

# The Practical Challenges of Litigating and Trying a Claim for Attorney Fees to a Jury in Minnesota: Providing Minnesota's District Court Judges, Lawyers, and Litigants the Guidance and Predictability They Need

S. Jamal Faleel  
jfaleel@fredlaw.com

Follow this and additional works at: <http://digitalcommons.hamline.edu/hlr>



Part of the [Civil Procedure Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Faleel, S. Jamal () "The Practical Challenges of Litigating and Trying a Claim for Attorney Fees to a Jury in Minnesota: Providing Minnesota's District Court Judges, Lawyers, and Litigants the Guidance and Predictability They Need," *Hamline Law Review*: Vol. 37: Iss. 1, Article 4.

Available at: <http://digitalcommons.hamline.edu/hlr/vol37/iss1/4>

This Article is brought to you for free and open access by DigitalCommons@Hamline. It has been accepted for inclusion in Hamline Law Review by an authorized administrator of DigitalCommons@Hamline.

**THE PRACTICAL CHALLENGES OF LITIGATING AND TRYING A CLAIM FOR ATTORNEY FEES TO A JURY IN MINNESOTA: PROVIDING MINNESOTA'S DISTRICT COURT JUDGES, LAWYERS, AND LITIGANTS THE GUIDANCE AND PREDICTABILITY THEY NEED**

*S. Jamal Faleel\**

<b>I.</b>	<b>INTRODUCTION</b>	110
<b>II.</b>	<b>BACKGROUND</b>	112
	<i>A. APPLICATIONS FOR ATTORNEY FEES BEFORE UNITED PRAIRIE</i>	112
	<i>B. UNITED PRAIRIE BANK-MOUNTAIN LAKE V. HAUGEN</i>	114
	1. <i>THE FACTS</i>	114
	2. <i>THE DISTRICT COURT PROCEEDINGS AND DECISION</i>	114
	3. <i>THE COURT OF APPEALS DECISION</i>	115
	4. <i>THE SUPREME COURT OPINION</i>	116
	a. <i>THE MAJORITY OPINION</i>	116
	b. <i>THE DISSENT</i>	117
	<i>C. THE APPLICATION OF UNITED PRAIRIE BEYOND A CONTRACTUAL CLAIM FOR FEES</i>	119
<b>III.</b>	<b>ANALYSIS</b>	120
	<i>A. THE PRACTICAL DIFFICULTIES OF LITIGATING AND TRYING AN ATTORNEY-FEE CLAIM TO A JURY</i>	120
	1. <i>CHALLENGES DURING THE DISCOVERY PROCESS</i>	122
	a. <i>PRODUCTION OF DETAILED BILLING RECORDS</i>	123
	b. <i>DEPOSITIONS OF TRIAL COUNSEL</i>	125
	c. <i>EXPERT TESTIMONY</i>	125
	2. <i>DIFFICULTIES AT TRIAL</i>	126
	a. <i>TRIAL COUNSEL AS A WITNESS</i>	126
	b. <i>POTENTIAL RELEVANCE OF OTHERWISE INADMISSIBLE EVIDENCE</i>	126
	c. <i>EXPERT TESTIMONY AT TRIAL</i>	127

---

\* S. Jamal Faleel is a shareholder at the law firm of Fredrikson & Byron, P.A. in Minneapolis. He serves as the co-chair of Fredrikson & Byron's Commercial Law practice group. He has more than ten years of experience in both federal and state courts. He clerked for the Honorable James M. Rosenbaum, then Chief Judge for the United States District Court for the District of Minnesota before entering private practice. He has litigated complex business disputes, contract matters, business torts, employment disputes, and shareholder disputes, with a focus on representation of the business and personal interests of medical professionals and healthcare providers.

d.	<i>ESTIMATING ATTORNEY FEES THROUGH THE CLOSE OF TRIAL</i>	128
e.	<i>ESTIMATING ATTORNEY FEES FOR POST-TRIAL MOTIONS AND APPELLATE FEES</i>	128
f.	<i>PRE-JUDGMENT INTEREST UNDER MINN. STAT. § 549.09</i>	129
3.	<i>THE INCREASE IN COMPLEXITY AND BURDEN ON THE DISTRICT COURT JUDGE</i>	130
4.	<i>THE INCREASED COSTS OF TRYING A LAWSUIT WITHIN A LAWSUIT</i>	130
5.	<i>INSUFFICIENT SAFEGUARDS AGAINST ERRONEOUS DECISION-MAKING</i>	131
B.	<i>HOW TO HELP DISTRICT COURT JUDGES AND LAWYERS</i>	132
1.	<i>USING EXISTING RULES TO COST-EFFECTIVELY AND EFFICIENTLY MANAGE CASES</i>	133
a.	<i>THE NEED FOR EARLY CASE MANAGEMENT CONFERENCES</i>	133
b.	<i>BIFURCATION</i>	134
c.	<i>DISTRICT COURTS SHOULD RULE ON CHALLENGES TO ATTORNEY-FEE JURY TRIAL DEMANDS AS SOON AS PRACTICABLE</i>	134
d.	<i>CLASSIFYING CASES INVOLVING JURY TRIALS ON ATTORNEY FEES AS COMPLEX CASES</i>	135
2.	<i>AMENDMENTS AND REVISIONS TO EXISTING RULES</i>	135
a.	<i>REVISIONS TO THE MINNESOTA RULES OF CIVIL PROCEDURE AND GENERAL RULES OF PRACTICE</i>	135
b.	<i>REVISIONS TO MINNESOTA CIVIL JURY INSTRUCTION GUIDE</i>	135
3.	<i>MINN. STAT. § 549.01 SHOULD BE AMENDED</i>	136
4.	<i>MINNESOTA RULES OF PROFESSIONAL CONDUCT RULE 3.7 SHOULD BE REVISITED</i>	136
<b>IV.</b>	<b>CONCLUSION</b>	137

## I. INTRODUCTION

For centuries, judges, not juries, have decided the amount and reasonableness of claims to recover attorney fees in both the state and federal courts of the United States. In fact, no jurisdiction had ever interpreted its constitution to find a right to a jury trial on the amount and reasonableness of a claim for attorney fees.<sup>1</sup> That changed in 2012.

---

<sup>1</sup> The one exception to this is a claim for attorney fees arising from an attorney-client relationship.

On March 14, 2012, the Minnesota Supreme Court became the first court to interpret its jurisdiction's constitution to find a right to a jury trial for a claim to recover attorney fees. In a 5-2 decision, the majority found that the Minnesota Constitution "provides a right to a jury trial for a claim to recover attorney fees based on a contract."<sup>2</sup> The dissent called the decision "a historic change in practice for Minnesota courts" that "casts Minnesota as an outlier among jurisdictions that have considered the issue."<sup>3</sup> Because the Minnesota Supreme Court is the last word on the Minnesota Constitution, there is no "legislative fix" for those who disagree with the decision. *United Prairie* is here to stay for the foreseeable future.

Whether the majority "accurately" interpreted the Minnesota Constitution has, and will be, dissected by judges and lawyers across the country.<sup>4</sup> These individuals will have a clear and well-written analysis to dissect.

Minnesota's district court judges, lawyers, and litigants, however, face a more immediate problem because *United Prairie* left Minnesota's district court judges and lawyers with no guidance on how to implement this decision. As a result, Minnesota's district court judges and lawyers must apply *United Prairie* against a centuries-old system of statutes, rules, and case law that never contemplated this result.<sup>5</sup> Because district judges and lawyers cannot wait for further guidance, or look to another jurisdiction as a model, they will have to adapt in real-time and on a case-by-case basis as they try to fit the proverbial square peg in the round hole. This may result in a patchwork of varying practices and procedures across Minnesota's 289 district court judges, 87 counties, and 10 judicial districts.<sup>6</sup>

---

<sup>2</sup> *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 53 (Minn. 2012).

<sup>3</sup> *Id.* at 63-67.

<sup>4</sup> Grant M. Borgen, Note, *Recent Minnesota Supreme Court Decisions: Civil Procedure: The Civil Right to a Jury Trial and What It Means for Minnesota Creditors in Light of United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equipment, LLC*, 39 WM. MITCHELL L. REV. 245 (2012).

<sup>5</sup> *Langeland v. Farmers State Bank*, 319 N.W.2d 26, 33 (Minn. 1982). The Minnesota Supreme Court has recognized some common law exceptions to this rule. *See, e.g.*, *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998) (stating that the "third-party litigation exception . . . permits a court to award attorney fees as damages if the defendant's tortious act thrusts or projects the plaintiff into litigation with a third party"); *In re Redetermination of Benefits of Nicollet Cnty. Ditch 86A*, 488 N.W.2d 482, 487 (Minn. Ct. App. 1992) (recognizing an exception to general rule "where the victorious litigant has conferred a substantial benefit that can be spread proportionally among an ascertainable class") (citing *Grassman v. Minn. Bd. of Barber Exam'rs*, 304 N.W.2d 909, 912 (Minn. 1981)).

<sup>6</sup> *Judicial District Leadership*, Minn. Judicial Branch, [http://www.mncourts.gov/Documents/0/Public/administration/Judicial\\_District\\_Leadership.pdf](http://www.mncourts.gov/Documents/0/Public/administration/Judicial_District_Leadership.pdf) (last visited Apr. 10, 2013).

The best efforts of able and diligent district court judges will, however, lack the necessary consistency and predictability lawyers and litigants need to analyze their legal claims. The resulting uncertainty will result in an already over-burdened district and appellate court system having to resolve a slew of motions and appeals looking for clarity and predictability. In the meantime, litigants making decisions about lawsuits that have significant impact on their lives and businesses will be burdened with higher legal costs, delays, and uncertainty in evaluating their claims.

Because the practical problems that arise from litigating and trying claims for attorney fees to juries challenge the cost-effective and efficient administration of justice, the existing statutes and rules must be revised to provide rules and guidelines to assist district court judges and lawyers.<sup>7</sup> The starting point for any such endeavor is to evaluate the statutes, rules, and practices in place before *United Prairie*.

## II. BACKGROUND

### A. Applications for Attorney Fees Before United Prairie

The “American Rule” calls for litigants to bear their own costs of litigation, including attorney fees absent a statutory or contractual basis for the claim.<sup>8</sup> Minnesota follows the “American Rule.”<sup>9</sup> Minnesota has also followed the common practice of having judges decide the reasonableness and amount of attorney fees.<sup>10</sup>

Minnesota Rule of General Practice 119, which codified the practice of submitting attorney-fee claims to judges, is exceedingly broad in scope.<sup>11</sup> First, it imposes a requirement that “any action or proceeding in which an attorney seeks the award, or approval of attorneys’ fees in the amount of \$1,000.00 or more . . . , application for award or approval of fees shall be made by motion.”<sup>12</sup> Second, it identifies the “Required Papers” that must

<sup>7</sup> See *infra* text accompanying notes 110–124 (proposing standard procedures and guidelines the legislature should adopt to assist district court judges and lawyers).

<sup>8</sup> See, e.g., *Barr/Nelson, Inc. v. Tonto’s, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983).

<sup>9</sup> See *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 782 N.W.2d 263 (Minn. Ct. App. 2010), *rev’d on other grounds*, 813 N.W.2d 49 (2012) (“Finally, we note that there is no history in Minnesota of turning such fee determinations over to juries.”); MINN. GEN. R. PRAC. 119.

<sup>10</sup> *United Prairie*, 782 N.W.2d at 270.

<sup>11</sup> MINN. GEN. R. PRAC. 119.

<sup>12</sup> MINN. GEN. R. PRAC. 119.01. In full, the rule states:

In any action or proceeding in which an attorney seeks the award, or approval, of attorneys’ fees in the amount of \$1,000.00 for the action, or more, application for award or approval of fees shall be made by motion. As to probate and trust matters, application of the rule is limited to contested formal court proceedings. Unless otherwise ordered by the court in a particular proceeding, it does not apply to:

accompany a motion for attorney fees, and outlines the information to be included in the attorney's affidavit supporting the motion.<sup>13</sup> Third, it gives the district court judges the discretion to “require production of additional records,” either “for review by all parties or *in camera* review by the court.”<sup>14</sup> The Advisory Committee comments explain that “rule authorizes the court to review documentation required by the rule *in camera*” because *in camera* review or submission of redacted records “is often necessary given the sensitive nature of the required fee information and the need to protect the party entitled to attorneys’ fees from having to compromise its attorney’s thoughts, mental impressions, or other work product in order to support its fee application.”<sup>15</sup> Finally, Rule 119.05 was adopted in 2003 “to establish a procedure for considering attorney fees on matters that will be heard by default.”<sup>16</sup>

The Advisory Committee comments—which “do[] not reflect [the Minnesota Supreme Court’s] approval of the comments”<sup>17</sup>—explain that the purpose of the Rule is “to establish a standard procedure for supporting requests for attorney fees.”<sup>18</sup> In particular, the “rule [was] intended to provide a standard set of documentation that allows the majority of fee applications to be considered by the court without requiring further information.”<sup>19</sup> The comment goes on to explain that, while the “rule is not intended to limit the court’s discretion, [it] is intended to encourage the streamlined handling of fee applications and to facilitate filing of appropriate support to permit consideration of the issue.”<sup>20</sup> Judges and attorneys relied on the Rule to determine attorney fees until the Minnesota Supreme Court modified the rule in *United Prairie*.

- 
- (a) informal probates,
  - (b) formal probates closed on consents,
  - (c) uncontested trust proceedings; and
  - (d) routine guardianship or conservatorship proceedings, except where the Court determines necessary to protect the interests of the ward.

*Id.*

<sup>13</sup> MINN. GEN. R. PRAC. 119.02.

<sup>14</sup> MINN. GEN. R. PRAC. 119.05 advisory committee’s cmt. (1997).

<sup>15</sup> *Id.*

<sup>16</sup> MINN. GEN. R. PRAC. 119.05 advisory committee’s cmt. (2003).

<sup>17</sup> Minnesota Supreme Court Order, No. CX-89-1863 (Dec. 8, 1997).

<sup>18</sup> MINN. GEN. R. PRAC. 119.05 advisory committee’s cmt. (1997).

<sup>19</sup> *Id.*

<sup>20</sup> MINN. GEN. R. PRAC. 119.05 advisory committee’s cmt (2003).

## B. United Prairie Bank-Mountain Lake v. Haugen

### 1. The Facts

The facts giving rise to *United Prairie* are fairly unremarkable and unfortunately commonplace following the economic slowdown of the 2000s.<sup>21</sup> The Haugens “owned two parcels of land in Cottonwood County, Minnesota on which they farmed and operated a feed mill business.”<sup>22</sup> They ran into financial problems in 2002 and had trouble making timely payments. United Prairie Bank-Mountain Lake (the “Bank”) agreed to refinance the debt.<sup>23</sup> The Haugens’ debt was “secured with a mortgage on the two parcels of land in Cottonwood County, commercial security agreements, and personal guarantees executed by the Haugens.”<sup>24</sup> The loan documents all included language requiring the Haugens to pay the Bank’s attorney fees and costs in the event of a default.<sup>25</sup>

### 2. The District Court Proceedings and Decision

The Haugens defaulted on the loan documents in 2004.<sup>26</sup> The Bank sued for breach of contract and sought to recover its attorney fees and costs of recovery.<sup>27</sup> The district court granted summary judgment in favor of the Bank on its contract claims and dismissed the Haugens’ counterclaims.<sup>28</sup> The

---

<sup>21</sup> *United Prairie*, 813 N.W.2d at 52. The court reasoned that:

The promissory notes accompanying each of the new loans obligated the Haugens and HNE to pay all costs of collection, replevin . . . or any other or similar type of cost. The notes further stated: [i]f you hire an attorney to collect this note, I will pay attorney’s fees plus court costs (except where prohibited by law). The mortgage required HNE to pay attorneys’ fees, court costs, and other legal expenses that were incurred by [UPB] in enforcing or protecting [UPB]’s rights and remedies under this Mortgage. The commercial security agreements provided that, in the event UPB repossessed the secured property or took action to enforce the obligations of HNE, UPB could apply any proceeds recovered to the expenses of enforcement, which includes reasonable attorneys’ fees and legal expenses. Finally, in the personal guarantees, the Haugens agreed to pay all costs and expenses (including reasonable attorneys’ fees and legal expenses) incurred by [UPB] in connection with the protection, defense or enforcement of [these guarantees] in any litigation or bankruptcy or insolvency proceedings.

*Id.* (quotations omitted).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 52.

<sup>26</sup> *United Prairie*, 813 N.W.2d at 53.

<sup>27</sup> *United Prairie*, 782 N.W.2d at 267–68.

<sup>28</sup> *Id.* at 269. The court stated:

district court denied the Haugens' request for a jury trial and awarded the Bank \$403,821.82 in attorney fees.<sup>29</sup>

### 3. *The Court of Appeals Decision*

In 2010, a three-member panel of the Minnesota Court of Appeals affirmed the district court's decision to deny the Haugens' request for a jury trial on the Bank's attorney-fees claim.<sup>30</sup> The Court of Appeals, borrowing heavily from the United States Supreme Court's decision in *Ross v. Bernhard*, looked to three factors to determine whether "the nature of the issue to be tried" is "legal" or "equitable" in nature: (1) the treatment of the issue before the merger of law and equity; (2) "the remedy sought"; and (3) "the abilities and limitations of juries."<sup>31</sup> The Court of Appeals, relying on precedent from a number of different jurisdictions, found that all three factors led to the conclusion that the Haugens did "not have a right to a jury trial on the issue of attorney fees."<sup>32</sup>

The Haugens appealed to the Minnesota Supreme Court. On March 14, 2012, the Minnesota Supreme Court published its opinion in *United Prairie*, sixteen months after it first heard oral argument on November 3, 2010.<sup>33</sup> The court granted the Haugens' petition for review to decide "whether the Minnesota Constitution provides a right to a jury trial for a claim to recover attorney fees based on a contract."<sup>34</sup> A five-member majority of the court answered in the affirmative, with two justices dissenting.

---

To determine whether a party is entitled to a jury trial under the Seventh Amendment, federal courts look to the nature of the issue to be tried rather than the character of the overall action. The nature of the issue is determined by considering (1) how the issue was customarily treated prior to the merger of the courts of law and equity (the pre-merger custom), (2) the remedy sought, and (3) the abilities and limitations of juries.

*Id.* (quotations omitted).

<sup>29</sup> *United Prairie*, 813 N.W.2d at 53.

<sup>30</sup> *Id.* at 49; Minnesota Supreme Court En Banc Calendar, [http://www.mncourts.gov/Documents/0/Public/Calendars/November\\_2010\\_Summary.htm](http://www.mncourts.gov/Documents/0/Public/Calendars/November_2010_Summary.htm) (last viewed Apr. 24, 2013).

<sup>31</sup> *United Prairie*, 813 N.W.2d at 60.

<sup>32</sup> *United Prairie*, 782 N.W.2d at 270.

<sup>33</sup> *United Prairie*, 813 N.W.2d at 56; Minnesota Supreme Court En Banc Calendar, *supra* note 30.

<sup>34</sup> *United Prairie*, 813 N.W.2d at 49.

#### 4. *The Supreme Court Opinion*

##### a. *The Majority Opinion*

The majority opinion looked to “the substance of the claim, based on the pleadings and the underlying elements of the claim, and ‘the nature of the relief sought.’”<sup>35</sup> As to the first factor, the majority characterized “the substantive nature of the claim for the recovery of attorney fees [as] an action for contractual indemnity,” which the majority explained had been “traditionally classified as an action at law.”<sup>36</sup> As to “the nature of the relief sought,” the majority “conclude[d] that a claim for a monetary payment under a contractual indemnity provision is a legal claim with an attendant right to a jury trial under *Article I, Section 4 of the Minnesota Constitution*.”<sup>37</sup>

The majority then disposed of the Court of Appeals’ opinion. The majority opinion rejected the notion that an attorney-fee claim was “‘more like a claim for restitution than for compensation’” and “‘collateral’ to the merits of the action.”<sup>38</sup> The majority concluded that the attorney-fee claim in the case was not a claim for restitution, but one for compensation.<sup>39</sup> The majority went on to find that the claim was not collateral reasoning that “[w]hen a party seeks attorney fees under the express provisions of a contract, the fees are an agreed element of damages available under the contract and are not collateral.”<sup>40</sup>

The majority also refused to:

distinguish between the predicate determination of [the Haugens’] liability for attorney fees and the amount of the fees awarded as damages. As with any other legal claim subject to a jury trial, a jury determines both the liability for a breach of contract and the amount of damages to award for the breach, if any, assuming genuine issues of material fact

---

<sup>35</sup> *Id.* at 53.

<sup>36</sup> *Id.* at 56.

<sup>37</sup> *Id.* at 57 (emphasis added). *But see* *Spaeth v. Plymouth*, 344 N.W.2d 815, 825 (Minn. 1984) (“Accordingly, we hold that a claim for attorney and expert fees pursuant to section 117.045 should be treated as a matter independent of the merits of the litigation.”); *In re Thulin*, 660 N.W.2d 140, 143 (Minn. Ct. App. 2003) (citations omitted) (explaining that “[i]n *Spaeth*, the supreme court held that a claim of attorney fees and expert fees should be treated as an independent matter” and that “[t]he Court reasoned that the matter was independent because the court need not reconsider the merits of the issue on appeal to reach conclusions regarding fees, and as a practical matter, if the district court had not entered the order setting the fees, the appellate court would have been required to remand for further proceedings if and when it upheld the district court on the merits”).

<sup>38</sup> *United Prairie*, 813 N.W.2d at 58.

<sup>39</sup> *Id.* at 58.

<sup>40</sup> *Id.* at 59.

exist with respect to both questions that warrant submission to a jury.<sup>41</sup>

Notably, the majority opinion also expressly rejected the Court of Appeals' decision to consider the practical challenges of having juries decide attorney fee claims, observing that "[t]he availability of a constitutionally guaranteed right to trial by jury does not and should not turn on the practical difficulties of its implementation."<sup>42</sup> Finally, the majority opinion offered no guidance on how to submit claims for attorney fees to lay juries:

We express no opinion, however, about the specific procedural or timing requirements for submission of a contractual attorney-fees claim to a jury. In this case, the parties have asked us to decide only whether the Minnesota Constitution provides a jury trial right for a claim involving a contractual right to attorney fees. We therefore decline to speculate about issues beyond those presented for our review.<sup>43</sup>

*b. The Dissent*

The dissent, authored by Justice Dietzen and joined in by Chief Justice Gildea, "conclude[d] that the [B]ank's claim for attorney fees is akin to a claim for costs or disbursements, which does not implicate the right to a jury trial under the Minnesota Constitution."<sup>44</sup> The dissent acknowledged that the matter was one of first impression in Minnesota, but asserted that Minnesota "ha[s] consistently treated a contractual claim for attorney fees as *sui generis* and a matter for the court to decide."<sup>45</sup> The dissent described the claim for attorney fees as "is in the nature of a request for costs or disbursements" and implicated "traditional equitable principles" that do not implicate a right to a jury trial.<sup>46</sup> The dissent was careful to point out that its analysis and reasoning should be limited:

to the circumstances presented by [*United Prairie*]<sup>47</sup>—where the attorney fees sought are in the nature of costs of collection or expenses of enforcement in connection with a

---

<sup>41</sup> *Id. Contra id.* at 63 (the majority disagrees with the dissent's treatment of an attorney-fee claim as *sui generis* and for treating attorney fees akin to costs and disbursements).

<sup>42</sup> *Id.* at 60.

<sup>43</sup> *United Prairie*, 813 N.W.2d at 63 n.9.

<sup>44</sup> *Id.* at 64 (Dietzen, J., dissenting).

<sup>45</sup> *Id.* at 65.

<sup>46</sup> *Id.* at 66.

breach of contract claim in the same action, in contrast to cases where the claim for attorney fees arises from an attorney-client relationship.<sup>47</sup>

The dissent went on to predict that “the majority’s rigid, wooden approach—treating attorney-fees claims like claims for contractual indemnity without considering the unique nature of attorney-fees claims—would extend the constitutional jury trial right to any claim for costs or expenses that springs from a contractual obligation.”<sup>48</sup>

To Justice Dietzen and Chief Justice Gildea, “[t]he majority’s decision represents a historic change in practice for Minnesota courts, which have decided attorney-fees claims for the last century and a half.”<sup>49</sup> And

---

<sup>47</sup> *Id.* at 67 n.13.

<sup>48</sup> *Id.* at 67.

<sup>49</sup> *United Prairie*, 813 N.W.2d at 66 (Dietzen, J., dissenting). The dissent begins by reminding the majority that the Minnesota Supreme Court “protects the same jury trial rights as those protected under the Minnesota Constitution.” *Id.* at 67. Then, it cites to the federal circuits that have reached a contrary result:

For example, the Second Circuit has concluded that the ‘collateral’ issue of the amount of reasonable attorney fees due under a contract does ‘not present the kind of common-law questions for which the Seventh Amendment preserves a jury trial right.’ *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1315 (2d Cir. 1993). Other circuit courts of appeal have reached similar conclusions. *E.g.*, *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 627 (7th Cir. 2000) (concluding that ‘[t]he issue of attorney fees (including amount)’ due under a contract constitutes “an issue to be resolved after the trial on the basis of the judgment entered at the trial,” just as in cases involving statutory entitlements to attorney fees); *Ideal Elec. Sec. Co. v. Int’l Fid. Ins. Co.*, 129 F.3d 143, 150, 327 U.S. App. D.C. 60 (D.C. Cir. 1997) (“Where a claim for attorney’s fees arises from a private contract provision, such a claim does not embody a right to trial by jury.”); *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991) (holding that the Seventh Amendment does not guarantee a jury trial to determine the amount of reasonable attorney fees, as no common law right exists to recover attorney fees awarded pursuant to a contract).

*Id.* at 67. The dissent also points to the six state courts that have reached a conclusion contrary to the majority in *United Prairie* when interpreting their own state constitutions:

Although state courts have relied on different rationales, they all have reached the same conclusion—there is no constitutional right to a jury trial on a claim for attorney fees based on a contract. *See, e.g.*, *Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 979 (Fla. 1987) (explaining that “the recovery of attorney’s fees is ancillary to the claim for damages”); *Hudson v. Abercrombie*, 258 Ga. 729, 374 S.E.2d 83, 85 (Ga. 1988) (reasoning that “attorney fees were not allowable at common law”); *Missala Marine Servs. Inc. v. Odom*, 861 So. 2d 290, 296 (Miss. 2003) (concluding that trial court properly “h[e]ld a hearing after the trial of the case to hear evidence on the issue of attorney’s fees”); *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 836 (Mo. Ct. App. 1995) (noting the “absence of any authority that Missouri has recognized a

significantly, the dissent believed that the decision “casts Minnesota as an outlier among jurisdictions that have considered the issue,” after becoming “the only court in the country that recognizes a constitutional right to a jury trial under these circumstances.”<sup>50</sup> The dissent observed that “courts deciding the right to a jury trial on an attorney-fees claim under the United States Constitution have universally concluded that there is no right to a jury trial.”<sup>51</sup> Then, the dissent identified decisions from four federal circuit courts and six state courts that have reached decisions contrary to the majority opinion in *United Prairie*.<sup>52</sup> Despite the dissent’s reservations, the majority opinion serves as the final word and may signal an expansion in the right to a jury trial beyond contractual attorney fee claims.

### ***C. The Application of United Prairie Beyond a Contractual Claim for Fees***

Although the majority tried to limit its holding to claims based on a contractual attorney-fee clause, the underlying reasoning of the majority opinion will most likely lead to an extension of *United Prairie* to other claims for attorney-fees context.<sup>53</sup> At least one court has already extended the right to a jury trial beyond the contractual attorney fee context since *United Prairie*.

In *St. Jude Medical v. Biosense Webster, Inc.*, St. Jude Medical sued BioSense, Johnson & Johnson, and a former St. Jude/current BioSense employee for breach of a noncompetition agreement, breach of a duty of loyalty, and tortious interference.<sup>54</sup> Among the claims made by St. Jude was a claim for attorney fees based on the common law exception to the American Rule that “permits a court to award attorney fees as damages if the defendant’s tortious act thrusts or projects the plaintiff into litigation with a

---

common law right to a jury trial to determine reasonable attorney’s fees once liability has been established”); *Paramount Commc’ns Inc. v. Horsehead Indus., Inc.*, 287 A.D.2d 345, 731 N.Y.S.2d 433, 434 (N.Y. App. Div. 2001) (“The amount of, if not the right to, attorneys’ fees raises post-judgment issues collateral to the merits in the nature of an accounting that are essentially equitable in nature.”); *Murphy v. Stowe Club Highlands*, 171 Vt. 144, 761 A.2d 688, 701 (Vt. 2000) (holding that determining the amount of attorney fees due under a contract involves equitable accounting).

*Id.* at 68.

<sup>50</sup> *United Prairie*, 813 N.W.2d at 67 (Dietzen, J., dissenting).

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., *Kallok*, 573 N.W.2d at 363 (citations omitted).

<sup>53</sup> *United Prairie*, 813 N.W.2d at 67 (Dietzen, J., dissenting).

<sup>54</sup> *St. Jude Medical S.C., Inc. v. Biosense Webster, Inc.*, No. 62-CV-11-718, 2012 WL 8009745 (Minn. Dist. Ct. July 16, 2012); *St. Jude Med. S.C., Inc. v. Biosense Webster, Inc.*, 2013 Minn. App. Unpub. LEXIS 913 (Minn. Ct. App. Oct. 7, 2013), *petition for review denied*, 2013 Minn. LEXIS 765 (Minn. Dec. 17, 2013).

third party.”<sup>55</sup> Following *United Prairie*, BioSense responded by demanding a jury trial on St. Jude’s claim for attorney fees.<sup>56</sup>

The court in *St. Jude* found that *United Prairie*’s “reasoning is too compelling to be limited to the facts of that case.”<sup>57</sup> It reasoned that St. Jude’s claim for attorney fees was “not some matter collateral to the merits of the tort claim” and was “part and parcel of its merits.”<sup>58</sup> The court went on to reason that St. Jude’s “pursuit of *Kallok* fees constitutes a tort action seeking only money damages, and a ‘tort action seeking only money damages is a legal claim with an attendant right to a jury trial under the Minnesota Constitution.’”<sup>59</sup>

The court dismissed St. Jude’s “well-founded practical objections” because it believed that the Minnesota Supreme Court “didn’t much care that a jury trial on attorney’s fees might be laden with procedural baggage.”<sup>60</sup> The court went on to invite “suggestions from counsel on how best to proceed efficiently.”<sup>61</sup>

In addition to common law exceptions like the *Kallok* exception, Minnesota has hundreds of state statutes and rules that permit the recovery of attorney fees.<sup>62</sup> Litigants will no doubt test the boundaries of *United Prairie* by calling for its application for these various statutory fee claims for years to come.

### III. ANALYSIS

#### *A. The Practical Difficulties of Litigating and Trying an Attorney-Fee Claim to a Jury*

The Honorable Edward Devitt offered the following challenge to the civil jury system over thirty years ago:

The complexities of modern life mirrored in our legal system raise the increasingly important question of whether a jury selected from voter lists, reflecting the age, education, and experience of a cross section of citizens is really competent

---

<sup>55</sup> Plaintiff’s Memo. Regarding *Kallok* Attorney Fee Claim at 10, *St. Jude*, No. 62-CV-11-718, 2012 WL 8009745, (Minn. Dist. Ct. July 16, 2012) (quoting *Kallok*, 573 N.W.2d at 363).

<sup>56</sup> *St. Jude*, 2012 WL 8009745, at 15.

<sup>57</sup> *Id.* at 16.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (quoting *United Prairie*, 813 N.W.2d at 54).

<sup>60</sup> *Id.* at 17.

<sup>61</sup> *Id.* (citing *United Prairie*, 813 N.W.2d at 63 n.9).

<sup>62</sup> Attorney Fee Awards in Minnesota Statutes, Minnesota House of Representatives Research Department (December 2011), <http://www.house.leg.state.mn.us/hrd/pubs/attyfee.pdf> (last visited May 21, 2013).

to decide today's complex cases. I suggest that many cases, by their very nature, are beyond the abilities of the average person to understand and fairly decide. Because of the required trial time and the complexity and difficulty of the legal and factual issues involved, certain cases should not be submitted to juries. I urge that modern realities dictate that we change the obligatory jury system in civil cases in order to preserve fair trials and to improve the efficiency and economy of the whole legal system.<sup>63</sup>

His words have more relevance in Minnesota today than ever before. As litigation has gotten larger and more expensive over the last few decades, juries have been asked to decide increasingly complex civil cases and sift through an ever-increasing volume of evidence. None of these challenges, however, may pose more of a challenge to juries, trial lawyers, and district court judges than litigating and trying attorney-fee claims to juries.<sup>64</sup>

To understand the difficulties in implementing *United Prairie*, it is helpful to identify what information a party making an attorney-fee claim needs to prove.<sup>65</sup> Minnesota courts use “the lodestar method for determining the reasonableness of . . . attorney fees.”<sup>66</sup> The lodestar method calls for the fact-finder to “determine the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”<sup>67</sup> “In determining ‘the

---

<sup>63</sup> Edward J. Devitt, *Should the Jury Trial Be Required in Civil Cases? A Challenge to the Seventh Amendment*, 47 J. AIR L. & COM. 495 (1982).

<sup>64</sup> Although juries have decided the reasonableness of attorney fees in other contexts, *United Prairie* stands alone in calling for the *simultaneous* presentation of evidence regarding liability, damages, and legal fees for work done in the *same lawsuit*. *J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1115–16 (10th Cir. 2009); *see also* *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1308 (2d Cir. 1993); *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991); *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 627 (7th Cir. 2000). These cases all distinguish between “free standing” attorney-fee claims where the damages “are *themselves* part of the merits of their contact claim”—such as a legal malpractice claim, collection claim for legal services performed, or claim for contractual indemnity arising from legal fees incurred in a separate lawsuit—from claims in which the fact-finder is being asked to make a determination of the reasonableness of attorney fees it is incurring in the lawsuit being tried to the jury. *J.R. Simplot*, 563 F.3d at 1115–16. In fact, *United Prairie* appears to be the only court to not draw such a distinction or deem the challenges posed by the distinction worthy of consideration.

<sup>65</sup> It is possible that the factors presented to juries for resolution of attorney-fee claims may be different, or at least framed differently, than the factors judges were permitted to consider in deciding claims for fees. *See, e.g., St. Jude*, 2012 WL 8009745.

<sup>66</sup> *See supra* note 62 and accompanying text (explaining the Supreme Court's lodestar approach to reasonable attorney's fees).

<sup>67</sup> *Green v. BMW of N. Am., LLC*, 826 N.W.2d 530 (Minn. 2013) (citing *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542 (Minn. 1986)) (adopting the Supreme Court's lodestar approach to reasonable attorney fees under civil rights statutes as a “sensible and fair approach” to determine reasonable attorney fees under the Minnesota Securities Act).

reasonable value of the legal services,' the [fact-finders] should consider 'all relevant circumstances.'"<sup>68</sup> The Minnesota Supreme Court has identified six specific factors to be considered in determining reasonableness of attorney fees: (1) "the time and labor required;" (2) "the nature and difficulty of the responsibility assumed;" (3) "the amount involved and the results obtained;" (4) "the fees customarily charged for similar legal services;" (5) "the experience, reputation, and ability of counsel;" (6) and "the fee arrangement existing between counsel and client."<sup>69</sup> An examination of each of these factors reveals the practical problems that will arise in having juries decide these claims.

### ***1. Challenges During the Discovery Process***

The practical challenges of trying attorney-fee claims to a jury will begin early in the life of a lawsuit. In cases where the liability phase and attorney fee claim would be tried before a jury in the same trial or immediately after the same trial, discovery by the party seeking attorney-fee records will probably be sought early in the litigation. While extensive discovery of attorney-fee claims has not been commonplace when these claims were decided exclusively by judges, more comprehensive and detailed discovery requests could become commonplace in the post-*United Prairie* world because lawyers will be presenting their claims to lay juries. These lay jurors will have little to no experience with the billing practices and review of legal bills, and the attorney-fee claims will be presented in the same trial as the liability issues, or in cases where the attorney-fee issue is bifurcated: immediately after the liability phase.<sup>70</sup> As a result, lawyers will approach discovery on the attorney-fee issue much like they approach discovery on any other damage claim.<sup>71</sup> And because virtually everything on

---

<sup>68</sup> *Id.* at 536 (quoting *State v. Paulson*, 188 N.W.2d 424, 426 (Minn. 1971)).

<sup>69</sup> *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 621 (Minn. 2008).

<sup>70</sup> In cases where the attorney-fee claim is bifurcated, there will probably be the strong preference to use the same jury deciding the liability phase to decide the attorney-fee claim. Therefore, if liability is established, presentation of evidence on the attorney fee issue will most likely occur immediately after the jury returns a verdict on liability. This will be necessary to ensure that the court is not imposing any unnecessary hardship on the jury and minimizing the risk of a decision based on extrinsic information or extraneous influences. *See United States v. Heppner*, No. 05-94, 2006 U.S. Dist. LEXIS 54148, at \*12 (D. Minn. 2006) ("Extrinsic or extraneous influences may be grounds for impeaching a verdict, which include publicity received and discussed in the jury room, matters considered by the jury but not admitted into evidence, and communications or other contact between jurors and outside persons.").

<sup>71</sup> The majority's holding in *United Prairie* even characterized a claim for attorney fees based on a contract as an agreed element of damages under a contract. *United Prairie*, 813 N.W.2d at 59 ("When a party seeks attorney fees under the express provisions of a contract, the fees are an agreed element of damages available under the contract and are not collateral.").

which a lawyer works becomes relevant to the attorney-fee issue, the broad scope of discovery permissible under Rule 26.02 will be expansive. Regardless of the degree, any expansion in connection with discovery of attorney-fee records could pose significant challenges to the trial lawyers and district court judges litigating and trying attorney-fee claims at the same time as, or immediately after, a claim for liability.

*a. Production of Detailed Billing Records*

One of the cornerstones of a successful attorney-fee claim is establishing and documenting the time and labor required of the attorneys.<sup>72</sup> Because a jury will be asked to evaluate “the time and labor required,” discovery will need to be conducted to allow the jury to scrutinize the attorney time records and determine if the attorney has presented sufficient documentation to support the attorney fee claim.<sup>73</sup> In addition, because an attorney making a claim for attorney fees is required to “exercise ‘billing judgment’ . . . and maintain billing time records in a manner that will enable a reviewing [fact-finder] to identify distinct claims,” the bills submitted to the client, and paid, may be deemed discoverable under the broad scope of Rule 26.02 of the Minnesota Rules of Civil Procedure.<sup>74</sup>

Courts may even require the defending party to produce its billing records.<sup>75</sup> The discovery of billing records and client correspondence will raise significant concerns as this information will most likely contain attorney-client privileged communications, attorney work-product, mental impressions, and even litigation and trial strategy.<sup>76</sup> These concerns are particularly problematic for the party seeking attorney fees as it has the

---

<sup>72</sup> See *supra* text accompanying note 69 (detailing the factors courts look at when determining proper attorney fees).

<sup>73</sup> Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983).

<sup>74</sup> *Id.* at 437 (“[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.”).

<sup>75</sup> *Id.* at 433; see also MINN. R. CIV. P. 26.02 (“Parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.”).

<sup>76</sup> The Advisory Committee comments to Minnesota Rule of General Practice 119 specifically provided for *in camera* review or redaction of billing records to avoid this problem. MINN. GEN. R. PRAC. 119 advisory committee cmt. (1997) (“authoriz[ing] the court to review documentation required by the rule *in camera*” because *in camera* review or submission of redacted records “is often necessary given the sensitive nature of the required fee information and the need to protect the party entitled to attorneys’ fees from having to compromise its attorney’s thoughts, mental impressions, or other work product in order to support its fee application”).

ultimate burden to document and support its claim for fees.<sup>77</sup> As a result, while parties seeking fees may be able to redact billing records and communications to not disclose privileged information and protected work-product, they must balance the need for maintaining these privileges against the need to prove their claim for fees with sufficient certainty.<sup>78</sup>

The production of the billing records may also reveal information about litigation and trial strategy that is not otherwise privileged. Rule 26.05 imposes a duty upon parties to supplement their discovery responses as additional or corrective information becomes available. This means that parties will be required to provide opposing counsel with records showing time spent on the lawsuit as that information becomes available. And in the case where such bills are generated on a monthly basis and sent to clients, it may mean monthly updates of billing records to opposing counsel. Opposing counsel will then have the opportunity to not only discern litigation and trial strategies, but gauge how much the opposing party is spending on the lawsuit—information that could prove very useful in settlement negotiations.

While there may be some inherent “fairness” in requiring a party seeking reimbursement for its attorney fees to support its claim through documents that may call for some waiver of privilege and work-product protection (or at least time spent redacting bills and records to ensure that any waiver is limited), how will courts deal with litigants who have not put their own fees at issue in a lawsuit? Will they be required to shoulder the same burden as the moving party by producing potentially privileged communications and work-product containing their lawyers’ mental impressions? And if deemed discoverable, will this information be deemed relevant and admissible at trial?

In the only attorney-fee claim this author is aware of that has been tried to a jury in Minnesota, the party defending against the attorney-fee claim was not only required to produce its fee records, but the fees it incurred were a factor to be considered in determining the reasonable of the moving parties’ fees.<sup>79</sup>

The discoverability and scope of the billing records and client communications that must be produced will continue to be one of the thorniest issues district court judges and lawyers will have to grapple with in this post-*United Prairie* landscape.

---

<sup>77</sup> *Hensley*, 461 U.S. at 437 (“[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.”).

<sup>78</sup> *In re Stisser*, 818 N.W.2d 495, 509–10 (Minn. 2012) (affirming district court’s decision to deny attorney fees because the redacted invoices “did not supply the [opposing party] with any documentation on which to make a reasoned decision”); *Bores v. Domino’s Pizza LLC*, No. 05–2498, 2008 WL 4755834 (D. Minn. Oct. 27, 2008).

<sup>79</sup> *See* Jury Instructions, *St. Jude*, No. 62-CV-11-718, 2012 WL 8009745 (Minn. Dist. Ct. Sept. 14, 2012) (identifying “the amount of attorneys’ fees incurred by Defendants” as a factor “[i]n determining the amount of attorneys’ fees [plaintiff] reasonably incurred”).

*b. Depositions of Trial Counsel*

The production of billing records could very likely result in depositions of one or more of trial counsel, as these lawyers would know the most about the billing records and the work performed. Rule 3.7 of the Minnesota Rules of Professional Conduct prohibits a lawyer from serving as an “advocate at trial in which the lawyer is likely to be a necessary witness.”<sup>80</sup> The Rule is designed to avoid misleading or confusing the fact-finder because “[i]t may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.”<sup>81</sup> While the Rule includes an exception for “testimony relat[ing] to the nature and value of legal services rendered in the case,” this exception is predicated on presentation of the evidence to a judge, not a jury: “[m]oreover, in such a situation the judge has firsthand knowledge of the motion in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.”<sup>82</sup>

Lawyers served with deposition notices will not only be placed in the very unusual circumstance of having to offer testimony in the case they are litigating, but will have some tough decisions to make about the applicability of the exception to Rule 3.7 in an adversarial setting.

*c. Expert Testimony*

Before *United Prairie*, judges made determinations regarding the reasonableness of attorney-fee claims without the need for expert testimony.<sup>83</sup> There have even been situations where juries deciding “free-standing” attorney-fee claims have decided the reasonableness of attorney-fee claims without the need for expert testimony.<sup>84</sup> Lawyers will have to decide whether experts are necessary to prove and defend against a claim for attorney fees. Most cases with even some level of sophistication will most

---

<sup>80</sup> MINN. RULES OF PROF'L CONDUCT R. 3.7.

<sup>81</sup> *Id.* at cmt. 2 (“The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.”).

<sup>82</sup> MINN. RULES OF PROF'L CONDUCT R. 3.7; *id.* at cmt. 3.

<sup>83</sup> *See, e.g., Tracy v. Perkins-Tracy Printing Co.*, 153 N.W.2d 241, 247 (Minn., 1967) (holding that the trial judge was “justified” in deciding an attorney-fee claim “without the necessity of soliciting expert opinions on the question”).

<sup>84</sup> *See Wojan v. Faul*, 64 N.W.2d 140, 143 (Minn. 1954) (holding that in a case seeking recovery of fees expended in a separate lawsuit, “[t]here is no requirement that a jury award for attorneys’ fees . . . be based on expert testimony”).

likely result in the use of attorney-fee experts to help the jury understand the claim for attorney fees and testify about each of the relevant lodestar factors.

## **2. Difficulties at Trial**

### *a. Trial Counsel as a Witness*

The ethical concerns posed by the potential application of Rule 3.7 of the Minnesota Rules of Professional Conduct to depositions of trial counsel apply equally, if not more acutely, to trial counsel who may be called as witnesses during trial. As a result, trial lawyers will have to decide whether Rule 3.7 would bar them from serving as an advocate in the same trial in cases where attorney fee claims are presented simultaneously, or shortly after a claim for liability.<sup>85</sup> This would be true even if the lawyer were able to present evidence on the attorney-fee claim through a different witness (e.g., client and expert witness), because opposing counsel may still want to cross-examine the lead counsel for a variety of fact-gathering and strategic reasons.

Aside from the ethical questions posed, there are significant barriers to the credible presentation of evidence that lawyers trying cases without the assistance of co-counsel would face. Imagine the scenario where a lawyer in these circumstances deems it necessary to introduce evidence of the lawyer's billing practices and rebut a specific allegation by opposing counsel regarding the lawyer's bills. Does the lawyer have to get on the stand? Must the lawyer then elicit testimony in a question and answer format? The lawyer will then have the unenviable task of standing in front of the same jury to deliver closing remarks. What will the jury think of the lawyer after the lawyer spent time on the stand as a witness? And what becomes of the admonition in the comments to Rule 3.7 which cautions against prejudicing the opposing party by confusing the jury as to which statements of the lawyer "should be taken as proof or as an analysis of the proof?"<sup>86</sup>

These are just a few examples of the numerous scenarios which will place lawyers in, at best, an uncomfortable position, and at worst, an ethical catch-22—a problem for which the Rules of Professional Conduct currently provide no clear guidance.

### *b. Potential Relevance of Otherwise Inadmissible Evidence*

Minnesota law requires a fact-finder determining the reasonableness and amount of an attorney-fee award to account for "all relevant

---

<sup>85</sup> MINN. RULES OF PROF'L CONDUCT R. 3.7.

<sup>86</sup> See *supra* text accompanying notes 82–84 (explaining MINN. RULES OF PROF'L CONDUCT R. 3.7).

circumstances,” including “the time and labor required,” “the nature and difficulty of the responsibility assumed,” and “the amount involved and the results obtained.” Accordingly, the jury may be exposed to information that would otherwise be irrelevant and inadmissible to resolving the merits of the underlying dispute because that same information is necessary and relevant in deciding the attorney-fee claim. As a result of reviewing attorney fee records, jurors may learn that the parties engaged in settlement negotiations and discussions, what fee arrangements exist between the lawyer and client, fee arrangements with other clients, motion practice before the court, the types and number of motions brought by the parties and their success or failure, disputes over discovery and discovery motions, what evidence the parties sought to exclude, and a host of other matters.<sup>87</sup> Consequently, the jury would be allowed “to look behind the curtain of a case presented to them . . . .”<sup>88</sup>

*c. Expert Testimony at Trial*

Expert testimony will most likely be necessary at trial to help jurors understand the intricacies of billing practices and decide the amount and reasonableness of the fee award.<sup>89</sup> The inclusion of attorney-fee experts to educate jurors will certainly lead to higher costs and longer trials.

<sup>87</sup> See, e.g., MINN. R. EVID. 408.

<sup>88</sup> Circuit (now Chief) Judge Dennis Jacobs of the Second Circuit described the problem as follows in a concurring opinion:

[I]n my view, the only limitation on the practical ability of the jury to decide reasonable attorney’s fees in this case is that jurors cannot be expected to look behind the curtain of a case presented to them on the merits in order to decide the reasonable compensation of counsel. For jurors, the attorney’s fee issue will almost always be a different and disconcerting way of looking at the merits. Prevailing counsel should not have to disclose to the jury the need for *in limine* motions, the protective efforts employed in discovery, the pursuit of settlement, or the toil and calculation required to build a case that may have been promoted to the same jury as simple or self-evident. For these reasons, I agree that the amount of attorney’s fees reasonably incurred in a case tried to a jury cannot practically be decided by the jury and therefore presents an equitable question.

*McGuire*, 1 F.3d at 1316–17. *But see id.* at 1316 (citations omitted) (observing “that [the] difficulty [articulated by Judge Jacobs] could be mitigated if not eliminated by bifurcating the issues of liability for fees and the amount of fees, the procedure followed in a case cited in the concurring opinion”).

<sup>89</sup> See *supra* notes 83–84 and accompanying text (explaining how expert testimony can be used to determine attorney fees). The majority in *McGuire* also referred to the complexities of educating a lay jury about billing practices. See *McGuire*, 1 F.3d at 1316 (citations and footnote omitted) (“In contrast, if the parties submitted evidence of the amount of attorneys’ fees to a jury at trial, the time spent acculturating the jury to the mysteries of attorneys’ hourly rates and incidental charges, and cross-examining about those matters, would likely increase fees and generate inconsistent awards.”).

*d. Estimating Attorney Fees Through the Close of Trial*

Because attorney fees will continue to be incurred through trial, litigants will be required to estimate the amount of fees through the end of trial. As the Second Circuit has observed:

A jury would have to keep a running total of fees as they accrued through summations and then predict future fees from post-trial proceedings and motions. The prospect of such a trial evokes images of an attorney struggling to prove the amount of fees to which he is entitled, but never being able to do so because he must prove the value of his last words even as he speaks them, and also the value of words yet unuttered and unwritten.<sup>90</sup>

*e. Estimating Attorney Fees for Post-Trial Motions and Appellate Fees*

Any attempts to estimate attorney-fee costs for post-trial motions, appealing any portion of the verdict, or defending against any such appeal are even more problematic.<sup>91</sup> As difficult as it may be to predict future fees through the end of trial, predicting fees for post-trial and appellate work may be more challenging; while there is certainty that trial counsel will incur fees through the closing argument on cases submitted to a jury, the type, number, and scope of post-trial and appellate work necessary would be speculative. This could result in lawyers getting underpaid if the appeal requires far more work than anticipated, or even more troubling, getting over-paid for work they never end up performing (e.g., where the jury awards fees for appellate work, but the losing party decides to not pursue an appeal).<sup>92</sup> To complicate matters even further, juries will have to perform this task without knowing whether the lawyer and the lawyer's client will succeed in any of the post-trial and appellate motions.

---

<sup>90</sup> *McGuire*, 1 F.3d at 1316.

<sup>91</sup> Attorney fees have been awarded for appellate work pursuant to a statute authorizing an award of attorney fees. *Johnson v. City of Shorewood*, 531 N.W.2d 509, 511 (Minn. Ct. App. 1995) (citing *Hughes v. Sinclair Mktg., Inc.*, 375 N.W.2d 875, 880 (Minn. Ct. App. 1985), *aff'd in part, rev'd in part*, 389 N.W.2d 194 (Minn. 1986)).

<sup>92</sup> While there is a possibility of "over-payments" in similar future lost-profits calculations (e.g., the plaintiff's mitigation efforts were more successful than anticipated), it will be very easy to compare what actually happened on appeal (and the amount of fees) in a short period of time with absolute certainty. This may provoke the losing party to vacate the portion of the verdict on future fees and threaten the finality of the verdict.

*f. Pre-Judgment Interest Under Minn. Stat. § 549.09*

Minn. Stat. § 549.09 provides, among other things, for the award of pre-judgment interest calculated “from the time of the commencement of an action.”<sup>93</sup> The statute provides for certain exceptions.<sup>94</sup> One of the exceptions expressly precludes pre-verdict interest “awarded on . . . that portion of any verdict . . . which is founded upon interest, or costs, disbursements, *attorney fees*, or other similar items *added by the court* or arbitrator.”<sup>95</sup>

Does a court faced with an attorney-fee award from a jury apply the literal language of Minn. Stat. § 549.09 and find that the exception does not apply because there is no award of attorney fees “*added by the court*”?<sup>96</sup> Or does the court look beyond the literal language of the statute?

Minnesota’s pre-verdict interest statute has already proved to be problematic in the wake of *United Prairie*.<sup>97</sup> One court that considered this issue since *United Prairie* has followed the plain language of the statute and refused to apply the exception.<sup>98</sup> In doing so, the Court explained the very difficult decision it faced in the wake of *United Prairie*:

There is no doubt that this is a troubling result that may require legislative attention. It seems indisputable that but for *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equipment, LLC*, 813 N.W.2d 49 (Minn. 2012) . . . the attorney’s fees sought by [Plaintiff] would have been ‘added by the court’ under Rule 119 of the general rules of practice. And if the attorney’s fees were ‘added by the court’ preverdict interest would not accrue on them, and [Defendant’s] ultimate liability would be about \$140,000 less than it is now. But the language of the statute is so plain . . . that the Court must apply the statute as written. The Court cannot conclude that [Defendant] has met these very exacting standards for deviating from clear and unambiguous language in this case.<sup>99</sup>

<sup>93</sup> MINN. STAT. § 549.01, subd. 1(b) (2012).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*, subd. 1(b)(5) (emphasis added).

<sup>96</sup> It is possible to read *United Prairie* broadly to conclude that a party is entitled to a jury trial includes a claim for costs. Regardless of the identity of the decision-maker, the problems posed by apparent divergence between the intent of the statute—enacted prior to *United Prairie* under the assumption that all claims for attorney fees would be presented to judges—and the literal language of the statute will need to be addressed.

<sup>97</sup> See *St. Jude Medical S.C., Inc. v. Biosense Webster Inc.*, No. 62-CV-11-718, 2012 WL 8009744 (Dec. 4, 2012) (ordering interest and taxation of costs and disbursements).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at n.4.

### 3. *The Increase in Complexity and Burden on the Trial Judge*

The uncertainty of adapting to a new system with a host of practical difficulties will unquestionably require more time from the district judges from the outset. In the pretrial stage, this will require increased involvement in pretrial case management, discovery management, and qualification of experts. At trial, this will mean a longer (and, in many cases, bifurcated), more complex trial that will require “time spent acculturating the jury to the mysteries of attorneys’ hourly rates and incidental charges, and cross-examining about those matters, would likely increase fees and generate inconsistent awards.”<sup>100</sup> The prospect of adding this new breed of cases and the resulting complexities to the dockets of already very busy district court judges with dwindling resources is problematic and frustrates the much-needed work of the Minnesota Supreme Court Civil Justice Reform Task Force to reduce the costs of litigation and improve efficiency.<sup>101</sup>

### 4. *The Increased Costs of Trying a Lawsuit within a Lawsuit*

Litigation in the twenty-first century is slow and expensive.<sup>102</sup> Unfortunately, *United Prairie* has the potential to increase an already expensive proposition by turning the attorney-fee claim into something the Minnesota Supreme Court itself has cautioned against: “. . . a second major litigation.”<sup>103</sup> Moreover, the good work of the Minnesota Civil Justice Reform Task Force will be challenged because jury trials of attorney-fee claims will test the ability of trial judges and lawyers to manage cases cost effectively and efficiently. This will most likely lead to delays and higher

---

<sup>100</sup> *McGuire*, 1 F.3d at 1316.

<sup>101</sup> See *infra* text accompanying notes 109–114 (describing the efforts of the Civil Justice Reform Task Force).

<sup>102</sup> As the Minnesota Civil Justice Task Force has observed, based on the experience of its own members and national survey data:

The reasons for the high cost include excessive discovery and expense related to discovery management, particularly e-discovery. High litigation costs cause parties to forgo claims that do not exceed the litigation expenses. The most commonly cited monetary threshold for pursuing a case is \$100,000. Some task force members feel that the local threshold may be closer to \$200,000. The surveys and studies also present evidence of agreement that litigation costs also drive cases to settle for reasons unrelated to the substantive merits of the claims or defenses.

MINN. CIVIL JUSTICE REFORM TASK FORCE, FINAL REPORT 11 (Dec. 23, 2011), <http://archive.leg.state.mn.us/docs/2012/other/120214.pdf>.

<sup>103</sup> *Hippert v. Ritchie*, No. A11-152, 2012 Minn. LEXIS 689, at \*13 (Minn. Aug. 16, 2012) (quoting *Hensley*, 461 U.S. at 437 (“[A] request for attorney’s fees should not result in a second major litigation”)).

costs, turning the attorney-fee claim into the proverbial tail wagging the dog.<sup>104</sup>

### **5. Insufficient Safeguards against Erroneous Decision-Making**

The common law gives great deference to jury verdicts. Generally, after the jury has been discharged, no affidavit of a juror or a third person concerning a juror's remarks will be received to impeach the verdict where the facts sought to be shown inherent in the verdict itself.<sup>105</sup> Even an "attempt to show that the jurors misapprehended the evidence, or did not understand the charge of the court, or that they misconceived the legal consequences of their factual findings" cannot be used to impeach a jury verdict.<sup>106</sup> Because courts and parties cannot inquire into how a jury reached its decision beyond an analysis of its responses to the verdict form jury decisions essentially become a "black box" that cannot be examined.

While this approach has significant advantages and helps preserve finality and order in the judicial system, it poses a unique problem in trying attorney-fee claims in cases where bifurcation is not appropriate or possible.<sup>107</sup> In these cases, there is a very real danger that a jury may, consciously or unconsciously, make a decision on liability and damages based on consideration of evidence only presented to prove the attorney-fee claim (e.g., deciding that the defendant is liable because it participated in settlement negotiations, deciding that the plaintiff should recover a smaller portion of its claim because it is receiving a large attorney fee award, or concluding that one of the parties is trying to "hide something" from the jury by moving to exclude certain evidence). Courts may use cautionary instructions to make clear that certain evidence should only be used for a limited purpose, but these warnings have been shown to be ineffective, and at times to even highlight the inadmissible evidence.<sup>108</sup> As a result, even if

---

<sup>104</sup> On November 24, 2010, Chief Justice Gildea, building on the efforts of former Chief Justice Eric Magnuson, formed the Minnesota Civil Justice Reform Task Force ("Task Force"). The Task Force described its mission as follows:

The task force began its work by identifying the issues we face—namely excessive cost and delay that affect both administrative efficiency and the accessibility of our civil justice system. Our courts must remain relevant to Minnesota litigants by providing a forum for just, prompt, and inexpensive resolution of civil disputes.

MINN. CIVIL JUSTICE REFORM TASK FORCE, *supra* note 102, at 4.

<sup>105</sup> Zimmerman v. Witte Transp. Co., 259 N.W.2d 260, 264 (Minn. 1977).

<sup>106</sup> Nebben v. Kosmalski, 239 N.W.2d 234, 238 (Minn. 1976) (citation omitted).

<sup>107</sup> "The rationale for the exclusion of juror testimony about a verdict or the deliberation process is to protect juror deliberations and thought processes from governmental and public scrutiny and to ensure the finality and certainty of verdicts." *Id.* (citing 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6072, at 403 (2d ed. 1990); MINN. R. EVID. 606, advisory committee cmt. (1989)).

<sup>108</sup> Psychological studies show that:

courts use these safeguards, there is the very real possibility that jurors may be making decisions based on evidence otherwise never seen or heard by the jurors. Because of the potential threat to the integrity of the jury system, existing statutes and rules must be revised to help the district court judges, trial lawyers, and litigants.

### ***B. How to Help District Court Judges and Lawyers***

While uncertainty in a common law system following a landmark decision is not unusual, the unique practical challenges posed by trying attorney-fees claims at the same time as a claim for liability sets this decision apart. Some of the uncertainty surrounding *United Prairie* (e.g., whether the defending party's fees are discoverable and subsequently admissible at trial; whether *United Prairie* applies outside of the contractual attorney-fee context; what factors jurors may consider in determining the reasonableness of an attorney-fee claim) will need to be resolved by Minnesota's appellate courts.

*United Prairie*, however, poses immediate procedural and case management challenges to district judges and trial lawyers. These pressing practical challenges already impact settlement negotiations, place an increased burden on the civil dockets of already understaffed district court judges, and will lead to an increase in litigation costs and delays in getting to trial—all matters of the utmost importance to Minnesota's judges, lawyers, and citizens.

These functional challenges are best addressed by recognizing the problem, then cooperatively and proactively working to minimize its impact on the cost-effective and efficient administration of justice. This can begin with the thoughtful use of existing rules by lawyers and district court judges to efficiently manage cases. The Minnesota Supreme Court and its committees can ease the burden on the district court judges, lawyers, and litigants by considering revisions to court rules and practices and build on the July 1, 2013, amendments to the Minnesota Rules of General Practice.<sup>109</sup>

---

Limiting information that admonish jurors to ignore inadmissible information, or to use information for certain purposes but not others (e.g., that they may use a defendant's prior record as an indicator of deception if the defendant testifies, but may not use prior record information as an indicator of guilt) have been shown not only to be ineffective, but also in some cases to produce a "backfire effect" . . . where jurors pay undue attention to inadmissible information after judicial admonitions.

1 JOEL D. LIBERMAN & DANIEL A. KRAUSE, JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES, PSYCHOLOGY IN THE COURTROOM (MPG Books, Ltd. 2009).

<sup>109</sup> Order Adopting Amendments to the Rules of Civil Procedure and Rules of Practice Relating to the Civil Justice Reform Task Force (Minn. Feb. 4, 2013) [hereinafter Adopting Order], available at [http://www.mncourts.gov/Documents/0/Public/Clerks\\_Office/](http://www.mncourts.gov/Documents/0/Public/Clerks_Office/)

The Minnesota Lawyers Professional Responsibility Board should provide some clear guidance to lawyers on the applicability of Rule 3.7 to attorney-fee claims presented to juries.

Finally, the Minnesota legislature should amend Minn. Stat. § 549.01 to make clear that litigants are not entitled to pre-verdict interest on attorney fees regardless of whether the fees are awarded by a court or a jury.

### ***1. Using Existing Rules to Cost-Effectively and Efficiently Manage Cases***

The Minnesota Rules of Civil Procedure were amended effective July 1, 2013.<sup>110</sup> The amendments are designed to “facilitat[e] more cost effective and efficient civil case processing.”<sup>111</sup> Among other things, the amendments: (1) permit judges to consider proportionality in determining the scope of discovery; (2) mandate automatic initial disclosures much like the Federal Rules of Civil Procedure; (3) require a more focused discovery plan and conferences between the parties and with the court; (4) call for the expedited processing of nondispositive motions, and (5) a introduce a new Complex Case Program.<sup>112</sup>

As a result, judges have more tools to better manage their civil dockets and reign in a steady rise in discovery costs.<sup>113</sup> Many of these amendments and case management tools can be effectively used to help district judges and lawyers more efficiently manage attorney-fee claims that may be decided by juries.<sup>114</sup> Although litigation of attorney-fee claims that may be submitted to a jury will most likely result in increased costs and delays in getting to trial, district court judges should consider using the new proportionality restrictions as a tool to minimize the likelihood that an attorney-fee claim turns into “a second major litigation.”<sup>115</sup>

#### *a. The Need for Early Case Management Conferences*

Early case management and planning will be critical. The early discovery conferences, informational statements, and subsequent scheduling orders should be used to address the practical problems associated with scope of discovery, depositions of trial counsel, and protection of the attorney-client privilege and work-product that may arise in attorney-fee claims which

---

Rule%20Amendments/2013-02-04%20Order%20Civ%20Proc%20&%20Gen%20RIs%20Amendments.pdf.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at amended Rules 26.01, 26.02, 26.06, 37, 111, 115.04, and 146.

<sup>113</sup> *See* Adopting Order.

<sup>114</sup> *Id.*

<sup>115</sup> *See supra* text accompanying notes 103–104 (explaining how the current rules governing attorney-fee claims will lead to a “second major litigation”).

may be submitted to a jury. These early conferences, both between the parties and with the court, should give district court judges a preview of the potential issues and an opportunity to make some informed decisions about case management.

*b. Bifurcation*

Bifurcation will help alleviate some of the difficulties in presenting an attorney-fee claim to a jury depending on how the case is bifurcated. For example, it would reduce (but not eliminate) the impact of having trial counsel as a witness; it would reduce (and probably eliminate) the dangers of having jurors' liability verdict improperly influenced by evidence relevant to the attorney-fee claim (e.g., settlement negotiations); it would reduce (and probably eliminate) the dangers of presenting jurors with detailed information about attorney-fee records. The early case management conference can help the court and the parties decide whether bifurcation is appropriate and, if so, how the case should be bifurcated (liability and breach of contract damages exclusive of attorney fees first, followed by the attorney-fee phase; liability first, followed by breach of contract damages, including attorney fees).<sup>116</sup> Although there may be reasons why bifurcation is not appropriate in some cases, early case management and solicitation of the parties' positions on this issue will help the court better manage the litigation and provide the parties with some much needed predictability.

*c. District Courts Should Rule on Challenges to Attorney-Fee Jury Trial Demands as Soon as Practicable*

The early case management conference will give the district judges enough information to determine if the parties disagree about the applicability of *United Prairie*. In particular, there will be a lot of uncertainty regarding the applicability of *United Prairie* beyond the contractual attorney-fees context. Courts would be well-advised to decide whether any of the claims before it entitle a party demanding a jury trial on attorney fees to this right as soon as practicable. The early resolution of this decision, and any certification for interlocutory appeal, could conserve a lot of resources in cases where the court finds that there is no right to a jury trial on attorney fees, by avoiding all the associated costs, discovery motions, and retention of expert witnesses.

---

<sup>116</sup> See Adopting Order.

*d. Classifying Cases Involving Jury Trials on Attorney Fees as Complex Cases*

Early case management conferences might also lead to the designation of the case as a “Complex Case” under new Minnesota Rule of General Practice 146 or appointment of a special master pursuant to Rule 53.<sup>117</sup> Both options would allow the court to more efficiently manage the discovery process and issue orders, reports, and recommendations on discovery matters related to the attorney-fee claim.<sup>118</sup>

**2. Amendments and Revisions to Existing Rules**

In addition to the case management tools district court judges and lawyers can employ, several amendments and revisions to existing rules should be considered.

*a. Revisions to the Minnesota Rules of Civil Procedure and General Rules of Practice*

The Minnesota Rules of Civil Procedure should be revisited to determine if the mandatory supplementation requirements of Rule 26.05 apply to the production of attorney-fee records, including billing statements and fee agreements.<sup>119</sup>

Minnesota Rule of General Practice 119 should be revised to account for the reality that not all claims for attorney fees will be made by motion.<sup>120</sup> The Supreme Court Advisory Committee on the General Rules of Practice should consider revising Rule 119 to identify a standard procedure for presenting attorney-fee claims to juries, much like the standard procedure outlined for such claims made by motion set out in the existing Rule 119. The revised Rule should provide a standardized set of guidelines district court judges and lawyers can use in managing attorney-fee claims. The revised Rule should provide enough certainty so the procedures employed maintain a base-level of uniformity across judges and courts, but provide enough flexibility for the district court judges to use their discretion to tailor the procedure to suit each case.

*b. Revisions to Minnesota Civil Jury Instruction Guide*

The Minnesota District Judge’s Association’s CIVJIG Committee should consider revisions to the jury instruction guide to include model

---

<sup>117</sup> See *id.*; MINN. R. CIV. P. 53.

<sup>118</sup> Adopting Order.

<sup>119</sup> MINN. R. CIV. P. 26.05.

<sup>120</sup> MINN. R. GEN. PRAC. 119 (1998).

instructions and special verdict forms on the issue of attorney fees to juries.<sup>121</sup> Aside from the benefits of standardizing the instructions given to juries, any comments or revised instructions by the Committee could provide district court judges and lawyers with some much needed guidance on whether the factors jurors are to consider in deciding attorney-fee claims are any different from the factors judges have used to resolve attorney-fee claims in the past.<sup>122</sup>

### **3. Minn. Stat. § 549.09 Should be Amended**

Minn. Stat. § 549.09 needs to be amended to make clear that the exception precluding pre-verdict interest “awarded on . . . that portion of any verdict . . . which is founded upon interest, or costs, disbursements, *attorney fees*, or other similar items *added by the court* or arbitrator” applies with equal force to an award made by a jury.<sup>123</sup> Absent such a modification, district court judges have to: (1) apply the plain and unambiguous language of the statute and arguably undermine the spirit of the statute; (2) divine the legislature’s intent—because it concludes that the legislature never contemplated the possibility that anyone but the court or an arbitrator would be awarding attorney fees, costs, or disbursements; or (3) conclude that the term “court” applies to attorney fee awards by judges and juries.

### **4. Minnesota Rules of Professional Conduct Rule 3.7 Should Be Revisited**

The Lawyers Professional Responsibility Board should consider whether the exception outlined in Comment 3 to Rule 3.7 applies when the lawyer is presenting the information to a jury in the same proceeding in which the lawyer is also serving as an advocate for the lawyer’s client.<sup>124</sup> Absent such a consideration, lawyers compelled to testify, or called to testify at trial by opposing counsel, may be subject to, among other things, ethics complaints by unhappy clients, and serve as an unresolved question for all

---

<sup>121</sup> 4 & 4A MINN. PRACTICE SERIES (JURY INSTRUCTION GUIDES—CIVIL) (5th ed.). The CIVJIG Committee may find it appropriate to wait for direction from the appellate courts before proposing model instructions.

<sup>122</sup> For example, as discussed previously, in *St. Jude*—the first jury trial on the issue of attorney fees—the district court permitted the jury to consider “the amount of attorneys’ fees incurred by Defendants in th[e] case.” See Jury Instructions, *supra* note 79. This is significant because this factor was presented to the jury *in addition* to the factors otherwise routinely considered by judges deciding “the fees customarily charged for similar legal services.” *Id.*

<sup>123</sup> MINN. STAT. § 549.09, subd. 1(b)(5) (2012) (emphasis added).

<sup>124</sup> See *supra* text accompanying notes 82–84 (outlining Minnesota Rule of Professional Conduct 3.7 and its significance to determining attorney fees).

trial lawyers who take on a case with the potential for a jury trial on attorney fees.<sup>125</sup>

#### IV. CONCLUSION

It is undeniable that litigating and trying a claim for attorney fees to a jury in the same proceeding as, or immediately after, a claim for liability poses significant practical challenges to district court judges and lawyers. Many of these changes precipitated by *United Prairie* will lead to increased costs, require more time and effort from the district court in case management, and lead to potential delays in getting to trial. Although the district court judges and trial lawyers can use some of the existing rules to minimize the costs of litigation and delays, they will need some help.

This help can take a variety of forms, but can come in the form of amendments to the Minnesota Rules of Civil Procedure, the Minnesota General Rules of Practice, the Minnesota Jury Instructions Guide, the Minnesota Rules of Professional Conduct, and an amendment to Minnesota's statute permitting interest on verdicts, awards, and judgments. Ultimately, the district court judges and trial lawyers will do what they do best and adapt, but it seems only fair to give them some tools to help them along the way.

---

<sup>125</sup> See *supra* text accompanying notes 82–84 (detailing how the Minnesota Rules of Professional Conduct prohibit lawyers from testifying in certain cases).