

**MARCH 2004**

**TRENDS IN THE LEGAL PROFESSION**

By Thomas J. Shroyer  
President and Chief Executive Officer



One of the major developments in the legal profession in recent years has been its consolidation into fewer and larger law firms. As Moss & Barnett's census approaches 70 attorneys, we are reminded that it was

not very many years ago when most firms ranged in size from 10–15 attorneys — and Minnesota's largest firm boasted of having 80 lawyers.

Today, Moss & Barnett ranks near the top of all law firms in Minnesota and we easily place among the elite business law firms, when specialty and "boutique" firms are excluded. We are quite pleased with our successful growth and positioning within the legal marketplace, as we find ourselves well-suited to efficiently and effectively provide our clients with all of the services they require in an increasingly complex legal environment.

Throughout the United States, however, many law firms have embarked upon ambitious growth programs. Especially in other parts of the country, law firms have been merging into "mega" law firms at a rapid pace. Indeed, recent years have witnessed the emergence of transnational law firms, boasting revenues easily in excess of \$1 billion annually. While this enormous growth can be eye catching, it is not always clear that the formation of ever-more complex and larger law firm structures is altogether in the best interests of clients.

At Moss & Barnett, it has never been our philosophy to "grow for the sake of growth." On the contrary, we carefully calibrate our size to ensure the delivery of legal services with the highest possible quality and value. For example, we do not employ large numbers of entry-level attorneys to leverage profits for partners, while training novices at client expense. To the contrary, for the past decade we have purposefully executed a policy of mostly hiring attorneys with several years of prior training. We also utilize highly skilled paralegals to provide many services formerly rendered by attorneys. Our clients also benefit from our membership in a

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network of business-oriented law firms known as "Business Counsel, Inc.," which allows us to utilize the resources and expertise of more than 35 law firms located throughout the major metropolitan areas of the United States, Canada and Mexico.

In summary, Moss & Barnett remains committed to growing with — and only with — our clients and their needs. Thanks again to our many clients and friends for letting us share this message with you!

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## EMPLOYEE TERMINATION: A BALANCING ACT

By Marcy R. Frost  
Employee Law Group Attorney



In the early years of my practice in the area of employment law counseling, I spent much of my time convincing employers that there were substantial risks associated with a contemplated employment termination. Ten years later, I find myself spending more and more time trying to convince employers that they should terminate a problem employee. What has changed?

Employers have become more aware of the wide range of potential claims

from disgruntled employees and the costs in time, morale, legal fees and damage awards that can result from such claims. Increasingly, employers are deciding that keeping a

If there is enough on the surface to interest a plaintiffs' attorney, the risk analysis must turn to the potential defense of the claim. The cost to the employer in time spent and attorneys' fees may not be substantial if the background facts and documentation easily and definitively demonstrate that the termination was not illegal.

Documentation is important not only to the defense of the case, but it also can help judge the likelihood of litigation. Many lawsuits come from employees who did not "see it coming." When an employee is blindsided by a termination, he or she may view the employer's "sudden" dissatisfaction with the employee's behavior or performance as a mask for some illegal basis for termination. If the employer has conducted regular, honest performance reviews, the reasons for the termination likely will be evident to the employee. Conversely, if problems have been ignored in past performance reviews, the employee will have reason to doubt that the termination truly is based on a performance or ongoing misconduct issue.

A termination that follows a formal warning will be easier for the employee — and the court — to understand. Likewise, consistent, fair documentation of performance and behavior problems can bolster a defense. Employers must be careful, however, to document similar issues for all employees to avoid claims that the employer was "building a case" against an employee discriminatorily.

Employers need to balance legitimate concerns about litigation against the very real problems that can be avoided by removing unproductive or disruptive employees from the workplace. These include:

- An employee with recurring behavior, attendance or performance problems requires increased attention of managers and human resources personnel. When considering whether to terminate employment or to continue to work with such an employee, managers and human resources personnel should think about how much time they have spent dealing with problems involving the employee as compared to other employees. The simple act of tracking time spent over the course of a week or month can be very enlightening.
- Employers also must consider the impact of a misbehaving or poor performing employee on co-workers. If co-workers perceive that the employer will tolerate a certain level of misconduct or poor performance, they may believe that they can "get away with it" too. Other employees who choose not to follow suit may resent that the employer is letting others "get away with it." If an employee who is a disruptive force in the workplace is retained, the employer might find itself losing its valued employees instead.

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troublesome employee is better than facing potential litigation. They hope the situation will improve, the employee will find a new job or leave voluntarily for some other reason, or the employee will do something that would place a termination beyond reproach.

While we caution employers to proceed with care, employers sometimes overvalue the risk of litigation and underestimate the value of severing the relationship.

An employer runs a risk of being sued whenever it terminates someone's employment. This risk is magnified when the employee is a minority or older, has raised issues of discrimination, safety or other legal concerns, has had health issues or has threatened to contact a lawyer. A realistic legal analysis of the potential claims of an employee can help put the risk in its proper perspective so that it can be a useful component of a cost-benefit analysis.

A proper analysis includes consideration of whether the employee's story would create an appealing contingent fee case. Most plaintiffs' attorneys recognize that not every unhappy former employee has a viable claim. Although administrative action, or even litigation, does not require an attorney, very few cases are pursued vigorously if the employee cannot hire a lawyer.

*Continued from Page 2*

- Employers should not discount the impact that a bad employee can have on clients or customers, vendors or the public. Problem employees may sabotage business relationships intentionally or through disparaging comments or lack of attention. A business must rely upon, and be at the mercy of, the impression its employees make in their contacts with individuals and other companies. Employers should take into account the potential impact a troublesome employee may have on those who have regular, business contact with the employee.

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## PROBLEM EMPLOYEES MAY SABOTAGE BUSINESS RELATIONSHIPS INTENTIONALLY OR THROUGH DISPARAGING COMMENTS OR LACK OF ATTENTION.

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The timing of a termination can be a critical factor. Sometimes simple compassion dictates that a termination be delayed for a short period to avoid a conflict with a holiday or personal circumstances. Whenever possible, employers should avoid terminating employees shortly before a bonus or commission is scheduled to come due or a benefit will vest.

Some employees simply cannot be turned into productive team members, but employers who hesitate to terminate such bad employment relationships are often forced to do so down the line. Employers should consider whether retention will give the employee an opportunity to bolster whatever claim he or she potentially might have. The troublesome employee who posed a threat of litigation earlier now may have additional weeks, months, or years of “ammunition” to use

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## IMPORTANT NOTICE FROM MOSS & BARNETT!

Moss & Barnett’s board of directors has determined to revise our billing practices and, effective March 1, 2004, will no longer charge clients for:

Facsimile transmissions  
Long distance telephone charges  
Postage

This decision reflects the dramatic changes of recent years caused by the electronic delivery of communications and information — and Moss & Barnett’s commitment to maximizing the value that we bring to serving the interests of our clients.

against the employer. Look for an article in the upcoming Moss & Barnett newsletter with tips on how to terminate employment once the decision has been made.

## ANNUAL REPORTING IN MINNESOTA

By Jill M. DeRouchey  
Business Department Paralegal

Minnesota business entities have annual requirements for reporting to the Minnesota Secretary of State. Here is an update on filing:

### Minnesota For-Profit Corporations, Nonprofits Corporations and LLC’s

If you filed a 2002 annual report, the Secretary of State’s office has filed the 2003 annual report for you. This is because they were so far behind in filing annual reports, they simply could not catch up. In January 2004, the Secretary of State mailed out postcards to all of these entities letting them know that they may now file their annual reports online at the Secretary of State’s Web site, which is [www.sos.state.mn.us](http://www.sos.state.mn.us). The Secretary of State prefers that all corporations file their annual reports online and will no longer be sending annual reports in the mail.

### Minnesota LLPs

All Limited Liability Partnerships (LLP’s) must file an annual report, along with the \$135 annual filing fee, on or before December 31 of each year. The 2003 annual reports were mailed out during the summer of 2003. If you miss the December 31 filing deadline, there is a one-year grace period during which you can file the missed annual report and pay the \$135 filing fee. Online filing for LLP’s is not available at this time.

Please call your contact at Moss & Barnett if you have questions or would like further assistance!

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## 2004 BOARD OF DIRECTORS

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## NEW SHAREHOLDERS

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## VAN VALKENBURG SERVICE AWARD

Moss & Barnett congratulates shareholder Thomas A. Keller III as the recipient of the 2003 Van Valkenburg Service Award. Each year, Moss & Barnett recognizes one of our employees who makes outstanding volunteer contributions to charitable organizations, bar-related organizations, pro bono services and cultural activities. Tom Keller was recognized for his volunteer service in health care, legal aid, civic and educational organizations, which has been a hallmark of his entire career.



### 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, P.A. assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.*

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