MILWAUKEE BAR ASSOCIATION, INC. 1858

MBA Messenger

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Fall 2012 Volume 3

Everything Lines Up Right at the 24th Annual MBA Foundation Golf Outing

Milwaukee Bar Association
424 E. Wells St.
Milwaukee, WI 53202-3746

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Regular Features

Be Part of the *Messenger*

Please send your articles, editorials, or anecdotes to editor@milwbar.org or mail them to Editor, Milwaukee Bar Association, 424 East Wells Street, Milwaukee, WI 53202. We look forward to hearing from you!

If you would like to participate on the *Messenger* Committee, we have seats available. Please contact James Temmer, jtemmer@milwbar.org.

The *MBA Messenger* is published quarterly by the Milwaukee Bar Association, Inc., 424 East Wells Street, Milwaukee, Wisconsin 53202.
Telephone: 414-274-6760
E-mail: marketing@milwbar.org

In This Issue:

Mission Statement

Established in 1858, the mission of the Milwaukee Bar Association is to serve the interests of the lawyers, judges and the people of Milwaukee County by working to:

- Promote the professional interests of the local bench and bar
- Encourage collegiality, public service and professionalism on the part of the lawyers of Southeastern Wisconsin
- Improve access to justice for those living and working in Milwaukee County
- Support the courts of Milwaukee County in the administration of justice

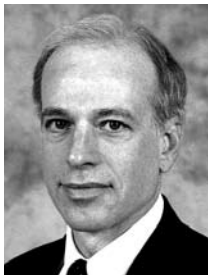
and

- Increase public awareness of the crucial role that the law plays in the lives of the people of Milwaukee County.

Contact Information

Milwaukee Bar Association, Inc.
424 East Wells Street
Milwaukee, WI 53202
Phone: 414-274-6760
Fax: 414-274-6765
www.milwbar.org

Letter From the Editor



Charles Barr, Editor

About the cover: that's J. Nels Bjorquist of Mawicke & Goisman lining up a putt at the MBA Foundation's Annual Golf Outing in August. We chose this photo because it portrays the lawyerly qualities of studied calm and deliberate calculation. If you were a prospective client and watched Nels line up this putt, wouldn't you want him as your lawyer? BTW, Nels advises that he sank it.

We thank all those who abandoned their air-conditioned offices for a day to hit the links at Fire Ridge Golf Club in support of the Milwaukee Justice Center, regardless of their approaches to the grand game of golf or the grander game of lawyering. We're also grateful to those who organized and sponsored the event, which cleared approximately $30,000. The Second Annual 5K Run at Veteran's Park on July 25, conducted in 94-degree heat despite the early evening start time, added another $4,000 for the same cause. Those runners, walkers, organizers, and sponsors deserve a lot of credit, as well. The proceeds from both events help the MJC fulfill its mission to guide the many thousands who cannot afford legal representation but must nonetheless navigate our local courts.

What's inside the *Messenger* this time? Hannah Dugan makes a strong bid to defend her 2011-12 "Best Article" crown with a fascinating and meticulously researched account of the 1914 attempt to assassinate Teddy Roosevelt in downtown Milwaukee, and the odd criminal proceeding it spawned. Moving from the scholarly to the pseudo-scholarly, one Rufus T. Firefly—the *Messenger's* first alias contributor since the infamous Wing-Tipped Contessa—flickers to life with a hilarious, if somewhat odiferous, *pièce de résistance* based (at least as an initial matter) on an actual case from Kentucky in 1890. And speaking of hilarious, resident film critic Fran Deisinger devotes his latest installment of "The Reel Law" to my favorite legal comedy: 1992's *My Cousin Vinny.*

Turning to more contemporary and serious legal subjects, we have an article by Robert Greenstreet, Dean of the UWM School of Architecture, assessing the effect of the Architectural Works Copyright Protection Act. Steve Biskupic discusses health care reform issues that loom after the Supreme Court's decision upholding the individual mandate. We get an inside look at how an OLR district committee processes disciplinary matters. And we remember the late Judge Thomas Curran, who presided for 23 years in Milwaukee's federal district court.

We hope you enjoy this edition of the *Messenger,* along with Wisconsin's splendid but all-too-brief autumn. When the weather inevitably turns nasty, try throwing a log on the fire, putting up a big samovar of tea, and writing an article for the *Messenger.*

— *C.B.*

Chief Judge Directive Marks FCC Michael Bruch's Retirement

Chief Judge Directive 12-16

TO: All Judges, All Court Commissioners, District Court Administrator, Deputy District Court Administrator, County Executive, Clerk of Circuit Court, Corporation Counsel, Sheriff, District Attorney, City Attorney, Public Defender, Court Coordinators, Managing Court Reporter, CCAP, Legal Resource Center, IMSD, Facilities Management, and Press

FROM: Chief Judge Jeffrey A. Kremers

RE: Milwaukee County Family Court Commissioner

WHEREAS: Michael Bruch served admirably as Milwaukee County Deputy Family Court Commissioner from August of 1988 to December of 1995 and has served with even greater distinction as The Family Court Commissioner from 1995 until the present, and

WHEREAS: Michael Bruch has provided exemplary service to the people of Milwaukee County for his entire career and brought statewide and national recognition to the Family Courts of Milwaukee, and

WHEREAS: Michael Bruch has indicated his intention to retire effective at the end of September 2012, and

WHEREAS: Deputy Family Court Commissioner Sandra Grady has worked in the Family Courts since 1988,

NOW THEREFORE IT IS HEREBY ORDERED:
That, effective October 1, 2012

1. Michael Bruch is to enjoy his retirement with appreciation from the citizens of Milwaukee County for his years of service.

2. Pursuant to Wis. Stat. §757.68 (2m) (b) and SCR 75.02(1) Sandra Grady is appointed The Family Court Commissioner for Milwaukee County.

Dated at Milwaukee, Wisconsin, this 20th day of August, 2012.

BY THE COURT
Jeffrey A. Kremers, Chief Judge

Member News


Jacob A. Manian

Fox, O'Neill & Shannon announced that **Jacob A. Manian,** Marquette University Law School, J.D. 2007, has joined the firm as an associate in its litigation practice.

Hupy and Abraham celebrated the opening of a new location in Wausau on September 4, 2012. The office is located at 505 South 24th Avenue, Suite 102, Wausau.


Don M. Millis


John H. Zawadsky

Reinhart Boerner Van Deuren announced the appointment of **Don M. Millis** as Managing Shareholder of its Madison office, and **John H. Zawadsky** as Madison office representative on Reinhart's Board of Directors.

The firm also announced that its Phoenix office is moving to a 285,000-square-foot, six-story, LEED-certified building at 16220 North Scottsdale Road, Suite 290, Scottsdale, AZ 86254.


Shay A. Agsten


William O. Jackson

von Briesen & Roper announced the promotion of **Shay A. Agsten** to shareholder in the Banking, Bankruptcy, Business Restructuring & Real Estate Practice Group. The firm also announced that **William O. Jackson** has joined the Health Care Practice Group.

Welcome New MBA Members!

Michael Blumenfeld
Timothy Bucher, *Foley & Lardner*
Amy Burger
Michael Carton, *Boyle Fredrickson*
Colin Casper, *La Fleur Law Office*
Mark Clay
Joseph Cohen, *Cohen Counsel*
Paul Crawford, *Kim & LaVoy*
Ashley Fale, *Crivello Carlson*
Andrew Franklin, *Franklin Law Office*
Katherine Gaumond, *Cross Law Firm*
Joseph Gorndt
Michael Gratz, *Boyle Fredrickson*
Eamon Guerin, *Guerin Law Office*
Margaret Haeger
April Hartman, *Legal Action of Wisconsin*
Steven Heiderer, *Guardian Credit Union*
Ellison Hitt, *Tabak Law*
Hannah Jahn
Stephanie Kebler, *Kim & LaVoy*
Melissa Longamore, *Vargas Law Office*
Hon. Kevin Martens, *Milwaukee County Circuit Court*
Sarah Matt, *O'Neil, Cannon, Hollman, DeJong & Laing*
Joseph McCleer
Larraine McNamara-McGraw, *Horizons Law Group*
Michael Roberts, *La Fleur Law Office*
Hrishikesh Shah, *Reinhart Boerner Van Deuren*
Jessica Slavin
Joshua Sofian
R. Joseph Stennis, *Reinhart Boerner Van Deuren*
Robert Ulander
Jody Usow, *Jody L. Usow, Attorney at Law*
Michael Van Someren, *The Schroeder Group*
Eido Walny, *Walny Legal Group*
Bryan Ward

Message From the President

Attorney Charles H. Barr

There is an Elephant in the room, and its name is "Annual Meeting." I like to think the 2012 version was long on substance, but unquestionably and unfortunately, it was also long on *length.* It went *waaaay* too long. To quote *The Paper Chase,* it was "hardly an auspicious start" to the term of Yours Truly.

I'm going to tackle the Elephant. But first, I'll warm up on an easier issue—Son of Elephant, as it were. The Annual Meeting was back in June. As countless judges have queried me throughout my career: why am I raising this issue *now?* Elementary, my dear colleagues. The deadline for this column in the summer issue of the *Messenger* preceded the event of which we speak.

All right, now I'm warmed up. After several consecutive years of Annual Meetings that ran more or less like clockwork, we became complacent and time, shall we say, got away from us. Left us in the dust, actually. This can be viewed as either "no big deal" or "big deal," depending on your perspective. Our members, or at least those who attended the 2012 Annual Meeting, rather sharply trend toward the latter perspective. The Annual Meeting is, well, the Annual Meeting—quite arguably our main event. Judges have calendars, as do the attorneys appearing before them, and the hard truth is that most attorneys live and die by the billable hour. MBA members should not have to sneak out of the Annual Meeting in order to meet their professional obligations during the presentation of an important award to an esteemed colleague. The last thing we want to do is to dissuade our membership from attending. The Annual Meeting cannot be administered like a baseball game.

Thus, the MBA leadership has taken this issue seriously. Seriously. We have assimilated a number of helpful suggestions from our members. A multi-pronged fix is being cobbled together to prevent a repeat performance in 2013 and beyond. Rocket science it ain't, though the execution can be tricky. ("Execution" for overlong speakers was briefly considered and discarded.)

So I'm going to lay it all on the line: I *guarantee* that the 2013 Annual Meeting will run on time. (Caveat: "on time" means within ten minutes of schedule. I mean, come on, let's be reasonable.) This thing is going to run like a train from Milan to Bologna on a Monday morning in 1942. How often do you get a guarantee in this biz? Either you will get an on-time Annual Meeting in 2013, or you'll get to see Barr go down in flames—which has always been a big crowd-pleaser in my 35 years of courtroom work. Ergo, a no-lose proposition. But you must be there to cash in on it.

In the much nearer term, we hope you also consider attending the Ninth Annual State of the Court Luncheon at the Wisconsin Club on October 24 at 11:30. This is the MBA's main autumn event, and features an update on the Milwaukee County Circuit Court from Chief Judge Jeffrey Kremers, as well as awards recognizing exceptional *pro bono* contributions in our legal community. Unless the *Messenger* has languished in your inbox for an unconscionable number of days, there is still time.

We do value and thank you for your continued support of the MBA. We will always strive to conduct our programs so as to earn that support.

— C.B.

MBA Offers Fee Arbitration Program

Even the most careful and professional attorney, from time to time, experiences disagreements with clients regarding the payment of fees and expenses. Resolution of such disputes can prove costly, time consuming and, occasionally, embarrassing. In recognition of these facts, and as a service to the public and our members, the Milwaukee Bar Association maintains and offers a Fee Arbitration Program. The arbitration fees are as follows:

$50.00 for clients
$50.00 for MBA members
$100 for non-MBA members

The fee arbitration is between the attorney and client only. The attorney or client requests the Fee Arbitration Packet, which consists of the forms and rules. Once the MBA processes an application for arbitration, the Fee Arbitration Coordinator schedules an arbitration session with the attorney, client, and one or more arbitrators. After that session, a decision is made and the case closed based on the decision of the arbitrators. The amount in dispute determines whether there will be a sole arbitrator or a panel of arbitrators:

$5000 or less (sole arbitrator)
$5000 or more (panel of arbitrators)

Contact Sabrina Nunley at 414-276-5932 or snunley@milwbar.org for more details.

Save the Date

9th Annual
State of the Court
Luncheon
Partners in the Administration of Justice

Wed., October 24, 2012
Noon - 1:30 p.m.
Wisconsin Club
Grand Ballroom
900 W. Wisconsin Ave.

Cost:

MBA members & staff	$45
Non-members	$55
Judges	$26
Table of nine	$400

A judge will be seated at the table, bringing the count to ten

CLE Calendar

October 2012

Register Online NOW!
@ milwbar.org / Continuing Legal Education

October 4, 2012
MBA Presents
Investment Fraud, From Wall Street to Main Street
What remedies do investors have if they have been victims of fraud by the big banks on Wall Street or their own brokers on Main Street? Attorney Sweeney will explore the world of stockbroker fraud, FINRA arbitration, and the remedies available to investors.
Presenter: Sean M. Sweeney, Halling & Cayo
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 5, 2012
Bankruptcy
Recent Amendments to the Uniform Commercial Code
Presenter: David I. Cisar, von Briesen & Roper
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 8, 2012
Corporate Banking & Business
Non-Competition Agreements in Employment
Attorney McCormack will discuss the elements necessary to create an enforceable non-competition agreement, and address common misconceptions and pitfalls, as well as the *Star Direct* decision and its impact on non-competition agreements.
Presenter: David C. McCormack, McCormack Law
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 10, 2012
ADR
Successful Mediation from the Standpoint of the Mediator
Presenter: Honorable Patrick Snyder, Waukesha County Circuit Court
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 10, 2012
Real Property
The Use of New Market Tax Credits in Real Estate Deals
Presenter: Jennifer A. Devitt, Foley & Lardner
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 16, 2012
Intellectual Property
A Litigator's Guide to IP Surveys
The presentation is a legal guide on developing and critiquing trademark surveys. In trademark litigation, surveys are an important component that can determine infringement or dilution of a trademark. They often entail complicated legal and procedural issues, and typically require the services of an outside expert and a survey support team. Patent and trade secret issues will also be discussed.
Presenters: Adam Lee Brookman, Boyle Fredrickson; James T. Berger, Market Strategies
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 18, 2012
Elder Law
Medicaid Update 2012
State and Federal Medicaid Law Update; Medicaid Application Process; Planning Tips and Traps Post-DRA; Complex Issues in Medicaid; Hearing Process; Medicaid Planning, Powers of Attorney, and Guardianships; Medicaid Estate Recovery
Presenters: Honorable Nancy J. Gagnon, Wisconsin Division of Hearings & Appeals; Stephen A. Lasky, Moertl, Wilkins & Campbell; Anne S. McIntyre, Nelson, Irvings & Wessels; Elizabeth Ruthmansdorfer, Moertl, Wilkins & Campbell; Peter J. Walsh, O'Neil, Cannon, Hollman, DeJong & Laing; James M. Weber, Affiliated Attorneys
8:30 - 9:00 a.m. (Continental Breakfast/ Registration)
9:00 - Noon (Presentation)
Noon - 12:30 (Lunch will be provided)
12:30 - 4:00 (Presentation)
7.0 CLE Credits

October 19, 2012
Estate & Trust
Understanding Life Insurance in Estate Planning
Life insurance is an important tool to help clients meet a variety of estate planning objectives. Whether those objectives are actually met depends on choosing the right product for the plan. Understand where life insurance "fits" into estate planning, the types of life insurance products most often used in estate planning, and considerations for choosing the right policy for your estate planning clients.
Presenter: Elizabeth Bruckman Taylor, Northwestern Mutual
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 22, 2012
Family
Short Sales in Divorce
Presenter: Susan E. Hanson, Hanson & Santaga
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 23, 2012
MBA Presents
Defense Strategies for an OLR Investigation/Prosecution
Presenters: Richard Cayo, Christopher Kolb, and Jeremy Levinson, Halling & Cayo
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE ethics credit

October 24, 2012
Labor & Employment/Civil Litigation, co-sponsors
E-Discovery: Something Wicked This Way Comes
Discussion of the preservation, collection, and production of electronically stored information and how to keep your firm and its clients protected and informed to avoid costly sanctions for non-compliance.
Presenters: Anique Nicole Ruiz and Jean-Marie Crahan, Gonzalez Saggio & Harlan
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 26, 2012
MBA Presents
Auto Insurance: Current Jury Attitudes, Ethics Negotiations, and Handling Auto Cases
Presenters: Christine Esser, Habush Habush & Rottier; Jason Knutson, Habush Habush & Rottier; Joseph E. Schubert, Schubert Law Offices

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Flatulence and the Vagaries of Proximate Cause

Rufus T. Firefly


Rufus T. Firefly

Recently I had occasion to discover that in connection with the principle of proximate cause, Wisconsin had adopted the minority view in *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 347-56, 162 N.E. 99, 101-05 (1928) (Andrews, J. dissenting).[1] Further investigation led to a related discussion—the text of which I feel moved to share. It appeared as an uncredited case note in the *Journal of Tortious Living* (Fall 1979).[2]

Hardin v. Harshfield: Clearing the Air

It is a fact of legal history that significant principles often arise out of insignificant cases. *Hardin v. Harshfield,* 11 Ky.L.Rptr. 638, 12 S.W. 779 (1890), is an example of one such case that has been ignored far too long. The story can at last be told. We begin by quoting from the record:

> Cordie Hardin went to the store of Chris Pauley to buy some groceries, and while Chris Pauley was waiting on her she let a big fart that was heard all over the house. Two or three young men being present, Chris Pauley looked at them and laughed, and they walked out of doors. Chris Pauley having fixed up the groceries, she took them, left the house and got on her horse, and forgot her gloves. She got down, and came back into the store. He supposed she was demoralized by what she had done, the fact being impressed on her mind so strongly. She said when she came back into the store: "Mr. Pauley, did you see anything of that fart that I let in here a while ago?" His reply was "No, but I smelt it damned strong."

The law of flatulence had its origin in ancient English history. As early as the fourteenth century, some courts began recognizing a tort of "flatutory battery," defined as causing a harmful or offensive contact with an intentional bodily emission.[3] While most judges accepted this doctrine in principle, practical application was often a difficult matter. For one thing, plaintiffs were seldom able to procure reliable nose witnesses to the tortious flatulence.[4] For another, the defendant could usually defeat recovery on grounds of "mistake," "necessity," or "unavoidable accident." To a certain extent, the courts of equity were able to relieve this judicial pressure through such devices as the temporary restraining order and the civil injunction.[5] But the former gave at best only temporary relief, while the latter presented rather delicate problems of judicial supervision. As a consequence, very few of these early cases were decided in favor of the flatulee.[6]

It was not until the beginning of the twentieth century that the real breakthrough in flatulence law occurred. In the leading American case of *Rylands v. Flatulor,* the defendant was held strictly liable for harm caused by the escape of an "abnormally dangerous substance."[7] At first, some judges turned up their noses at this ruling, but before long the *Rylands* doctrine began to spawn other theoretical innovations. In the so-called "blasting cases," liability was extended to damage caused solely by the flatulent shock, without any accompanying gaseous trespass.[8] Some courts began imposing "joint and several liability" in cases where it was impossible to determine which of several joint flatufeasors had caused a given injury.[9] The American Law Institute eventually recognized a tort of "negligently inflicted olfactory distress."[10] And the Clean Air Act of 1968 gave this whole trend statutory sanction.

These developments are of more than passing interest, especially in legal academy. Heretofore, law schools have usually handled flatulence law in traditional Oil and Gas classes, but the recent judicial explosion is fast turning this subject into a separate discipline. The new outpouring of statutory and case law raises issues that demand the attention of serious scholars.[11] As more and more schools sense which way the legal winds are blowing, we can expect to see new courses in flatulence law, flatulence theory, and perhaps even comparative flatulence. The possibilities are limitless. It is to be hoped by teachers and students alike that this long-neglected subject will not remain at the tail end of the legal curriculum.

[1]*See Krier v. Vilione,* 2009 WI 45, ¶ 37, 317 Wis. 2d 288, 766 N.W.2d 517.

[2]Many thanks and special credit to legal historians David P.S. Mack and Michael D.S. Mack for preserving this important work of scholarship.

[3]It was assumed by most courts that the term "bodily emission" referred exclusively to flatulence. Sneezing, spitting, vomiting, and related acts were non-actionable under this definition. For a helpful background discussion, *see* "Adding Insult to Injury: Torts of Emission Under the Early Common Law," 81 JOURNAL OF SOCIALLY UNACCEPTABLE BEHAVIOR 301 (1974).

[4]*See,* e.g., *Depue v. Flateau,* 17 Q.B. 884 (1810) (emission of plaintiff's evidence denied).

[5]For an extreme example of equitable intervention, *see Bottum v. Kamen,* 180 N.W. 948 (1824) (court ordered defendant fitted with catalytic converter). Remedies of this sort had an unpleasant tendency to backfire.

[6]Prosser, LAW OF TORTS 1209 (1971).

[7]For a discussion of the implications of this doctrine, *see* "Is Bodily Gas an Inherently Dangerous Condition?," 12 FLAT. Q. 903 (1962).

[8]The main difficulty in these cases has been defining the scope of liability. In *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99 (1928), defendant flatulated while boarding a train and caused a baggage scale to fall on plaintiff. The court denied recovery on the grounds that since plaintiff was upwind from defendant at the time of accident, she was outside the "zone of danger." Other courts have reached a similar result by applying a "foreseeability" test. *See,* e.g., *Ex parte Pooper,* 89 F.2d (Short Cir. 1951), and *Boomer v. Atlantic Cement Company,* 96 F.2d (Closed Cir. 1957).

[9]Most courts have been willing to find "gross negligence" in cases involving joint tortfeasors. As an extreme example, *see Walker v. Feinstein, et al.,* 74 F.2d 111 (A.C.D.C. Cir. 1932), in which plaintiff was awarded punitive damages after being simultaneously gassed by four defendants. In the words of the trial judge, "If this isn't gross, I don't know what is."

[10]MISSTATEMENT (SECOND) OF TORTS, § 223(a).

[11]Some of these issues have constitutional implications. *See,* e.g., "Flatulence and the First Amendment: May Courts Order Prior Restraint?," 82 STEVENS HENAGER L. REV. 114 (1978).

Erratum Notice:
Photos of the Annual Meeting in the Summer 2012 edition of the *Messenger* were courtesy of Justin Metzger. The *Messenger* regrets its omission of the attribution in that issue and thanks Justin for his contribution.

The MBA LRIS has a blog
where the public can post legal questions!
http://www.mbaevice.blogspot.com/

Refer callers to it!

OLR District Committee Service Offers Unique Volunteer Opportunity

Attorney Heather K. Gatewood, Davis & Kuelthau

The Office of Lawyer Regulation (OLR) is the Wisconsin Supreme Court agency responsible for processing grievances pertaining to lawyer misconduct, investigating the factual bases for grievances, and prosecuting violations of the Rules of Professional Conduct for Attorneys (SCR Chapter 20). For many lawyers, this agency is simply one they hope never to encounter.

Lawyers seeking a valuable volunteer opportunity, however, should take a closer look at the OLR. To ensure local input into the grievance process through peer review, the OLR uses 16 district-based committees (Milwaukee County is District 2), each composed of two-thirds lawyers and one-third non-lawyers, to assist in the investigation of certain cases. The members of these committees are volunteers dedicated to giving both the grievant and the attorney a fair investigation and review, and making informed recommendations to the OLR regarding ethical violations and disciplinary measures. These committees play a key role in supporting the OLR's mission of supervising the practice of law and protecting the public from lawyer misconduct.

Application

The first step toward joining an OLR district committee is to send a letter and résumé (or an online résumé form) to the Clerk of the Supreme Court. The résumé form and contact information are available at the Wisconsin Court System's website, www.wicourts.gov.

Appointment

Members of district committees are appointed as needed by the Wisconsin Supreme Court, and can serve up to three consecutive three-year terms, with terms expiring on December 31. Upon selection by the Court, the Chief Justice usually calls the applicant to extend a personal invitation to join the committee. The Chief Justice sends the new member a welcome letter, including general information about district committees and the lawyer regulation system, with a copy to the new member's committee chairperson (who is elected at the committee's first meeting of each year). The chairperson then contacts the new member with information about the next committee meeting.

Meetings

In Milwaukee County, the district committee typically meets over the lunch hour at the Milwaukee Bar Association (424 East Wells Street). The District 2 Committee is divided into two sections, A and B, which address separate grievances. Meetings are scheduled on a regular basis for the entire year (typically monthly or bimonthly), taking into account the need to investigate, deliberate, and submit a final report to the OLR within the 90-day period prescribed by the Court, and the number of grievances assigned to the committee.

The chairperson calls the meetings to order, but the discussion of a particular grievance and investigation is led by the committee investigator—the committee member assigned by the chairperson to investigate the grievance through document review and witness interviews, and to compile a report for discussion by the committee. Prior to the meeting, committee members each receive a confidential package in the mail consisting of the committee investigator's report, which includes the investigative history, summary of available evidence, and evaluation of potential disciplinary violations. After thorough discussion, motions are brought regarding potential

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Has the Architectural Works Copyright Protection Act Worked? An Architect's Perspective

Robert Greenstreet, Dean, University of Wisconsin-Milwaukee School of Architecture

Twenty-two years ago, the Architectural Works Copyright Protection Act became law, ostensibly providing greater protection for original architectural work. Before the Act, there was very little architects and their attorneys could do to stop copyright infringement beyond the prevention of unauthorized use of actual drawings, so the new legislation was generally believed to be a great step forward for the architectural profession.

Two decades later, however, we must ask: has the Act really helped? A brief review of the history of the legislation and its subsequent implementation suggests that, in many instances, it may have led to unanticipated consequences, taking designers, builders, developers, and their legal counsel into new realms of litigation that have little to do with the protection of original creative work.

The History of the Act

Prior to the 1990 Architectural Works Copyright Protection Act, most architectural work received limited protection from the 1976 Copyright Act, which tended to deal only with drawings rather than buildings and actual design ideas themselves. The new Act, which was designed to bring the United States into compliance with the Berne Convention, extended copyright protection to the design of buildings that could be shown to be original works of authorship. Following its adoption, there were some perceived shortcomings of the Act,[1] notably the exclusion of some three dimensional structures (bridges, walkways), ambiguity about others (such as garages, silos, and freestanding walls), the legitimacy of copyright ownership, and the exclusion of non-original but nevertheless integral building elements. Now, after a couple of decades, there is ample evidence of the Act's application in a number of cases to enable an assessment of its value. Some of these cases indicate a legitimate pursuit by designers to protect their original ideas from being used by others without attribution or compensation. A new trend has emerged in one sector of the construction industry, however, which suggests the Act is being used as much for market protection and outright opportunism as the preservation of design originality, in an area with relatively little connection to architectural creativity or the original intentions of the Act.

In the housing industry, particularly the market rate sector, the number of architects involved is relatively small.[2] While housing units (exclusive of customized, larger, and more expensive models) no doubt meet market need in both price and consumer demand, they are not usually known for their originality. They are unlikely to garner many architectural housing awards, receive much attention in the architectural press, or be lauded for their creativity. Their very names, culled from websites, brochures, or newspapers, evoke standard, recognizable, and traditional styles—such as Georgian, Saltbox, Cape Cod, Colonial, Williamsburg—and they do not seek to set themselves apart from the existing stock of comparable housing.

And yet, it is this field that is producing a considerable degree of legal activity as the owners of enforceable copyrights seek to prevent other homebuilders and developers from building houses that approximate their own, and sue their competitors for building houses similar to their protected models.

Obviously, copyright protection is entirely justifiable when unique designs are being used without permission, and some high profile names and buildings have been involved in legal tussles.[3] The modest end of the housing scale, however, where very little design originality is evident (or, to be frank, often desired by prospective buyers), seems an unlikely battleground for establishing the concept of originality.

Most housing, and certainly the housing involved in a number of recent cases, is modest in size, mass, and detail. The units exhibit much the same number of rooms, have a similar overall appearance, and contain few or no original details that could be categorized as "creative." Because the Act specifically excludes functional requirements, standard architectural features, and traditional spatial relationships, it could be argued that in the typical market rate house design, there is very little left to copyright. This has not deterred a number of house builders and plan sellers, however, from applying for and receiving copyright protection from the Copyright Office of the Library of Congress by demonstrating their ownership of the work and claiming that their models were original to their creators. As long as they aver that they (or their assignors) are the originators of the drawings being submitted for registration, they receive automatic copyright protection without having to prove further originality or creativity beyond a statement that the work is not derivative—perhaps a startling claim, for many of the buildings are clearly derived from widely known, existing styles developed long before the creation of the Act, and may even bear the names of those styles (such as Colonial or Traditional).

The fact that these "original" works look remarkably similar to many other models—"Mediterranean" or "Cape Cod" styles will inevitably share common physical characteristics that are rooted in traditional understanding of the terminology—is perhaps not important in a design sense. When the owner of the copyright then sues other builders or developers for building very similar models, however, the question of appropriateness of the protection arises, as well as the legitimacy of the copyright owner's claim that the copyrighted material is not derivative, one of the few requirements for legitimate copyright protection.

Why should one owner of a home based on traditional, recognizable, and well-used design elements that have existed long before the 1990 Act be able to exclude others from the market and even claim damages for comparably built work because he or she holds the copyright for a design that is questionably creative or original? Certainly, if a builder has deliberately used the design drawings of his or her competitor to build and sell a house so that the latter has suffered financial loss as a result, there should be legal redress, which the Act provides. But where the owner of copyrighted designs systematically reviews the websites and promotional materials of other homebuilders who have no former connection to him or her, and sues those homebuilders for copyright infringement, the relevance of the Act is questionable and its use is arguably a misuse.

Do these cases succeed? Many of them are settled before trial, so it is hard to assess the overall impact. Certainly, there have been many instances of extensive litigation involving unsuspecting builders and

continued page 22

24th Annual MBA Foundation Golf Outing

Looking authentic in his knickers, T. J. Perlick Molinari tees off.

Golfers are welcomed to Fire Ridge.

Foursome of Frank Gimbel, Marty Kohler, Judge Bill Jennaro, and Judge Jeffrey Wagner.

Foursome of Dennis Purtell, Judge Michael Skwierawski, Judge Michael Guolee, and Steve Hayes.

Jennifer Walther awaits her turn.

2013 MBA Foundation Golf Committee Co-Chairs Aaron Olejniczak and Ben Wagner.

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Second Annual MJC 5K Run Is Smokin' Hot

Devin Curda Photographs by Tom Caldart, Moving Pictures WI

Wednesday, July 25, 2012 was no ordinary summer evening. Some will remember it for the scorching 94-degree heat. Others will remember it as the kickoff of the London Olympics. But for 160 supporters of the Milwaukee Justice Center, this day marked the running of the second annual "Run/Walk for Justice." From babies in strollers to well-trained striders, the five-kilometer run and one-mile walk drew a diverse crowd of lawyers, paralegals, students, youth, and other friends of the legal community. All proceeds will support the MJC's mission of helping unrepresented persons to navigate the Milwaukee County court system.

Participants wandering onto the green expanse of Veteran's Park—well, brown, actually, due to the drought—were greeted by the cool crooning of "The Riverwest Aces," who provided a jovial atmosphere for the evening. As the runners and walkers were situating themselves, the race committee of Laura Now (O'Neil Cannon), Elizabeth Haas (Foley & Lardner), Dayna Frenkel (Michael Best), Gregg Herman (Loeb & Herman), and Megan Zabkowicz (MU Law) worked tirelessly to arrange the course and otherwise assist in final preparations. As the 7:00 start drew near, Retired Chief Judge Michael Skwierawski assumed his role as master of ceremonies. After a few words—well, perhaps more than few—the racers were off, flying down the paths and cruising around the lagoon. Despite the punishing heat and humidity, most persevered to reach the finish line.

At the finish, participants were greeted to ice cold refreshments provided by the Big Bay Brewing Company. After hugs were given, smiles shared, and shoelaces undone, it was time for the final awards ceremony.

Kadie Jelenchick, defending her 2011 title, crossed the finish line in 22 minutes and 38 seconds. The fastest male runner award went to Todd Wienke, who clocked in at 17:42. For team spirit, the State Public Defender's Office Appellate Division in Milwaukee won for their animated displays of camaraderie and support. The firm of O'Neil, Cannon, Hollman, DeJong & Laing won the award for team participation, bringing the most runners to the event.

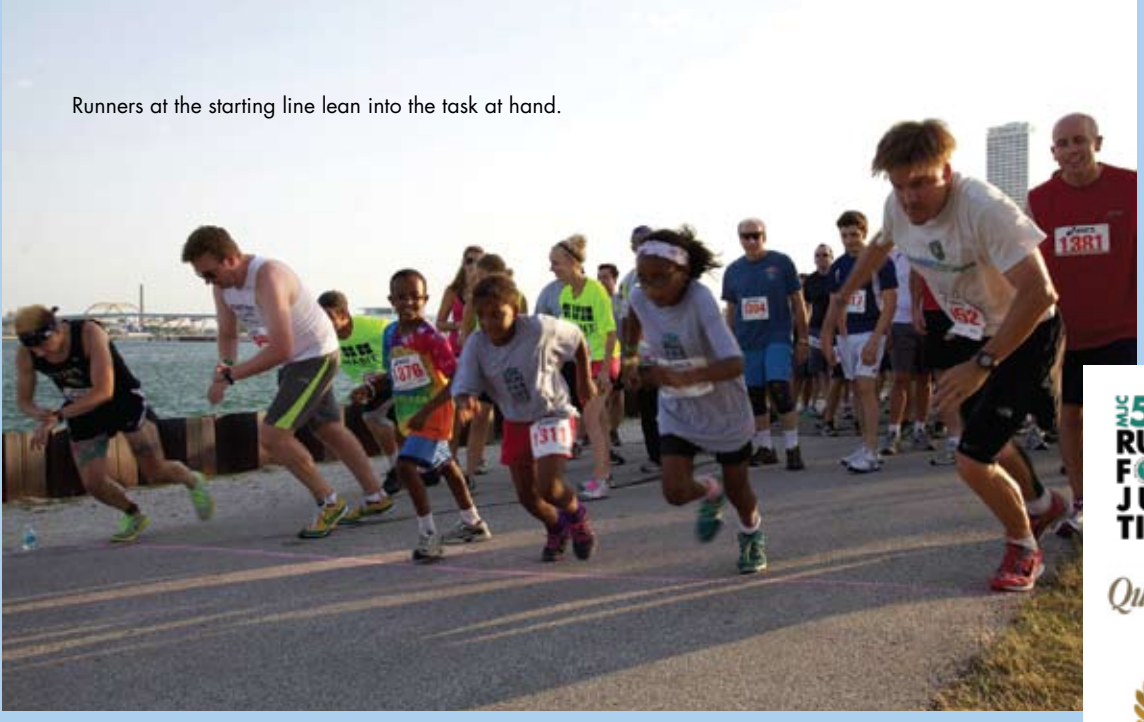
None of this would have been possible without water stations, and none of the water stations would have been possible without the multitude of Milwaukee Justice Center sponsors. The MJC would sincerely like to thank Foley & Lardner, Quarles & Brady, O'Neil Cannon, the Milwaukee Bar Association, Big Bay Brewing Company, and the Milwaukee County Parks for their support. Additionally, SP Video, INSTEP, LexisNexis, Reinhart Boerner, Drinker Biddle & Reath, Quantum LS, Weiss Berzowski Brady, and Hinshaw & Culbertson all provided valuable sponsorship.

The Honorable Mike Skwierawski, emcee extraordinaire, makes himself heard.

Judge Michael Dwyer, Gregg Herman, and Judge Michael Skwierawski.

Dawn Caldart from the MJC shows that lawyers are such warm and fuzzy people.

Max, son of Diane Sackmann and Lekneh Workneh, came up big in the Big Wheels Division.



Runners at the starting line lean into the task at hand.

Emma, daughter of Foley & Lardner attorney Laura Schulteis Kwaterski, crushed the competition in the Crawling Division.

The Riverwest Aces, featuring Foley & Lardner attorney Mark Diliberti, furnished the musical entertainment.

Thomas J. Curran Served as Federal Judge for 23 Years

Attorney Jacqueline H. Dee

The story of Judge Thomas Curran's distinguished legal career is a tale of two counties—rural Juneau County in the Western District of Wisconsin and urban Milwaukee County in the Eastern District. Judge Curran, who died July 17, was born in Mauston in 1924. Mauston (current population 4,500), the county seat of Juneau County, is set on the eastern edge of what geologists call the Driftless Area—the land untouched by glaciers. It is covered with farmland, rivers, streams, lakes, and forests populated by abundant whitetail deer, wild turkeys, bald eagles, and the occasional black bear and cougar. It was there that Curran enjoyed the hunting season.

After graduating from Mauston High School, Curran followed his brothers and sister to Marquette University where he enrolled in the College of Business Administration and joined the Naval Reserve Officer Training Corps. As a freshman, he met the woman who was to become his wife and mother of his six children, Colette Saether Curran. They married in 1948.

Curran's brief undergraduate career included serving as skipper of R.O.T.C.'s social arm—Anchor and Chain. That career was cut short when he was assigned to a ship in the Pacific Theater during World War II. At one point, he was the youngest line officer serving in the Pacific Fleet. Curran was in the Pacific for many of the war's decisive battles, and he was aboard a ship expected to participate in the invasion of Japan when the Japanese surrendered.

After the war, Curran enrolled in Marquette Law School's Class of 1948, known as the "class the robes fell on" because at least 16 class members would go on to become judges. They included John L. Coffey, John F. Cook, Robert M. Curley, Leander J. Foley, Jr., Raymond E. Gieringer, Allen E. Grams, Wilfred J. Hupy, David V. Jennings, Jr., J.T. Merriam, Richard J. O'Melia, James G. Sarres, William J. Shaughnessy, Michael T. Sullivan, and Clair Voss. Curran is the only federal district judge in the group. The class was so large that students went to class year round, and graduations were held every four months in 1948.

Curran considered staying in Milwaukee and accepting an offer from an established firm or going into practice with classmates Patrick Sheedy and Robert Curley, but instead decided to return to Mauston, where he joined his two brothers at their law firm and engaged primarily in trial work. Soon he was serving as Mauston's City Attorney, a position that brought him into contact with other young city attorneys throughout the state, including future federal jurists John Reynolds and Robert Bittner. He put his business school degree to work promoting economic development in Juneau County. He suggested to the area's cranberry growers that they process surplus cranberries as juice—a product not seen on store shelves at that time. He was also a mainstay of St. Patrick Parish and occasionally served as an advisor to the Diocese of La Crosse.

In 1971, Curran traveled the state, campaigning successfully for the 1972-73 presidency of the State Bar. During his tenure, he introduced mandatory continuing legal education and simplified probate procedures for small estates. He also served as president of the Wisconsin Judicial Council and as a member of the Governor's Commission on Crime and Law Enforcement, the State Judicial Commission, and the Board of Governors. On the basis of his high-caliber practice, he was invited to be a Fellow of the American College of Trial Lawyers.

The next decade bought Curran's appointment by President Ronald Reagan to the federal bench in the Eastern District of Wisconsin. In 1983, Judge Curran returned to Milwaukee where, during the next 23 years, he presided over 2,385 civil cases and 463 criminal matters involving 672 defendants. Some of his decisions in cases involving city-suburban school desegregation, county jail conditions, group homes for the disabled, and the funding of Miller Park will continue to affect Milwaukee County for years to come.

In addition to his judicial duties, Judge Curran made it a point to meet with and speak to diverse groups in the community. In one typical engagement, he joined Judge Russell Stamper and then-Common Council President Thomas Donegan for a rousing

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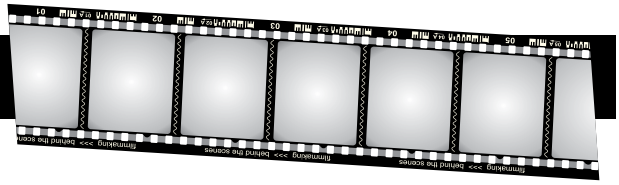
The Reel Law

Attorney Fran Deisinger, Reinhart Boerner Van Deuren



My Cousin Vinny

Directed by Jonathan Lynn
1992; 120 minutes

In this series about "legal" movies, I have somehow avoided—unintentionally—writing about any straight-up comedies. While most movies in the legal genre tend to the dramatic, there are some wonderful exceptions. And in recent history, none better than *My Cousin Vinny.*

Vinny is a classic fish-out-of-water comedy. I won't spend much time here recounting the narrative; it would be hard to believe most don't know it already. It's the early 1990s, and two New York college students are driving to California through the Deep South in a mint green 1964 Buick Skylark convertible. They stop at a roadside convenience store in Alabama to buy a few supplies and soon are on their way. But a few miles later they are pulled over, and just as soon charged with the murder of the store clerk. So there they are, faced with a capital charge in a sleepy southern town—and desperately in need of defense counsel. Fortunately (maybe) one of them has a cousin from Brooklyn, Vinny Gambini, who has just graduated law school and wants the case. When Vinny arrives in Alabama with his fiancée, sassy cosmetologist Mona Lisa Vito, the fun begins. Battling the townies, the District Attorney, Mona Lisa, and most of all, fearsome, stern Judge Chamberlain Haller, Vinny eventually vindicates the two kids and wins over everybody in town. The end.

Of course, it's the ride along the way that provides the laughs. Reminiscent of some classic British comedies of the 1950s, this film is populated not by great leading actors, but by great character actors. Joe Pesci, squat, nasal and New York to his core, is Vinny. Marisa Tomei, in an Oscar-winning performance, and bedecked in phenomenally eye-catching outfits, makes Mona Lisa Vito the most colorful distraction (and most compelling automotive expert witness) that Alabama has ever seen. And as the Great Dane to Pesci's yapping terrier (a line so good I stole it), baby-boomer icon Fred Gwynne (Officer Muldoon/Herman Munster) makes Judge Haller the perfect foil and straight man to Vinny's naïve but natural defense lawyer.

What makes *My Cousin Vinny* so much fun for us lawyers, of course, is its take on the classic courtroom tropes. I have noted in other reviews that almost every trial movie has a demonstration of the axiom that you don't ask a question in cross-examination that you don't know the answer to. Here the victim is the hapless public defender assigned to one of the defendants, whose cross-examination of an eyewitness, who was not wearing his eyeglasses at the time he saw the defendants, trips thunderously on the witness's disclosure that they were just reading glasses. As he helplessly retreats to counsel table, he mumbles "tough witness" to his incredulous client. But up jumps Vinny, who proceeds to demonstrate the importance of persistence when he not only catches the same witness in a bad estimate of the time the defendants were in the store (based, on all things, on the time it takes to cook breakfast grits), but then badgers him into retracting his estimate, notwithstanding the D.A.'s objections and Judge Haller's banging gavel. Upon receiving the admission, Vinny dispatches the vanquished witness with a line that every courtroom lawyer dreams of using some day: "I got no more use for dis guy."

The ongoing battle between Judge Haller and Vinny animates most of the trial action in *My Cousin Vinny,* but the denouement relies on Vinny's realization that a picture taken by Mona Lisa of the tire tracks of the get-away car is the key to proving his defense of mistaken identity. Of course by then, Mona Lisa isn't speaking to Vinny and he has to compel her to take the stand, where he makes her an expert witness. It turns out the gum-snapping, wisecracking, drop-dead gorgeous hairdresser grew up working in her father's Brooklyn auto shop, and the District Attorney turns tail quickly after a spectacularly counterproductive *voir dire* as to her qualifications. Mona Lisa explains that the tire tracks could only have been made by a 1963 Pontiac Tempest with positraction, not a 1964 Buick, and as she is leaving the stand, the sheriff strides in to announce that just such a car has been found in Georgia with two similar looking passengers and, oh by the way, a gun. The D.A. drops the charges.

Is all of this absurd and unrealistic? Of course. We do not care. These wonderful character actors inhabit their Brooklyn and Alabama and legal stereotypes so well, and conflict so amusingly, that it all makes for great entertainment. Even 20 years after its release, we all still got use for *My Cousin Vinny.*

CLE continued from p. 7

8:30 - 9:00 a.m. (Continental Breakfast/ Registration)
9:00 - 12:15 (Presentation)
12:15 - 12:45 (Lunch will be provided)
12:45 - 4:00 (Presentation)
7.0 CLE credits including 1.5 CLE ethics credits

October 29, 2012
MBA Presents
Securities Arbitration
This course will provide a basic understanding of the FINRA Arbitration process, by which most securities disputes are settled. Attendees will gain an understanding of the required steps, including filing a claim, arbitrator selection, discovery, hearing procedures, and the award process.
Presenter: Victor A. Shier, Broker Dealer Services
Noon - 12:30 (Lunch/Registration)
12:30 - 1:30 (Presentation)
1.0 CLE credit

October 30, 2012
MBA / LawReview, co-sponsors
Business Contracts A-Z: Reviews, Drafts, and Negotiations
Businesses large and small require a number of contracts to be drafted or reviewed by their business attorney. This presentation is designed for attorneys who are new to business law, specifically transactional law, and will be a guide to drafting common business contracts. Review agenda at milwbar.org (continuing legal education).
Presenter: J. Scott Scarbrough, Midwest Legal Partners
8:30 - 9:00 a.m. (Continental Breakfast/ Registration)
9:00 - 12:15 (Presentation)
3.0 CLE credits including 1.0 CLE ethics credit

October 30, 2012
MBA / LawReview, co-sponsors
Medical Malpractice 101: Overview of Medical Liability Cases
Medical malpractice cases are among the most complex personal injury cases to litigate. This "Medical Malpractice 101" course will provide a 360-degree review of medical malpractice litigation from inception through trial. We will examine when to pursue certain cases and, even more importantly, when to reject a case. Review agenda at milwbar.org (continuing legal education).
Presenter: J. Michael End, End, Hierseman & Crain
8:45 - 9:15 a.m. (Continental Breakfast/ Registration)
9:15 - 12:30 (Presentation)
3.0 CLE credits including 1.0 CLE ethics credit

October 30, 2012
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U.S. Trademark Registration: the Attorney's Role from Clearance to Renewals
This program covers all aspects of the trademark registration process, from conducting trademark searches and drafting trademark availability reports, to the preparation and submission of trademark applications. The program will also cover the steps necessary to renew and maintain a trademark registration and how best to employ an effective policing strategy, including trademark watching and in some cases the use of demand letters and litigation. The program closes with a discussion of ethical issues that are specific to the clearance, registration, maintenance, and policing of a trademark. Review agenda at milwbar.org (continuing legal education).
Presenter(s): to be announced
1:00 - 1:15 p.m. (Registration)
1:15 - 4:30 (Presentation)
3.0 CLE credits including 1.0 CLE ethics credit

October 30, 2012
MBA / LawReview, co-sponsors
Social Security Disability: Disability Appeals and Preparing a Case for Hearing
This seminar will review all levels of appeal within the Social Security disability process, from the first administrative appeal through federal court. The presentation will provide practice tips on the hearing and appeal process, including preparing clients for hearing and techniques for cross-examining vocational and other experts. This seminar is designed for practitioners with at least a basic level of knowledge of the Social Security disability process. Review agenda at milwbar.org (continuing legal education).
Presenter: Paul M. Erspamer, Paul M. Erspamer Law Offices
1:15 - 1:30 p.m. (Registration)
1:30 - 4:45 (Presentation)
3.0 CLE credits including 1.0 CLE ethics credit

November 9, 2012
MBA Presents
Landlord and Tenant Law
Get updated on significant changes to Wisconsin's landlord and tenant law.
Presenters: Evan E. Knupp, Roney & Knupp; Patrick M. Roney, Roney & Knupp; Tristan R. Pettit, Petrie & Stocking; Margaret Bowitz, Milwaukee Fair Housing Council
8:30 - 9:00 a.m. (Continental Breakfast/ Registration)
9:00 – Noon (Presentation)
Noon - 12:30 (Lunch will be provided)
12:30 - 3:00 (Presentation)
5.5 CLE credits

December 6, 2012
MBA Presents
Ethics Seminar
Presenter(s): to be announced
Noon - 1:00 (Lunch/Registration)
1:00 - 4:00 (Presentation)
3.0 CLE ethics credits

Beyond the Individual Mandate:

Additional Health Care Reform Issues for Providers and Other Businesses

Attorney Steven M. Biskupic, Michael Best & Friedrich

The Supreme Court's recent decision on the constitutionality of the individual mandate provision of the Patient Protection and Affordable Care Act (ACA)—*NFIB v. Sebelius,* No. 11-393 (June 28, 2012)—has drawn the bulk of recent public attention on health care reform. Business owners and health care providers, however, should not overlook a number of important issues that remain in the wake of that decision. Here are three of the major issues that will continue to impact health care:

1. "Exchanges" will probably be the next major battleground.

The individual mandate of the ACA requires uninsured individuals to obtain health insurance or pay a penalty (or tax). In order to make it easier for individuals and small businesses to obtain and provide health care insurance, respectively, the ACA relies on the States to create "Exchanges." American Health Benefit Exchanges and Small Business Health Option Program (SHOP) Exchanges will serve as a clearinghouse for health care options. The Exchanges, however, also are the trigger for a penalty provision for companies employing 50 or more full-time employees but not offering health insurance benefits. If uninsured employees then utilize the Exchanges to obtain health care insurance, such businesses will face a potential penalty of between $2,000 and $3,000 a year for each uninsured employee.

The ACA, however, does not have an explicit mechanism to require States to create Exchanges, though there are financial incentives to do so. If States do not create Exchanges (as many governors have already indicated they may not due to the expense), those Exchanges will have to be created and funded by the federal government. According to some commentators, that step is uncertain because Congress may not provide sufficient funds.

If no Exchanges exist within a State, then there may be no penalty trigger for businesses that do not provide health care insurance. As in the case of the individual mandate, the question will then become whether the ACA as a whole can operate without the Exchanges in force. Businesses and health care providers should expect a major political and legal fight over the refusal of individual States to provide Exchanges.

2. The ACA regulatory framework continues in full force for health care providers, group health plans, and health insurance issuers.

The Supreme Court decision focused not only on the individual mandate, but also on the issue of whether the federal government can financially punish States for failing to expand Medicaid coverage. The Court said "no." For businesses and non-profit entities involved in health care-related activity, however, the ACA contains hundreds of new requirements untouched by the Supreme Court decision. Many are simply extensions of requirements that already existed for businesses involved in any way with Medicare and Medicaid. Other provisions are potentially more onerous.

Absent legislative amendment or additional court review of the entire law, these provisions will remain applicable. In addition, many of the provisions require the Secretary of the Department of Health and Human Services (HHS) to propose new rules or regulations for implementation of the various mandates. That process will continue, as well.

One important and broadly applicable provision in the ACA is a new statutory framework requiring health care providers and suppliers to return Medicare overpayments within 60 days. The Secretary of HHS followed up on this provision earlier this year by proposing a new, detailed federal regulations setting forth policies and procedures for the prompt return of overpayments.

HHS essentially made mandatory its prior, voluntary overpayment framework, which included a Web-based reporting mechanism. The new regulations also contain provisions for determining the size of the overpayment, when the 60-day clock would run, and options for how overpayments are to be repaid.

3. Significant enforcement mechanisms still exist under health care laws.

While the Supreme Court struck down the Medicaid penalty provision against the States, and a fight over Exchanges may soon arise, the ACA still includes significant enforcement provisions that apply to large and small businesses, as well as all health care providers, group health plans, and health insurance issuers. Those tempted to ignore the health care laws should bear in mind that within the intentionally broad and all-encompassing nature of the ACA, additional criminal and civil penalty provisions abound.

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The Strange Milwaukee "Trial" of Theodore Roosevelt's Would-Be Assassin

Attorney Hannah C. Dugan

One hundred years ago, the Milwaukee courts held one of America's most notable attempted murder trials. And the "trial," such as it was, is all the more intriguing because it might not even have been held without the intervention of the gunshot victim himself: Theodore Roosevelt. As noted in a contemporary article, Presidential candidate TR, bleeding in the streets of Milwaukee, rose to his feet and called for the police to have his mobbed, foiled assassin brought to him. Ever the politician, TR did not want an imminent lynching by the angry crowd to mar his campaign, nor did he want to appear fazed by the attack. Instead, he spoke directly to the perpetrator, directed the police to protect the shooter, and directed his entourage to drive him to the Milwaukee Auditorium to deliver his stump speech.

This article recounts the trial of the would-be assassin, remarkable not only because of its celebrated victim but also because of the uncommon proceedings undertaken in the prosecution.[1]

Abbreviated Backstories: The Victim

On October 14, 1912, Milwaukee welcomed Bull Moose Party[2] candidate "Colonel" Theodore Roosevelt just weeks before he hoped to be elected to an unprecedented third presidential term.[3] At about 8:00 p.m., an armed man muscled his way through a crowd outside the Gilpatrick Hotel, where TR had dined.[4] The candidate, about to be transported to the Milwaukee Auditorium[5] to speak to 9,000 waiting devotees, climbed into his waiting car and stood on its floorboard at the same time the shooter, at point blank range, aimed a pistol at him. Another person in the crowd struck the shooter's arm, causing it to drop to TR's chest level at the same time TR lifted his arm to wave.The gun's bullet, headed straight for TR's heart, was slowed by his heavy overcoat, a 50-page speech folded onto itself in his breast pocket, and his metal eyeglass case. The bullet imbedded in his right rib cage instead of penetrating his lung and heart.[6] Bleeding into his white shirt and a borrowed handkerchief he used inside his topcoat to cover the bullet hole, he delivered his 80-minute speech, telling the crowd that it would take more than a bullet to bring down a Bull Moose. After the speech, TR headed to Johnston's Emergency Hospital[7] for x-rays and medical assessment. He was transported by train the next day to Chicago's Mercy Hospital, where he recuperated for over a week (campaigning from his hospital bed) before he returned to Oyster Bay, New York.[8] Back home, he delivered two more campaign speeches,[9] cast his vote, and waited for the results of his third-party presidential candidacy.[10]

The Perpetrator

John Schrank, a childhood immigrant and ex-barkeep at a relative's New York saloon, was a stocky, studious, quiet, and unassuming man without criminal record or clear indication of mental disorder. He was a self-styled poet and a self-taught student of politics and the history of nations and empires. He wrote lengthy political manifestos, with the centerpiece that the "unwritten laws" of the American Founders—which he entitled "The Four Pillars of our Republic"—were in danger.[11] Apropos of one pillar—that no President should have a third term—Schrank set about to avert that real possibility presented by TR's campaign.

The day after President McKinley's September 15, 1901 death, Schrank dreamed that the assassinated President was identifying TR as his murderer and directing Schrank to "avenge my death." On September 14, 1912, McKinley's ghost interrupted Schrank's poetry writing and implored Schrank: "Do not let a murderer sit in the president's chair." In a letter found on his person upon arrest, addressed to the People of the United States, Schrank informed the world about these incidents and included in his rant that he was being called both by God and by his patriotic duty to die if necessary to prevent or remove anyone who would be a third-term President.

Schrank bought a gun and stalked TR's campaign for the next month through seven states and eleven cities, looking for the opportune moment to shoot the candidate. The inspectors' reports included not just his age (36), address (156 Canal Street, New York), occupation (saloon keeper), moles, marks, weight, height, hair color, and fingerprints (five sets), but also noted that he was a native of Bavaria and noted detailed measurements of his head, cheeks, and ears.[12]

The Unique Law in 1912

During the decades before 1912, both legal and medical professionals, in their respective disciplines and sometimes together, were studying approaches to insanity, mental illness, and feeble-mindedness. In its 1910-11 session, the Wisconsin Legislature passed a statute allowing the court, essentially, to circumvent a jury trial by appointing a panel of "alienists" (mental health doctors), who could evaluate a defendant as "insane," either at the time of commission of the alleged crime or at the time of trial. The theory behind the legislation: the battles of the "expert witness opinions" were creating a variety of difficult issues in jury trials. Judges therefore were given statutory authority to opt not to empanel a jury. Schrank's case was among the first cases in which a judge opted to employ this law.

Not Really a Trial but, Rather, a Homegrown Legal Proceeding

After Schrank's immediate arrest, District Attorney Winfred C. Zabel[13] interrogated him twice and had him appear the next morning before Judge Neelen in District Court in an effort to evade crowds. Reportedly, 200 people were in court anyway. The D.A. was explicit: John Schrank "is legally sane…. He has a perfect knowledge of right and wrong and realizes that the act he committed was against the law." The court detective displayed TR's bloodstained undershirt and shirt before the court asked for a plea to the charge of "Assault with intent to murder or rob. Section 4376."[14] Schrank pleaded "guilty" outright, waived "examination" (preliminary hearing), and stated that he did not seek an immediate trial.

District Court Judge Neelen imposed $5,000 bail, and then raised it to $7,500 when reminded about concerns of a poisoned bullet in McKinley's assassination (concerns that were eventually unsubstantiated). The court ordered the bullets from the defendant's revolver sent to Marquette Professor Summer for chemical examination, ostensibly to assure that the bullets were not poisoned; Schrank assured the court that they were not. Jurisdiction for deciding criminal matters, including sentences, belonged to the Municipal Court. Judge Neelen sent the defendant to appear before Municipal Court Judge August G. Backus during his December Municipal Court

continued next page

Roosevelt continued from p. 18

session.[15] On the morning of November 13, Judge Backus appointed James Flanders as counsel, who as it turned out served a limited role.[16]

From that point forward, the Milwaukee legal process turned a bit odd, at least to modern sensibilities, with respect to Schrank's (1) speedy trial rights, (2) bail, and (3) jury trial rights.

Speedy trial rights. Reportedly, it was D.A. Zabel who wanted to delay trial, citing three reasons: to learn the results of TR's injury should the charge need to be amended, to avoid hurrying the defendant, and because it would be "unwise" to try the case prior to the election and have the "plain criminal aspects of the case in anyway involved in the National political situation." The D.A. believed that Schrank acted alone, that he could (and would) withdraw his plea prior to trial, and that he was sane.

Bail. Judge Backus increased bail from $7,500 to $15,000 to better assure Schrank's incarceration, but not because Schrank posed a flight threat.[17] Rather, "movie men" wanted to get Schrank out of jail and into a crowd to "reenact" the attempted assassination scene, record it in pictures before the authorities could prevent them from doing so, then recall the bail and have Schrank remanded to jail. The trash-talking began: Judge Backus would send the bail "sky high"; the movie men said that the amount could not get too high for them to get Schrank out of jail for the pictures.

On October 18, Judge Neelen convened in "open court" with no one present—except the defendant and the D.A.—and ordered the bail to be increased. He also made it clear that if the movie men raised $15,000, he would nonetheless not release the prisoner and thereby permit shameful publicity and undermining of the authority of his court.

Jury trial rights. Schrank ultimately was not allowed to decide to have a trial by jury. Two things were clear: his guilty plea to the charge that "with malice aforethought, [he] did attempt to kill and murder Theodore Roosevelt," and his wish to accept his fate. But the guilty plea was not without some qualification. Schrank saw his crime as a political crime, not a crime against humanity or the state. Newspapers reflected his demeanor as without passion and with resolution. The following exchange in court changed the course of his prosecution:

> Judge Backus: You understand that within [the Complaint] you are charged with having attempted to kill Theodore Roosevelt. Do you plead guilty or not guilty?
>
> Schrank: I did not mean to kill a citizen[,] [J]udge; I shot Theodore Roosevelt because he was a menace to the country. He should not have a third term. It is bad that a man should have a third term. I do not want him to have one. I shot him as a warning that men should not try to have two terms as president. I shot Theodore Roosevelt to kill him; I think all men trying to keep themselves in office should be killed; they become dangerous. I did not do it because he was a candidate of the Progressive Party[,] either, gentlemen.

The D.A., in a complete turnabout, then asserted that "the man is insane. It would be wrong to sentence him for a crime if he was mentally unsound just because he was willing to plead guilty." He moved the court to appoint a commission of alienists or have Schrank tried before a jury.

Judge Backus ordered a five-person panel of alienists,[18] had them sworn, and allowed them examine Schrank as often as needed for as much time as they needed. To assuage concerns, the judge made clear that the commission should determine whether Schrank "is sane at the present time."

Schrank's attorney does not appear to have been present at the alienists' sessions or at the legal proceedings. Schrank responded to questions and provided documents to the commission. On November 22, Judge Backus reconvened the legal proceeding and it went forward as follows: the D.A.'s witnesses testified to Schrank's movements in Milwaukee; and the alienists' 50-page report was read into the record for the next two hours. The report included five exhibits, including Schrank's lengthy written statement to the never-convened jury. The commission concluded that Schrank was insane.

The court did not provide for cross-examination, defense witnesses, a jury to evaluate the report or exhibits, or the defendant's testimony. Judge Backus adopted the report; ordered commitment; and made clear that under the sanity commission's findings, Schrank would not be able to escape sentence under his guilty plea or a jury determination if at a future date, sanity having been restored, he should demand a jury trial and be determined guilty. As a person declared insane, he would remain a ward of the court.

The disappointed Schrank self-righteously asked, "Why didn't they give me my medicine right away instead of making me wait? I did it and I am willing to stand the consequences of my act." As he was led away, he insisted on shaking hands with each of the five alienists.

Postscript

Both Judge Backus and what was deemed the "Wisconsin Idea"—the judicial alternative of empanelling alienists in commissions instead of swearing them as disagreeing

continued next page

Legal Action's Volunteer Lawyers Project Offers Training for *Pro Bono* Lawyers

Legal Action of Wisconsin's Volunteer Lawyers Project will present its 2012 Training in Madison and Pewaukee in November. This series of seminars is offered without charge to lawyers who commit to provide *pro bono* services to Legal Action clients. This year's training offers eight topics in two locations.

The training will start in Madison on Wednesday, November 7, at the American Family Training Center. Once again, American Family is making its high-tech training center available at no charge for this important event. The first day will focus on representing tenants. The second day (November 8) will be devoted to enforcing consumer rights. And the final day in Madison (November 9) will feature unemployment compensation in the morning and bankruptcy in the afternoon. The 2012 "Enforcing Consumer Rights" seminar will focus on the work of the Wisconsin Department of Justice, the Federal Trade Commission, and the new Consumer Financial Protection Bureau. Lawyers representing those agencies will describe their work on various consumer protection issues.

The remaining training subjects will be presented in Pewaukee at the R.T. Anderson Education Center on the campus of Waukesha County Technical College. On Friday, November 16, VLP will present "Basic Family Law," concentrating on divorce and family law procedure. On Monday, November 19, the morning session will feature "Issues in Immigration," and the afternoon session will be "Working with Interpreters." The final seminar will be "Elder Law" on Tuesday morning, November 20.

Go to the Volunteer Lawyers Project website, vlp.legalaction.org, for more details about the topics to be covered, presenters, CLE credits, directions to the training sites, and lodging availability. If you are unable to get the information you need, contact VLP at VLP@legalaction.org, or call Don Tolbert at 414-274-3067 or 888-278-0633, ext. 3067.

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expert witnesses in jury trials—were widely praised in newspaper editorials throughout the country. [19]

Schrank's institutionalization on November 25, 1912 in the Northern State Hospital for the Mentally Disturbed in Oshkosh was followed by his transfer to the Central State Mental Hospital in Waupun. Nicknamed "Uncle John" by the staff, he was a model patient for the next 30 years. Had his guilty plea been accepted, he would have served 15 years instead of being institutionalized for 31 years. The alienists determined that he acted on a delusion once; no evidence of similar attempts or other antisocial conduct was ever reported. Curiously, Schrank had no visitors or communications during his entire institutionalization. He died in 1943, three years after Franklin Delano Roosevelt, TR's cousin, was elected to his third presidential term, and just after FDR announced his intent to run for a fourth term.

[1]Remey, Oliver E., Cochems, Henry F., and Bloodgood, Wheeler P., eds., *The Attempted Assassination of Ex-President Theodore Roosevelt* (O.E. Remey, Milwaukee 1912), reissued (Roger H. Hunt, Madison 1978); Aderman, Ralph M., ed., *Trading Post to Metropolis: Milwaukee County's First 150 Years* (Milwaukee County Historical Society, Milwaukee 1987); Olivar, Willard, and Marion, Nancy, *Killing the President: Assassinations, Attempts and Rumored Attempts on U.S. Commanders in Chief* (ABC-CLIO, LLC, Santa Barbara, California 2010); Bruce, William, and Currey, Josiah Seymour, eds., *History of Milwaukee, City and County,* Volume 1 (S.J. Clark Publishing Co., Milwaukee 1922); Usher, Ellis Baker, *Wisconsin, Its Story and Biography, 1848-1913,* Volume 4 (The Lewis Publishing Co., Chicago 1912); *Journal of the American Institute of Criminal Law and Criminology,* Volume XI, No. 1 (American Institute of Criminal Law and Criminology, American Prison Association, American Society of Military Law, Chicago 1920); *Journal of Criminal Law, Criminology & Police Science,* Volume IX (Northwestern University Press 1919); "Would-be Assassin Is John Schrank, Once Saloonkeeper Here; A Maniac on Third Term," Special to *The New York Times,* pg. 1 (10/14/1912); "Schrank Owns Guilt, Callous, Then Sorry," Special to *The New York Times,* pg. 1 (10/15/1912); "Moving Picture Men Try to Get Schrank," *The New York Times* (10/17/1912); "Schrank Says He Shot to Kill," *El Paso Herald* (11/12/1912); "Sanity Board to Examine Schrank," *The New York Times* (11/13/1912); "Schrank to Asylum, Declares He is Sane," *The New York Times* (11/23/1912); "Attempted Assassination of Theodore Roosevelt," *Racine Journal* (8/13/22); "The Attempted Assassination of Teddy Roosevelt," *Wisconsin Magazine of History,* Vol. 53, No. 4 (Summer 1970); www.classicwisconsin.com/features/assassin.html (viewed August 8, 2012); www.linkstothepast.com/milwaukee/mkemarFbios.php (viewed August 7, 2012); www.wisconsinhistory.org/museum/artifacts/archives/001692.asp (viewed August 7, 2012); www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=13239354 (viewed August 7, 2012); www.classicwisconsin.com/features/assassin.html (viewed August 8, 2012); www.freeinfosociety.com/article.php?id=425 (viewed August 8, 2012); murderpedia.org/male.S/s/schrank-john-book-4.htm (viewed August 8, 2012).

[2]TR was the Progressive Party candidate, but for his campaign he renamed his party affiliation to reflect that he was as "fit as a bull moose."

[3]TR was nominated as the Progressive Party candidate, much to Wisconsin's Fightin' Bob LaFollette's consternation. Fightin' Bob wrote a series of highly critical articles regarding TR's "betrayal" of Progressive Movement ideals. TR's visit to Wisconsin was meant to shore up the loyalty of progressive constituents in person. In the Wisconsin election results he came in third; Wilson carried the state.

[4]The Hotel Gilpatrick, 223-225 3rd Street (1894-1929), 831 North 3rd Street (1930 - 1941), was closed and demolished in 1941. The Hyatt replaces the hotel at the corner of West Kilbourn Avenue and North 3rd Street, and displays a bronze plaque in its entranceway marking the approximate location of the aborted assassination of TR.

[5]The auditorium where TR gave his speech underwent a $42 million redesign in 2003, and was renamed the Milwaukee Theater.

[6]The bullet was never removed; TR died with it in his rib cage.

[7]Johnston Emergency Hospital, at the intersection of Oneida (now Wells) and Jackson Streets, was operated by the City of Milwaukee.

[8]TR did not have to return to Milwaukee for trial. As Schrank's appointed counsel argued, because Schrank's present mental state was in play, "summoning" TR to testify was not likely.

[9]Candidates Woodrow Wilson and President William Howard Taft both intended to suspend their campaigns for a short time following the assassination attempt. But TR sent missives decrying the idea. He claimed that the people needed to be able to hear the candidates and make their choice; he also wanted the electorate to maintain its confidence in him. He resumed his campaign while he recuperated, using telegrams, letters, and surrogates. Before the November 5 election, TR delivered two final speeches—with the one in Madison Square Garden drawing an audience of over 15,000 persons.

[10]TR's was the most successful third-party candidacy in American history. While Democrat Woodrow Wilson won, incumbent Republican William Howard Taft had fewer popular votes than TR. It is conceivable that, but for the break in TR's electoral momentum due to the assassination attempt, he would have been elected outright or the election would have been decided by the House of Representatives. A factor influencing Taft's campaign was that his Vice-President, James Sherman, died on October 30, 1912, leaving Taft without a running mate.

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Pro Bono Corner:

AIDS Resource Center of Wisconsin Legal Services Program

The Pro Bono Corner *is a regular feature spotlighting organizations throughout the Milwaukee area that need* pro bono *attorneys. More organizations looking for attorney volunteers are listed in the MBA's* Pro Bono Opportunities Guide, *at www.milwbar.org.*

AIDS Resource Center of Wisconsin Legal Services Program

Contact: Rebekah Kopec-Farrell
Office: AIDS Resource Center of Wisconsin
820 North Plankinton Avenue
Milwaukee, WI 53203
Phone: 414-225-1530
Fax: 414-225-1632
E-mail: Rebekah.Kopec-Farrell@arcw.org
Web: www.arcw.org

Individuals living with HIV or AIDS have greater opportunities that ever before to live long, healthy, and happy lives, notes Rebekah Kopec-Farrell, Director of the AIDS Resource Center of Wisconsin Legal Services Program. As medications improve and people gain greater access to them, "we have seen many of our clients win back some stability in their health, which in turn provides a healthy foundation upon which to work toward long-term goals such as regular employment, adequate housing, and stable families," said Ms. Kopec-Farrell.

ARCW's Legal Services Program seeks to help its clients reach those goals. The program is part of an integrated, holistic approach to safeguarding the overall well-being of those living with HIV or AIDS in Wisconsin. It provides free legal representation to people living with HIV or AIDS, regardless of the client's income, for advanced directives, Social Security Disability appeals, and HIV discrimination issues. The program also represents clients with incomes under 125% of the federal poverty limit in estate planning, family law, guardianships, health care confidentiality, housing, employment, consumer, bankruptcy, and insurance matters. The group provides legal services throughout Wisconsin in collaboration with ARCW offices around the state, and often works closely with clients' medical providers, case managers, and behavioral health providers.

With only two attorneys and no support staff, the Legal Services Program welcomes *pro bono* attorneys to take on one or two cases at a time. Volunteers are needed in all areas of law, but particularly in bankruptcy, family law, housing, and consumer law matters. According to Ms. Kopec-Farrell, the Legal Services Program has seen a dramatic increase in the need for legal assistance this year. At the end of July, the program had served nearly 41% more clients during the year than at the same time last year. "I'm uncertain whether the increase is a function of the economy or a response to our efforts to increase awareness of our program among HIV-positive individuals, or perhaps both," said Ms. Kopec-Farrell.

While resources are tight, the Legal Services Program can provide *pro bono* attorneys with reference materials and can help with postage, copying, and the like. In some cases, ARCW can cover other litigation-related expenses and can help refer clients to services such as ARCW's food pantry or housing assistance.

"Unfortunately, stigma and discrimination are still very real and direct threats to individuals living with HIV or AIDS," Ms. Kopec-Farrell added. Clients of the Legal Services Program, largely low-income or indigent, live with the ongoing stress of balancing the costs of housing, transportation, health care, and food. Some face harassment by creditors, live in inadequate or dangerous housing, or struggle to find reliable transportation to medical providers. These are challenges that confront all low-income members of our community, but as Ms. Kopec-Farrell noted, "to an HIV positive individual living with an already compromised immune system, [these] can be very dangerous prospects."

OLR District continued from p. 9

violations and sanctions, and then put to a vote of the committee. After the meeting, the report is finalized and submitted to the OLR, with copies sent to the grievant and the attorney (while the committee's recommendations and meeting minutes are submitted only to the OLR). All details of the committee investigations and meetings are confidential, not to be shared with anyone other than committee members, OLR staff, and individuals directly involved in the investigation.

Training

The Supreme Court Rules require that new members be trained on the ethics rules. Under SCR 21.11(2), "[t]he director shall provide formal training in procedural and substantive ethics rules to the members of the district committees. Committee members shall attend at least one training session within the first year of appointment as a condition of appointment, unless the director extends the time to fulfill the training requirement." Training is provided to new members in the spring, summer, or fall following appointment to the committee, usually after attending their first committee meetings. In past years, training has been provided in Madison and Wausau, but it is being provided to the individual committees this year. Generally, the training is approved for four hours of CLE ethics credit.

Lessons

Not only does committee participation offer a comprehensive refresher course on all ethical rules to which Wisconsin lawyers are bound, it also provides a unique insight into the common pitfalls to which many well-meaning lawyers fall prey. For those lawyers who hope never to encounter the OLR, remember that client communication is key to the ethical practice of law.

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[11]The "Four Pillars of our Republic" were (1) no third terms, (2) the Monroe Doctrine, (3) only a Protestant by creed can be President, and (4) no wars of conquest.

[12]Although phrenology as a means of determining sanity and criminality was largely out of vogue in the U.S. by the 20th century, recording such measurements became integral in Schrank's case.

[13]Zabel, born in Germany in 1877, came to Milwaukee in 1884. His father was a Milwaukee County deputy clerk of court. Schooled in Milwaukee, Zabel worked at the *Milwaukee Sentinel* prior to going to Ohio Northern University, where he earned an L.L.B. degree in 1900. He returned to Milwaukee and became a member of the bar in 1901. He joined W.B. Rubin in law practice and ran for D.A. in 1910, winning as the first socialist D.A. elected in the nation.

[14]"Any person being armed with a dangerous weapon who shall assault another with intent to rob or murder shall be punished by imprisonment in the state prison not more than fifteen years nor less than one year." The D.A. and Schrank squelched statements that Schrank waited to strike in a state without the death penalty.

[15]In 1859, the Legislature established the Municipal Court of Milwaukee County as a formal criminal court, replacing the criminal jurisdiction of the city's "police justice system." The Municipal Court jurisdiction included appellate review of justice of the peace (and later District Court) decisions, and excluded cases in which defendants adjudged guilty would face life imprisonment or death sentences. (These excluded cases remained in the Circuit Court's jurisdiction.) In 1899, the District Court of Milwaukee County was authorized by the Legislature, and in 1902, it replaced the civil police justice system. The District Court, subordinate to the Municipal Court, heard ordinance, misdemeanor, and traffic cases. The bifurcated District and Municipal Court jurisdictions were absorbed by the County Court system in 1962 and by the Circuit Court in 1977.

[16]James Greeley Flanders came to Wisconsin at age four from New Hampshire. He was schooled in Milwaukee, at Phillips-Exeter Academy, and at Yale College (1867). He spent a year reading law at Milwaukee's Emmons & Van Dyke before attending Columbia College Law Department (1869). He returned to Milwaukee to practice; eventually became a member of Winkler, Flanders, Bottum & Fawsett; and was elected to the school board and later to the State Legislature in 1877.

[17]The newspapers recorded some of Schrank's activities in jail: drawing a checkerboard on a blank paper and playing with fellow inmates; insisting on wearing his rosary around his neck (despite authorities' concerns of suicide); writing, in closely written lines, page after page of foolscap.

[18]The commission consisted of Dr. F.C. Studley (superintendent of a sanitarium), Dr. William Becker (former head of the Northern Hospital for the Insane at Winnebago), D.W. Harrington (a nerve specialist), Dr. W. Wege (an alienist), and chair Dr. Richard Dewey.

[19]Judge Backus subsequently became an active member of the American Institute of Criminal Law and Criminology, and of ABA committees regarding "insanity."

Curran continued from p. 14

dedication of a new church on Sherman Boulevard where his courtroom deputy was a member of the congregation. On other occasions, he delivered the annual member memorial address for the Milwaukee Bar Association. As in Mauston, Judge Curran enjoyed contributing his time and talent to civic affairs, education, the legal community, and his church. At the same time, he was able to enjoy big city attractions such as Marquette basketball and Irish Fest.

Among the honors bestowed upon Judge Curran were Marquette University Law School's Lifetime Achievement Award, the State Bar Foundation's Truman McNulty Service Award, the Eastern District of Wisconsin Bar Association's Myron L. Gordon Lifetime Achievement Award, and the State Bar's first Mentorship Award. Judge Curran, however, considered his family of six children and sixteen grandchildren his most important lifetime achievement. He would be proud to know that his grandson, Richard Orton, is one of the newest members of the Milwaukee Bar Association, and that another grandson, Peter Curran, recently joined the Juneau County Bar.

Health Reform continued from p. 17

The most common penalty provisions relate to any false statements made in connection with health care matters. For example, the ACA allows the Secretary of HHS to require health care plans to document and certify compliance with the ACA. The Secretary then may institute proceedings and assess financial penalties not only for failure to comply with the paperwork requirements, but also for any false statements made in connection with the forms.

In addition, any intentional false statement to the federal government or participation in a scheme to defraud involving a health care matter may give rise to criminal penalties. The ACA further directs federal judges, through the U.S. Sentencing Commission, to consider increased incarceration for health care offenders. The government maintains the manpower, including federal investigators and attorneys, to ensure enforcement. In short, it remains extremely difficult to fight "City Hall" (in this case, the federal government) by either ignoring the law or lying about compliance.

The author may be reached at 414-277-3474 or smbiskupic@michaelbest.com.

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designers who discover that, without any previous knowledge of their accuser, they are forced to defend their work because it bears a strong resemblance to the work of others that has prior legal protection.

These aggressive tactics are possibly fostered by the recession and a weak housing market, which causes some groups to favor legal action over actual construction as a major part of their business plan. These tactics are costly and time-consuming, and have little to do with actual design originality or creativity, the protection of which was presumably the primary intention of the Act. There do not appear to be any moves afoot to revise the Act (itself a costly and time-consuming venture), or to strengthen the implementation of the copyright process to address the issues of originality and creativity. Accordingly, designers (including those architects who venture into the housing design market) need to be aware that they are not immune from legal action should their work be regarded as derivative, regardless of the lack of wrongful intent or previous knowledge of comparable copyrighted designs. Furthermore, as a matter of good practice, attorneys can help their designer clients by strongly recommending that all architectural work, however modest in design aspiration, be systematically copyrighted to protect against not only unauthorized use but also the threat of ownership challenges by competitors.

The author is an architect specializing on the impact of law on architecture and architectural practice, and has served in numerous cases as an expert witness, many of which involve market rate housing as described in this article.

Notes

[1]Greenstreet, R., Klingaman, R., "Architectural Copyright: Recent Developments," *Architectural Research Quarterly* (Cambridge University Press), Vol. 4, No. 2, 2000, pp. 177-183.

[2]La Barre, S., "Truth in Numbers," *Metropolis Magazine.com,* January 1, 2012. Depending how the question is framed, the percentage of architects involved in housing design varies from 2% to 28%.

[3]Greenstreet, R., "Who Really Owns Your Design?" *Progressive Architecture,* April 1985, pp. 63-64.

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Phone: 262.347.0102
E-mail: mmcdonnell@atgf.com

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N14 W23800 Stone Ridge Drive, Suite 120
Waukesha, Wisconsin 53188

800.788.8989
WWW.ATGF.COM