

## Remembering a maverick judge

Former clerk pens Miles Lord biography

By Mike Mosedale  
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When the former U.S. District Court Judge Miles Lord died last December at the ripe age of 97, he was no longer a household name.

Unless you are of a certain age, you may only remember him as a sparky old codger pitching his personal injury firm — The Law Office of Miles Lord — in late-night television advertisements.

But for most of his long career, Lord was arguably Minnesota's most famous jurist — or, at the very least, its most famous jurist whose surname was not Burger or Blackmun. An unabashed populist, Lord presided over some of the biggest cases of his day and, with his bold rulings and even bolder comments, courted controversy all the way.

In an unprecedented 1974 order now regarded as watershed moment in environmental law, Lord shut down the Reserve Mining Company to stop the company from using the waters of Lake Superior as a repository for its mining waste. The order got Lord kicked off the case by his longtime nemesis — the 8th U.S. Circuit Court of Appeals — but it was ultimately vindicated by the more conservative judge who replaced Lord.

Lord's admirers saw him as a black-robed champion of the little guy who refused to let legal niceties get in the way of justice. His critics regarded him as the quintessential "activist" judge — a loose cannon who sacrificed judicial impartiality to his personal crusades.

As Roberta Walburn recounts in her engrossing and trenchant new biography "Miles Lord: The Maverick Judge Who Brought Corporate America to Justice," such divergent perspectives were one of the constants in Lord's long



Retired U.S. District Judge Miles Lord, shown in 2005 in his Chanhassen office, presided over some of the biggest cases of his day. AP FILE PHOTO: JIM MONE

life in the spotlight.

After the magazine American Lawyer named him one of the 11 worst federal judges in the country in 1980, Walburn notes, the Association of Trial Lawyer of

America came back the next year and honored Lord as the nation's outstanding federal judge.

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## Social workers push back on child protection panel's priorities

By Kevin Featherly  
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Elected officials and social workers swamped by a tidal wave of child maltreatment reports are at odds over a legislative task force's priorities for moving ahead with reforms.

The elected officials are members of the Legislative Task Force on Child Protection. That joint House-Senate panel oversees implementation of recent statutory fixes to the state's child protection system. It also recommends new statutory changes to the full Legislature.

Many of the reforms came from a batch of 93 recommendations issued in 2015 by Gov. Mark Dayton's own Task Force on the Protection of Children, a separate body. Some of the Dayton group's recommendations have been legislatively approved; many others have yet to be considered.

At its most recent June 27 meeting, the legislative task force signaled plans to take a step back from pushing for further policy changes. Instead, it wants to focus on a more technical task — recodifying existing child-protection legislation found in Minnesota Statutes 626.556.

Over nearly 30 convoluted pages, the statute defines terms like "maltreatment" and "egregious harm," spells out data handling, and lays out rules for abuse reporting, investigations and enforcement, among many other provisions.

"It is an incredibly unwieldy statute that we are going to fix," said Rep. Ron Kresha, R-Little Falls, the legislative task force's chair.

Michelle Zehnder Fischer, the

Child | Page 22

## Contract compelling commission forfeiture unenforceable

By Barbara L. Jones  
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Two million dollars is too much to pay for hanging on to documents belonging to an ex-employer, the Court of Appeals has ruled.

John Capistrant worked for Lifetouch National School Studios as a photographer and territorial manager from 1980 to 2015, when he retired. During that time, he

worked entirely on commission and believed he was entitled to a "residual commission" at the time he left. The parties disputed the amount of the residual commission, with the employer saying it was \$1.208 million and Capistrant arguing it was \$2.622 million. He started a declaratory judgment action in April 2015, asking the court to calculate his proper residual commission. Lifetouch counterclaimed.

The employment contract had a noncompete agreement guarding the confidentiality of the information belonging to Lifetouch, and preventing solicitation of the company's customers or employees. The noncompete agreement required the immediate return of Lifetouch's property at the end of the term of employment.

The employment contract also had a

Noncompete | Page 7



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Address

### ALL IN THE FAMILY

The Minnesota Supreme Court has ruled on the procedural mess of Crowley v. Meyer.

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### BAR BUZZ

Chief Justice Lorie Gildea led the Fourth of July parade in her hometown of Plummer.

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## Miles Lord

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It's hard to imagine a biographer more ideally suited to her subject than the journalist-turned-lawyer Walburn, who, while working as a reporter at the Star Tribune, had decided to enroll at the University of Minnesota Law School.

At the time, Walburn wasn't thinking of a law practice; she thought a JD might help advance her journalistic career. All that changed after she landed a clerkship with Judge Lord, arriving just in time to get a front row seat for the Dalkon Shield litigation.

An IUD manufactured by the A.H. Robins Company, the Dalkon Shield had a grave design defect — a “wicking tail” that spread bacteria, leading to pelvic inflammatory disease, infertility or, in some cases, death.

Although A.H. Robins was sued in courts across the country over the Dalkon Shield, Lord's rulings on the key discovery issues proved to be the game changer.

The wave of lawsuits over the Dalkon Shield ultimately bankrupted A.H. Robins. They also provided a career moment for trial attorneys Dale Larson and Mike Ciresi, with whom Walburn, as an attorney, would later collaborate in the state of Minnesota's groundbreaking lawsuit against Big Tobacco in the '90s.

Walburn, now of counsel at the Ciresi Colin firm, garnered widespread praise for her work in the tobacco case, as well as the nickname “the Document Diva” in honor of her discovery chops.

In the Lord biography, Walburn devotes alternating chapters to a blow-by-blow recounting of the Dalkon Shield saga. The other chapters sketch out broader contours of Lord's life, tracing his rise from a penniless but proud child of the Iron Range to his role in the creation of the modern DFL party and the intense friendships he forged with the party's luminaries, including Hubert Humphrey and Eugene McCarthy.

Minnesota Lawyer sat down with Walburn to talk about the book (now available for pre-order from the University of Minnesota Press and set for an Oct. 1 release date). This interview has been edited for length and clarity.

**Minnesota Lawyer:** Why did you

write this book?

**Roberta Walburn:** I always wanted to write a book. About five years ago, I decided, If not now, when? I didn't know what I wanted to write about. But I kept coming back to Miles. I had kept a couple of boxes of Dalkon Shield pleadings and transcripts from my clerkship. Reading them, I would be either laughing out loud or screaming or shaking my fists. That kind of indicated, yeah, there's something here.



Roberta Walburn

I contacted the judge and his daughters and told them what I was thinking. I made it clear from the start that this was an independent writing venture, that it was not going to be a puff piece, and that they would not have the right to edit the book. They still gave me the keys to the storage unit in Chanhassen where there were dozens of boxes of his private and public papers.

**ML:** That sounds like a biographer's dream. What did you discover that most surprised you?

**RW:** When I clerked for him, I heard so many of his great stories. But I couldn't put them all in context or even know if they were all true. Some of them seemed pretty fantastic — like the story about getting spit on in the courthouse by [Teamsters boss] Jimmy Hoffa. One of the pleasant surprises was that so many of his stories were true.

**ML:** Did you find any evidence of the fabulist?

**RW:** Not that I can think of.

**ML:** So he really fed his children poison ivy sandwiches and kept an alligator in the basement of the family home?

**RW:** That story came from his kids. He really was one of a kind.

**ML:** And he really ordered a lawyer dress up in a giant bunny suit, in court, to collect his attorney's fees?

**RW:** Yeah, Big John Cochran.

**ML:** He didn't object to that?

**RW:** Cochran would have loved it even if he didn't get his \$4 million.

**ML:** What was your relationship like with Judge Lord?

**RW:** We hit it off from the start. I wasn't the typical clerk because I had all those years of being a reporter, and

Miles loved the press. He loved being in the press, and he was newsworthy. Whatever he was doing, he was great copy. Everybody knew Miles.

**ML:** It's obvious from the book that you have a lot of admiration for him. What were his shortcomings?

**RW:** He sometimes took things too far. He said things that were outrageous and it got him in trouble. On the other hand, that's what made him so effective.

**ML:** You write about two very controversial speeches Lord made — one in which he really lays into the three A.H. Robins executives over their responsibility for the Dalkon Shield fiasco and one where he denounces corporate crime in an address to church groups. How unusual is such outspokenness in a judge?

**RW:** You hardly ever see it. Other judges might have thought the same things, but none of them would come out and say it, or say it like he did. And not only was he outspoken, he had a way with words.

The Dalkon Shield speech might be an example of him going too far. It got him brought up on judicial misconduct charges. On the other hand, that speech was one of the key factors in blowing the litigation out of the water and was reprinted in newspapers all over the country. Today, with the internet, it would have gone viral.

**ML:** I was interested to read that Lord didn't even want to take the Reserve Mining case at the outset.

**RW:** Yes, he tried to get rid of it and couldn't. And the government lawyers thought about moving to disqualify him for bias because they thought he was going to favor Reserve.

**ML:** Because he was an Iron Ranger?

**RW:** And because the DFL, including Hubert Humphrey, had been instrumental in helping to lure Reserve to the state. It [Lord's handling of the case] was really emblematic of the judge. He didn't get the case and just order Reserve to shut down the next day. He spent a long time in pretrial proceedings, and nine months in trial, where he was on bench virtually every day, and worked his butt off.

**ML:** Only to get the boot from the 8th Circuit. That was a very problematic relationship, wasn't it?

**RW:** For many judges, getting along with the appellate courts is extremely

important because they're the ones who grade you. Miles didn't like being reversed any more than any other judge. But he didn't let that stop him, either. He was a fighter from his literal fistfighting days on the Iron Range up through his years on the bench. He loved a good fight and, if he was going to get crossed by the 8th Circuit, he was going to go down fighting.

**ML:** What was Judge Lord's impact on you?

**RW:** Very profound. I realized more and more as I was researching the book that my life turned out the way it did because of my experience with Miles. Some people see just the surface of Miles — the colorfulness and outrageousness — and think there's not much substance there. But he was incredibly substantive. He really believed in his mission to help the least fortunate.

**ML:** When did you know that you weren't going to return journalism, that you wanted to practice law?

**RW:** At the end of my clerkship. I'd never seen a case like Dalkon Shield. When I was watching the judge in action — and when I was watching Mike Ciresi and Dale Larson in action — I was seeing the cream of the crop. I thought, “This is amazing. I'm going to try it.”

**ML:** And you went on to get that nickname, “The Document Diva.”

**RW:** I had never before thought about the law as being a great platform for getting to the truth, or getting to the facts. But Miles blew the Dalkon Shield litigation out of the water by reopening discovery which other judges across the country had closed. It's not something you think in law school — I'm going to be the best document discoverer ever — but Miles really recognized how powerful a tool document discovery could be.

**ML:** Who is your intended audience for the book?

**RW:** Broad, I hope. It's not targeted solely at lawyers and the legal community, but I am hoping that law students will read it because, hopefully, it will get people thinking about what it means being a lawyer and how the legal system works. I try to portray how the legal system works in real life when you're in a big case against a big corporation. These cases are years old but in many respects the legal system hasn't changed that much.

## Family

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granted Mother's petition for review, and reversed, in a unanimous opinion.

Lillehaug began by noting that the party seeking to modify a custody arrangement bears the burden of meeting the relevant statutory requirements. He indicated that the District Court must first determine whether the party seeking to modify the custody arrangement in the judgment and decree has made a prima facie case for modification.

To establish a prima facie case, the party seeking to modify must allege that: (1) the circumstances of the children, or custodian, have changed; (2) modification would serve the best interests of the children; (3) the children's present environment endangers their physical health, emotional health, or emotional development; and (4) the benefits of the change outweigh its detriments with respect to the children.

The court went on to suggest “if a party establishes a prima facie case, the District Court must hold an evidentiary hearing at which evidence may be presented on each factor.”

In this instance, however, Lillehaug indicated that “the District Court erred,

as matter of law, in three respects.”

First, he pointed out that both the District Court and the Court of Appeals erred in determining that Mother had the burden of persuasion. Justice Lillehaug indicated that “[i]t is the party seeking to change the custody arrangement in the judgment and decree who bears the burden in pursuing modification.” Accordingly, Father, not Mother, had the burden to show that the custody arrangement in the judgment and decree should be modified.

Second, Lillehaug opined that the District Court erred by modifying the judgment and decree without holding an evidentiary hearing. He noted that the statement by the District Court that Mother “has failed to set forth any evidence to set the case for an evidentiary hearing” turned the relevant statute “on its head.”

Finally, Lillehaug suggested that the District Court erred by failing to make each of the factual findings required by statute.

The court concluded by opining that “remand is necessary to reinstate the original custody order or, upon a motion to modify, for an evidentiary hearing.” And the District Court was told to do it quickly.

What a wild procedural ride. Are

the facts today the same as they were in 2013? Not if Mother's position is accepted by the District Court on remand. This may all have been for naught.

It's difficult to understand how both the District Court and the Court of Appeals missed in terms of holding Father to his Nice-Peterson burden (and then turning it around on Mother); the general framework for custody modification in Minnesota has remained untouched since 1981.

Given the number of non-evidentiary hearings the District Court offered to Mother and Father, it seems as though the court was trying to do the “right thing” by giving the parties an opportunity to self-correct with the assistance of professionals. The trouble, however, is that the conflict between these two parents appears to have superseded their ability to work together.

Perhaps the District Court hoped the parties might work things out, in light of the fact that the original order was based on an agreement of the parties? It is apparent that Father (right or wrong) had a different agenda — in seeking to modify custody, in petitioning for an HRO, and in asking a parenting time expeditor to continue to reduce Mother's time with the children.

If the District Court was trying to be creative, and protect Mother by giv-

ing her chance after chance to remedy her perceived shortcomings, it begs the question of when to draw the line as a judge, and make a decision based on the evidence presented. The hope of simplifying matters and saving money for litigants seems to have backfired in Crowley, if that was the even the goal to begin with.

*Jason and Cynthia Brown, husband and wife, are the founding shareholders in the Brown Law Offices, P.A., a northwest Twin Cities divorce and family law firm.*

