigan Law School, joined our business law practice group in February 2007. He currently serves on the Planning Commission for the City of Maple Grove.

Kristin Heebner, a graduate of the University of Minnesota Law School, joined our litigation practice group in March 2007. Kristin was recently appointed by Governor Pawlenty to a four-year term on the Minnesota State Board of Dentistry.

Kerry A. Trapp, a graduate of the University of Minnesota Law School, joined our business law practice group in May 2007. She was named a “Rising Star” by Minnesota Law & Politics in 2007.

Sheila Engelmeier, a graduate of the University of Minnesota Law School, joined our employment law practice group in June 2007. Her practice is focused primarily on employment matters, malpractice matters, and issues facing the early childhood education industry.

Susanne J. Fischer, a graduate of William Mitchell College of Law, joined our litigation practice group in June 2007. Her practice focuses on employment law, including both litigation and counseling and training employers.

Richard Todd Franks, a graduate of William Mitchell College of Law, joined our litigation practice group in June 2007. His practice is focused primarily in the areas of litigation, creditors' remedies and employment law.

To learn more about Tony, Kristin, Kerry, Sheila, Sue, and Todd, please visit our web site at www.moss-barnett.com.



From left to right: Kerry Trapp, Tony Marick, Sheila Engelmeier, Todd Franks, Kristin Heebner and Sue Fischer



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APPROACHES TO HANDLING INTERMITTENT LEAVE

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Certification of Need for Intermittent Leave

Where a serious health condition of an employee will require intermittent leave, the employer can and should require the employee to provide medical certification from his or her healthcare provider about the leave, including a statement of the medical necessity for the leave, the expected duration of the intermittent leave, the anticipated frequency of episodes of incapacity, and ongoing treatment. An employee like Cindy, who needs to be absent to care for a family member, may also be required to provide such a certification, although the information required is somewhat different. If the certification provided is incomplete, the employer must so advise the employee and allow a reasonable opportunity to cure the deficiency.

If the employer questions the adequacy of a medical certification, the employer may have a healthcare provider selected by the employer contact the employee's healthcare provider, with the employee's permission, "for purposes of clarification and authenticity" of the medical certification. An employer may also require the employee to obtain a second opinion, at the employer's expense.

Recertification of Need

To better monitor cases of chronic health conditions and minimize the risk of abuse, employers should request recertification as frequently as possible. However, the right to request recertification is limited. If the original medical certification for a chronic or long-term condition does not specify a minimum duration of incapacity, an employer may require a recertification "on a reasonable basis," but no more often than once every 30 days, and only in connection with an absence. However,

recertification may be requested more frequently than every 30 days if: (1) the circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications), or (2) the employer receives information that casts doubt upon the employee's stated reason for the absence.

Information that casts doubt upon the employee's stated reason for the absence could include a suspicious pattern of absences, such as a pattern of Friday/Monday absences or other apparently excessive absences. For example, Joe may claim that his chronic migraine headaches cause him to be absent two or three days a month, but if his absences always occur on a Monday or Friday, his employer would have sufficient information to trigger the right to recertification. Where such information presents itself, an employer should request recertification.

If the original medical certification specifies a minimum duration of incapacity (such as six months or one year), an employer may not request recertification during that minimum period of incapacity unless the employee requests an extension of leave or one of the two conditions described above is met.

In any event, an employer may and should require a new medical certification, not just recertification, for an employee's first absence in each new 12-month leave period for a previously-certified serious health condition. FMLA leave cannot be taken forever on the basis of one leave request.

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Additional Strategies

Employers might also consider the following in dealing with suspected abuse situations:

- When requesting a recertification because of information that casts doubt on the employee's stated reason for being absent, consider informing the employee's doctor (via a question on the recertification form or separate letter) of the employee's pattern of absences or apparent excessive absences. Ask the doctor if this pattern is consistent with the employee's serious health condition.
- Where recertification is permissible, require the employee to furnish the recertification within the 15-day calendar period allowed under the FMLA.

Intermittent leave situations present one of the more challenging applications of the FMLA. If you are faced with such a situation, you should consult with counsel for answers to specific questions.

PHIL YOUNG ELECTED MAYOR OF EDEN PRAIRIE



Philip J. Young, a member of our litigation practice group, was elected Mayor of Eden Prairie in November 2006. Phil's election comes after serving for four years on the Eden Prairie City Council. Phil says his greatest challenge in his new position is creating a 20-year plan for the city of 65,000 residents that will preserve the strong business climate, school system, and residential amenities that persuaded *Money* magazine to name Eden Prairie one of the top ten cities in the country in which to live.



CLIENT ROD BURWELL HONORED WITH ENTREPRENEURIAL AWARD

Rodney Burwell, Chairman and CEO of Burwell Enterprises, Inc., a long time client of Moss & Barnett, was recently honored by the University of St. Thomas Opus College of Business with its John F. Cade Entrepreneurial Award. This Award is given annually to an individual who possesses outstanding entrepreneurial attributes, capitalizes on entrepreneurial opportunities, contributes to the community, and has high standards of integrity. Moss and Barnett attorneys joined with many of Rod's friends and family at a dinner honoring Rod for this significant and well-deserved recognition.

Front left to right: Teresa Peterson (spouse of Mark Peterson), Mark Peterson, Rod Burwell, Barbara Burwell (spouse of Rod Burwell), Rick Kelber and Sharon Van Dyke (spouse of Rick Kelber).

By Thomas J. Shroyer

President and
Chief Executive Officer



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IS THERE A “RIGHT SIZE” FOR LAW FIRMS?

The recent and sudden closing of the Rider Bennett law firm shocked and saddened the local bar and our law firm (although we are pleased to have been joined by four of their attorneys). Following the demise of other large Twin Cities law firms in recent years, this event has again raised questions about the role played by law firm size.

Indeed, several media reports about the closing of Rider Bennett suggested that a mid-sized firm like Rider Bennett, which ended with a census of 90 attorneys, could no longer compete in the current market for legal services. But is that true?

The facts suggest otherwise. First, Rider Bennett was not the first prominent local law firm to fail, having been preceded by, for example, the much larger firms of Popham Haik (over 150 attorneys) and Doherty, Rumble & Butler (over 130 attorneys.) On a national level, recent years have witnessed the demise of several “mega” law firms (Brobeck — over 600 attorneys; Coudert Brothers

— more than 800 attorneys; Jenkins & Gilcrest — over 500 attorneys). If size “matters,” why are firms of such magnitude also failing?

The answer, as we have previously suggested in this space, is that law firms fail when they are not “right-sized” for the needs of their clients. At Moss & Barnett, we have paid very careful attention to this factor — for example, by recently adding our excellent patent and trademark attorneys in response to client-driven needs instead of implementing an “if we build it they will come” strategy. Moreover, as our firm is just now looking to clear the bar with a robust census of 75 attorneys, we remain as stable and successful as ever!

As always, we offer a heartfelt thanks to all of our many clients and friends for granting us the privilege to be of service.

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Moss & Barnett, A Professional Association, assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

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