



DAVID F. HERR

Of Counsel

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OVERVIEW

David Herr, a member of Maslon's Litigation Group, is a highly regarded appellate lawyer and complex case litigator. He is frequently sought out to provide practical and sophisticated advice on how to resolve difficult, multi-party disputes in trial courts and arbitral forums as well as in the appellate courts.

David is past president of the American Academy of Appellate Lawyers, past president of the Academy of Court Appointed Masters, and regularly argues cases in the Minnesota appellate courts and the Eighth Circuit Court of Appeals. He annotates the Federal Judicial Center's *Manual for Complex Litigation*, published and distributed nationally by Thomson West.

ADDITIONAL QUALIFICATIONS

Appointed by Minnesota Supreme Court to serve as Reporter to three of its advisory committees

Trained Arbitrator, American Arbitration Association

Appointed Special Master by several courts in complex, class-action litigation

Has successfully resolved over 100 civil disputes by mediation or arbitration

Qualified neutral under Rule 114 of the Minnesota General Rules of Practice, Minnesota Supreme Court, since 1994

SELECTED EXPERIENCE

- *Commonwealth Land Title Ins. Co. v. Historic Ivy Tower, LLC, et al.*, A13-1621 (Minn. 2014). Maslon provided appellate counsel in this million-dollar dispute arising from the refinancing of a commercial development project.
- *Curtis v. Altria Group, Inc. and Philip Morris, Inc.*, A10-0215 (Minn. 2012). The Supreme Court rejected an effort by plaintiffs to bring a private class action for damages under the Minnesota Consumer Fraud Act following litigation and settlement of claims by the Attorney General.

AREAS OF PRACTICE

Litigation

- Appeals
- Business Litigation
- Tort & Product Liability

BAR ADMISSIONS

Minnesota, 1978

U.S. District Court

- Minnesota, 1978
- E.D. Michigan, 1998
- E.D. Wisconsin, 1986

U.S. Court of Appeals

- Third Circuit, 1982
- Fifth Circuit, 2000
- Sixth Circuit, 1998
- Seventh Circuit, 2004
- Eighth Circuit, 1978
- Ninth Circuit, 1998
- Tenth Circuit, 1998
- Eleventh Circuit, 1999
- Federal Circuit, 1990

U.S. Court of Federal Claims, 1986

U.S. Supreme Court, 1989

EDUCATION

William Mitchell College of Law
J.D., *cum laude*, 1978

University of Colorado at Boulder
M.B.A. 1977 B.A. 1972

- *McCaughtry v. City of Red Wing*, 808 N.W.2d 331 (Minn. 2011). The Supreme Court held that a challenge to the constitutionality of a rental inspection ordinance presented justiciable controversy. Maslon represented friends of the Court whose position was adopted by the court.
- *U.S. Bancorp v. Mitgang*, No. A09-1472 (Minn. Ct. App., June 1, 2010). Obtained reversal of decision misconstruing recourse agreement in conjunction with multiple loans.
- *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010). Counsel for amici curiae providing constitutional law support for Governor in high-profile "unallotment" decision.
- *Savig v. First Nat'l Bank of Omaha*, 781 N.W.2d 335 (Minn. 2010). Established standard for garnishment of jointly owned accounts, resolving persistent problem for creditors.
- *In re Kaiser Aluminum Corp.*, 350 Fed. App'x 775 (3rd Cir. 2009). Argued and won affirmance of \$400,000,000 decision in bond indenture case.
- *Clifford L. Whitaker, et al. v. 3M Co.*, 764 N.W.2d 631 (Minn. Ct. App. 2009). Established standards for obtaining class certification (counsel for Minnesota Chamber of Commerce, amicus curiae).
- *Otter Tail Power Co. v. Surface Transportation Board*, Nos. 06-1962 & 06-2412 (8th Cir. 2007). Appellate challenge to massive rate proceeding before Board involving construction of interstate railroad.
- *OneBeacon Ins. Co. v. A.P.I., Inc.*, No. A06-1229 (Minn. Ct. App.). Appellate counsel to respondent on appeal from \$60 million insurance coverage judgment.
- *Commandeur LLC v. Howard Hartry, Inc.*, 724 N.W.2d 508 (Minn. 2006). Won reversal of dismissal of appeal for untimeliness due to court of appeals failure to recognize holiday.
- *Jaenty, Inc. v. Northern States Power Co.*, A04-901 (Minn. 2006). Won affirmance of appellate court decision affirming dismissal of actions relating to gas explosion on statute-of-limitations grounds; argued on behalf of several separately represented respondents.
- *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006). Appellate counsel for Minnesota Lawyers Mutual as amicus curiae in case involving novel interpretation of Minnesota's statute of limitations for malpractice actions arising from drafting of antenuptial agreements.
- *State of Minnesota v. Philip Morris USA, Inc.*, 713 N.W.2d 350 (Minn. 2006). Appellate counsel on unsuccessful challenge that health impact fee of 75 cents did not violate 1998 settlement agreement between state and cigarette manufacturers and distributors.
- *MedCam, Inc. v. MCNC*, 414 F.3d 972 (8th Cir. 2005). Court declined to reverse district court order compelling arbitration.
- *Afremov v. AGA*, numerous reported and unreported decisions. This shareholder dispute involved appellate proceedings arising from a single trial court action, applications for extraordinary writs, discretionary appeals, interlocutory appeals as of right, and petitions for further review by the Minnesota Supreme Court of numerous Court of Appeals decisions. The Maslon appellate team prevailed in all of these except one ancillary award of sanctions that was reversed by the court of appeals after the case had settled on all merits issues.
- *Triple Five of Minnesota, Inc. v. Simon*, 404 F.3d 1088 (8th Cir. 2005). Won partial reversal in case involving complex claims of ownership and partnership rights in Minnesota's Mall of America.
- *Tuttle v. Lorrillard Tobacco Co.*, 344 F.3d 753 (8th Cir. 2005). Affirming dismissal of variety of tort claims.
- *Broek v. Park Nicollet Health Services et al.*, 660 N.W.2d 439 (Minn. Ct. App. 2005). Obtained reinstatement of medical malpractice claim following dismissal on statute of limitations grounds.
- *Roehrdanz v. Brill*, 682 N.W.2d 626 (Minn. 2004). Obtained reversal of court of appeals decision on proper method of service of notice of removal.
- *Schumacher v. Tyson Fresh Meats, Inc.*, (8th Cir. 2004). Obtained affirmance of class certification in expedited appeal under Fed. R. Civ. P. 23(f).
- *Seed v. Astra Genstar P'ship*, 2003 WL 178790 (Minn. Ct. App. 2003).
- *Barbara Grutter v. Lee Bollinger, et al., and Jennifer Gratz and Patrick Hamacher v. Lee Bollinger, et al.*, 188 F.3d 394 (6th Cir. 1999), *aff'd* 123 S. Ct. 2411 (2003), *intervention appeal*, 288 F.3d 732 (6th Cir. 2002), *rev'd*, 123 S. Ct. 617 (2003) (two companion civil rights class actions).

- *In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46 (Minn. Ct. App. 2002), *aff'd in part*, 667 N.W. 2d 405 (Minn. 2003). Insurance coverage litigation and appeals involving over 100 parties.
- *Todd v. Ortho Biotech, Inc.*, 138 F.3d 733 (8th Cir. 1998), *cert. granted, vacated and remanded*, 525 U.S. 802 (1999). Won reversal of \$780,000 sexual harassment award on basis that trial court applied erroneous standard for finding liability under state and federal law.
- *Minnesota Min. & Mfg. Co. v. Nishika, Ltd.*, 565 N.W.2d 16 (Minn. 1997). On certified questions from Texas Supreme Court relating to multimillion-dollar UCC dispute.
- *In re Minnesota Asbestos Litigation*, 552 N.W.2d 242 (Minn. 1996), *rev'g* 540 N.W.2d 896 (Minn. Ct. App. 1995). Obtained reversal of case involving unconstitutional exercise of jurisdiction over Australian corporation; David Herr served as national coordinating counsel for client.
- *Independent School Dist. No. 622 v. Keene Corp.*, 511 N.W.2d 728 (Minn. 1994). Obtained reversal of multimillion-dollar punitive damage award, including fraud claim.
- *La Société Générale Immobilière v. Minneapolis Community Development Agency*, 44 F.3d 629 (8th Cir. 1994), *rev'g*, 827 F. Supp. 1431 (D. Minn. 1993). Special appellate counsel for appellant; obtained reversal of multimillion-dollar judgment.
- *Seagate Technology, Inc. v. Int'l Business Machines Corp.*, 962 F.2d 12 (8th Cir. 1992). Represented individual appellant and obtained vacation of preliminary injunction in complex trade secrets case; case stands as a leading case on "inevitable disclosure doctrine."
- *Minnesota Mining & Mfg. Co. v. Travelers Ins. Cos.*, 457 N.W.2d 175 (Minn. 1990). Counsel for plaintiff Tonka Corp. on question certified from federal court. Case established standards for issuance of coverage for environmental claims.
- *Uselman v. Uselman*, 464 N.W.2d 130 (Minn. 1990). Counsel for appellant in seminal case establishing standards for Rule 11 sanctions in Minnesota. Won reversal of \$180,000 sanction judgment; heard on accelerated review. Case remains leading sanctions case 20 years later.

LEADERSHIP & COMMUNITY

- Minnesota Supreme Court Advisory Committee: Rules of Civil Procedure, Reporter since 1983; Uniform Local Rules, Reporter 1989-1992; General Rules of Practice, Reporter since 1992; Civil Appellate Procedure, Co-Reporter since 1996
- Minnesota State Bar Association: Civil Litigation Section, past Chair; Task Force on Complex Litigation, past Chair
- Ramsey County Bar Association
- Minnesota Supreme Court Historical Society: Founding Member; Board of Directors 2008-2013; Treasurer 2007-2012
- William Mitchell College of Law: Partners-in-Progress Annual Fund Drive, past Chair
- United Hospital Foundation: Board of Directors 2001-2016; past Chair
- Innocence Project of Minnesota: Board of Directors 2008-2013, Co-Chair 2011-2013
- USA Fencing: Board of Directors 2008-2012; Audit Committee 2009-2012 (USFA is the national Governing Board for the Olympic sport of Fencing.)

SELECTED HONORS

- **Pro Bono All Star**, Minnesota State Bar Association, 2020 (*Pro Bono All Star is a designation that recognizes MSBA members who have been recognized as North Star Lawyers for seven or more years.*)
- **Attorney of the Year**, *Minnesota Lawyer*, 2005, 2017
- **Senior Statesman in Chambers USA: America's Leading Lawyers for Business**, Appellate Litigation, Minnesota, 2017-2021
- **Recognized in Chambers USA: America's Leading Lawyers for Business**, Appellate Litigation, Minnesota, 2006-2021
- **Fellow**, American Academy of Appellate Lawyers, 1993–present; President, 2004-2005
- **North Star Lawyer**, Minnesota State Bar Association, 2012-2020 (*North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.*)

- **Francis McGovern Writing Award**, Academy of Court-Appointed Masters, 2017
- **Trustee of the Year Award**, United Hospital Foundation, 2015
- **Marcy S. Wallace Award of Excellence in Leadership**, William Mitchell Law Review, 2009
- **Selected for inclusion in *The Best Lawyers in America*®**, 1995-2022 in Bet-the-Company, Appellate Practice, and Commercial Litigation categories
- **Best Lawyers' Minneapolis Appellate Lawyer of the Year**, 2010
- **Recognized on Minnesota Super Lawyers® list**, 1994, 1997-2021 (*Minnesota Super Lawyers® is a designation given to only 5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.*)
- **Top 100 Minnesota Super Lawyers® list**, 2005-2014
- **Master of the Bench**, Warren E. Burger Inn of Court
- **Eighth Circuit Litigation Star**, *Benchmark Appellate*, 2012-2013
- **Leading Appellate Practitioner in the Eighth Circuit**, *Benchmark Litigation*, 2008-2011
- **Advocate's Award**, Civil Litigation Section of the Minnesota State Bar Association, 1999
- **Distinguished Alumnus Award**, William Mitchell College of Law, 1997
- **AV Preeminent**, Martindale-Hubbell®

SELECTED PRESENTATIONS

- Erica Holzer, Jevon Bindman, and David Herr to Present at Minnesota CLE's 2021 Civil Litigators Update
- 2021 Civil Litigators Update, co-chair, Minnesota CLE
- "Eighth Circuit Appellate Practice: Overview of Eighth Circuit Practice," moderator, Eighth Circuit Appellate Practice Manual Webcast Series, Minnesota CLE, 2020
- Co-Chair, 2020 Civil Litigator Update, Minnesota CLE, 2020
- "Curious Judge' Goes Googling," National Association of Appellate Court Attorneys Conference, 2019
- Co-Chair and Presenter, Civil Litigator's Annual Short Course, Minnesota CLE, 2019
- "Appeals: Repairing Mistakes on Appeal and Avoiding New Ones," webcast, Minnesota Lawyers Mutual, 2018
- "New Minnesota Civil Practice Rules – Practical Insight on the Extensive Amendments, Effective July 1," moderator, webcast, Minnesota CLE, 2018
- "Brief Legal Updates: New Developments in Real Estate, Family Law, Tax and Civil Litigation," Minnesota State Bar Association Convention, Minnesota CLE, 2018
- "New Minnesota and Federal Rules," The 2018 Civil Litigator's Annual Short Course, Minnesota CLE, 2018
- The 2018 Civil Litigator's Annual Short Course, Course Chair, Minnesota CLE, 2018
- "The Future of the Federal Rules of Appellate Procedure: A Discussion of AAAL's Ideas for Change," panel member, American Academy of Appellate Lawyers Fall Meeting, 2017
- "Case Management Strategies by Transferee Judges," panel member, Multi-district Litigation Roundtable, The George Washington University School of Law, 2017
- "The Realized Effects of the New Discovery Rules & How Strategy and Practice Are Changing," moderator, The 2017 Civil Litigator's Annual Short Course, Minnesota CLE, 2017
- "New Minnesota & Federal Rules – Including a New Timing Rule," The 2017 Civil Litigator's Annual Short Course, Minnesota CLE, 2017
- "ADR – Appellate Practice – Family Law Appellate Mediation Program," webcast, Minnesota CLE, 2016
- "What's New with Appellate Court Rules," co-moderator, webcast, Minnesota CLE, 2016
- "United States Supreme Court Update," co-moderator, webcast, Minnesota CLE, 2016
- "Minnesota Supreme Court Update," co-moderator, webcast, Minnesota CLE, 2016
- "Affirmative Action," The U.S. Supreme Court's Big New Decisions, Minnesota CLE, 2016
- "Ten (or so) Things Every Lawyer Should Know About Appeals," webcast, Minnesota CLE, 2016
- "Appeals and the Minnesota Supreme Court: Two New Justices Share Their Views and Experiences," co-moderator, webcast, Minnesota CLE, 2016
- "Questions & Answers," moderator, Evidence Tools for the Compleat Litigator, Minnesota CLE, 2016

- "New Federal and State Rules – Including the New Federal E-Discovery Rules," simulcast, The 2016 Civil Litigator's Annual Short Course, Minnesota CLE, 2016
- "What Every Civil Litigator Should Know About Multi-District Litigation and Class Actions," panelist, Minnesota CLE, 2016
- "The Ethics of Judicial Use of Internet Resources," panel member, Eighth Circuit Bar Association, 2015
- David Herr to Present on Developing Professionalism in Appellate Practice for AAAL
- "Significant Amendments to Minnesota General Rules of Practice and Rules of Civil Procedure," New Rules: Mandatory E-Filing Implementation, Minnesota CLE, 2015
- "Appellate Practice: Ethics on Appeal," co-moderator, webcast, Minnesota CLE, 2015
- "Deposition Obstructionism," ACTLM Spring Meeting, 2015
- "How I Built My Appellate Practice," panel member, 9th Annual Appellate Practice Institute, Minnesota CLE, 2015
- "How to Make Your Points to a Busy Trial Court," Winning Tips for Successful Litigation, Minnesota CLE, 2015
- "Business Law: Appeals in Business Cases," guest speaker, webcast, Minnesota CLE, 2015
- "New Federal and State Rules," The 2015 Civil Litigator's Annual Short Course, Minnesota CLE, 2015
- "Electronic Evidence in Its Various Forms: Why You Need It, How to Get It, How to Use It," co-presenter, The 2015 Civil Litigator's Annual Short Course, Minnesota CLE, 2015
- "Appellate Practice: The U.S. Supreme Court – A Preview of the October Term," co-moderator, webcast, Minnesota CLE, 2014
- "Appellate Practice: Electronic Briefs – Brief-Writing for When Judges Will Be Reading the Brief on a Computer Screen" co-presenter, webcast, Minnesota CLE, 2014
- "New Appellate Rules," co-presenter, Minnesota County Attorneys Association, 2014
- "Intellectual Property Series: Appellate Practice – Intellectual Property," co-moderator, webcast, Minnesota CLE, 2013
- "Partnering on Appeal: Successful Partnering Between Inside and Outside Counsel," co-presenter, webcast, West LegalEdCenter, 2013
- "Appellate Law and Practice," Adjunct Professor, William Mitchell College of Law, 2009-2010
- "Recent Supreme Court Decisions," Adjunct Professor, William Mitchell College of Law, 2002-2007
- "Using Counsel on Appeal," moderator, 19th Annual Federal Appellate Practice and Advocacy
- "Advanced Civil Procedure," Adjunct Professor, William Mitchell College of Law, 1990-1999
- "Management of Complex Litigation," Adjunct Professor, William Mitchell College of Law, 1985-1998
- "Insurance Law," Adjunct Professor, William Mitchell College of Law, 1982-1992
- "Judicial Internship Clinic," Adjunct Professor, William Mitchell College of Law, 1978-1987
- Numerous CLE programs for Minnesota CLE, Minnesota Institute of Legal Education, ALI-ABA, Hennepin County Bar Association

SELECTED PUBLICATIONS

- *Multidistrict Litigation Manual: Practice before the Judicial Panel on Multidistrict Litigation*, Thomson West, 2020 ed.
- *Annotated Manual for Complex Litigation Fourth*, Thomson West, 2020 ed.
- "Summary of Eighth Circuit Appellate Procedure," co-author, Minnesota CLE, 6th ed. 2020
- *Appellate Rules Annotated, Minnesota Practice Series Vol. 3*, co-author, Thomson West, 2021 ed.
- "Clearing Up Confusion Over Unpublished Opinion Copies," co-author, Minnesota Lawyer, 2020
- *Minnesota Appellate Procedure Summary Guide*, Minnesota CLE, co-author, 9th ed. 2020
- "The Trouble With Eyewitness Testimony: Toward a model jury instruction on witness Accounts" co-author, *Bench & Bar of Minnesota*, January 2020
- *Minnesota Evidence Rules Summary Guide*, Minnesota CLE, 7th ed. 2019
- *Eighth Circuit Appellate Practice Manual*, co-editor, Minnesota CLE 2001 (5th ed. 2010; 6th ed. 2013; 7th ed. 2015; 8th ed. 2018)
- *Multidistrict Litigation Manual: Practice Before the Judicial Panel on Multidistrict Litigation*, Thomson West, 2016 ed.
- *Annotated Manual for Complex Litigation 4th*, Thomson West, 2016 ed.
- Maslon's Appellate Attorneys Contribute Chapters to Minnesota CLE's *Eighth Circuit Appellate Practice Manual*

- "E-Discovery Under the Minnesota Rules: Where We've Been, Where We Might Be Headed," co-author, 40 *Wm. Mitchell L. Rev.* 390 (2014)
- Chapter 11 "Hearing and Argument," co-author, *Eighth Circuit Appellate Practice Manual*, Minnesota CLE, 5th ed. 2010; 6th ed. 2013
- "Conducting an Effective Litigation Hold," *ON Litigation*, Vol. 3, Summer 2011
- *Discovery Practice*, co-author, West Publishing, 5th ed. 2008, 2009, 2010 & 2011
- "Chapter 66: Appeals," co-author, *Successful Partnering Between Inside and Outside Counsel* 66-1, 2010 ed.
- *Multidistrict Litigation Manual: Practice Before the Judicial Panel on Multidistrict Litigation*, West 2010
- *Courtroom Handbook of Minnesota Evidence*, co-author, West, 2009-2010
- *Annotated Manual for Complex Litigation* 4th, West 2010; MP3 edition 2010
- *Minnesota Practice: General Rules of Practice Annotated*, West, Vol. 3A, 2010
- *Motion Practice*, co-author, Little Brown, 1985, 5th ed. 2010
- *Summary of Minnesota Appellate Procedures/Basics of Appeals/Preparing for Appeal in the Trial Court/Timeline and Deadline*, 1992; 6th ed. 2010
- "Why Guess? Erie Guesses and the Eighth Circuit," co-author, 36 *Wm. Mitchell L. Rev.* 1625 (2010)
- *Minnesota Practice*, West, 4 Vols. 1986; 3rd ed. 1996; 4th ed. 2002-2005; 5th ed. 2009, 2010
- *Minnesota Evidence Rules/Trial Objections/Evidence Basics*, co-author with Hon. Daniel Mabley, 6th ed. 2010
- "Suggestions from the Practicing Bar: Things Practitioners Wish the Court of Appeals Would Do Differently," co-author, 35 *Wm. Mitchell L. Rev.* 1286 (2009)
- "It's a whole new case," *ON Litigation*, Vol. 1, Spring 2009
- "Admissibility of E-Evidence in Minnesota: New Problems or Evidence as Usual?" co-author, 35 *Wm. Mitchell L. Rev.* 1453 (2009)
- "Preparing for Appeal in the Trial Court," co-author, *Bench & Bar of Minnesota*, February 2008
- "The Class Action Fairness Act of 2005 – Congress Again Wades into Complex Litigation Matters," co-author, 228 *F.R.D.* 673 (2005)
- "Improving the Odds on Appeal," co-author, 50 *Bench & Bar of Minnesota* 17 (2003)
- "Applying Amended Rule 26(b)(1) in Litigation: The New Scope of Discovery," co-author, 199 *F.R.D.* 396 (2001)
- "Handling Appeals: Beyond Litigation as Usual," co-author, *ACCA Docket* 16, No. 6 at 34, 1998
- "*Amici Curiae*: Not Just Friends of the Court Anymore," co-author, *The Practical Litigator*, Vol. 9, No. 3 (1998)
- *Multidistrict Litigation*, Little Brown, 1986, Supp. 1996
- "The Trial of a Punitive Damages Case in Minnesota - A Judicial Perspective," co-author with Hon. Donald D. Alsop, 11 *Wm. Mitchell L. Rev.* 319 (1984)
- "Handling a Civil Case in the Minnesota Court of Appeals," co-author, 41 *Bench & Bar of Minnesota* 17, September 1984