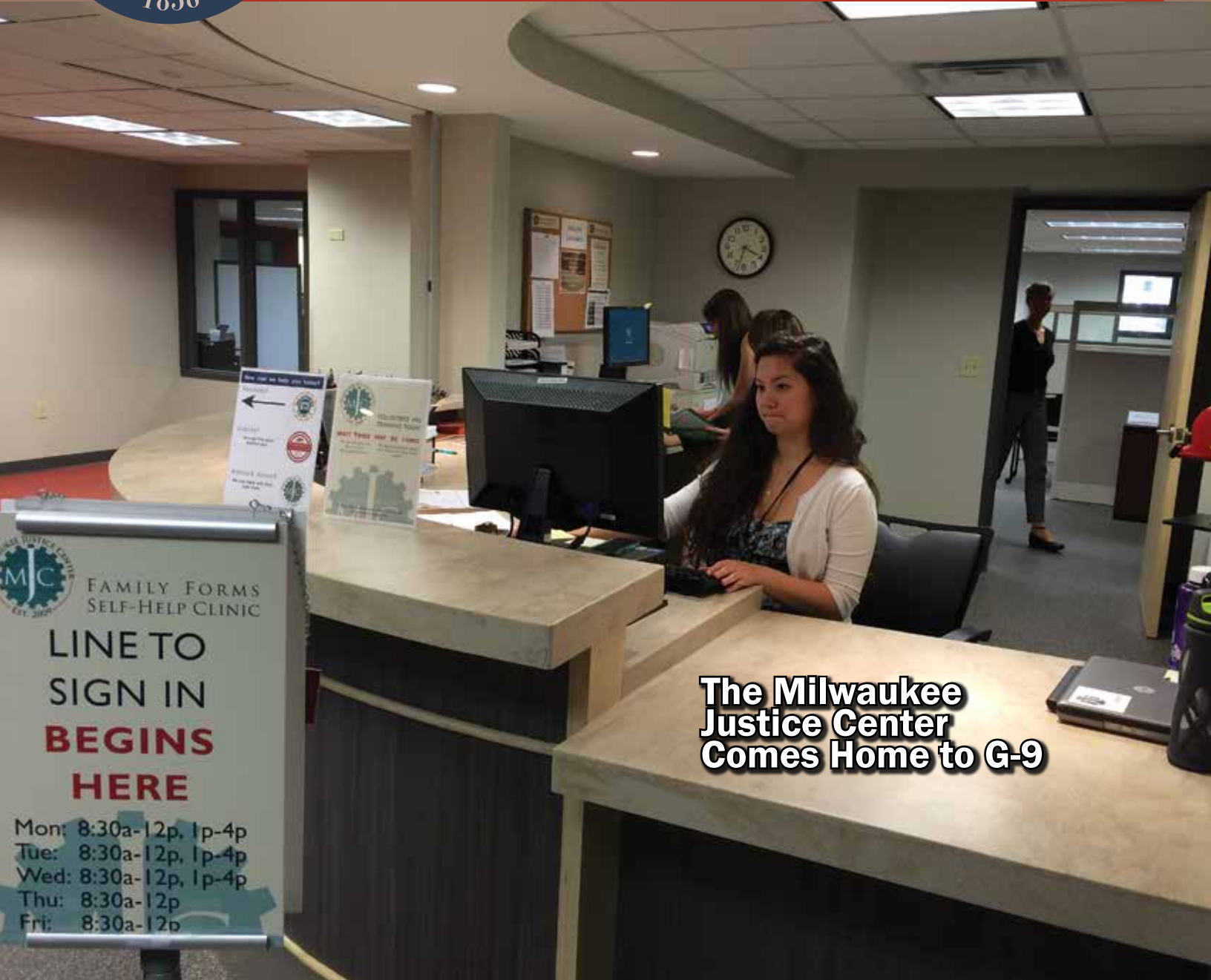




Fall 2014 • Volume 3

Messenger



The Milwaukee Justice Center Comes Home to G-9

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Group Term Life Insurance Plan

Affordable group term life insurance, approved by the State Bar of Wisconsin as a benefit of your membership.

Peace of mind for your family—protection for their future

No one wants to think about death, but if you avoid planning for the future, you could be forcing your family to abandon the lifestyle they are accustomed to.

The State Bar of Wisconsin Group Term Life Insurance Plan with coverage issued by The Prudential Insurance Company of America—was designed for a simple purpose: to provide money to help keep your family's hopes and dreams for the future on track following an untimely death. It's money to help pay the mortgage, so they can continue to live in the family home; or to help with college expenses, so your children can get the education they deserve. It's money to help ensure your family's financial future is protected.

Coverage designed with you in mind

All State Bar of Wisconsin members under the age of 65 are eligible to apply for the Group Term Life Insurance Plan. Rates for the State Bar of Wisconsin Group Term Life Insurance Plan are competitive, helping to make the decision to apply an easier one. And, as your needs increase, you can simply apply for more coverage.

Optional Dependent/Spouse Coverage

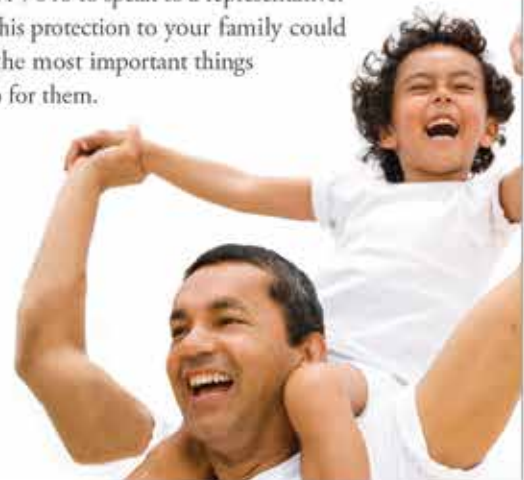
Covered members may also apply to insure their spouses under age 65 and eligible dependent children.

Features at a glance:

- Up to \$1,000,000 of term life insurance that can help keep your family's future on track
- An Accelerated Benefit Option that lets you receive a percentage of your coverage amount if you become terminally ill*
- Coverage you can keep, even if you change employers
- Optional Accidental Death Coverage
- **Insurance approved by the State Bar of Wisconsin.**

How do I Apply?

Applying for coverage is quick and easy. Members of the State Bar of Wisconsin can visit www.wisbar.org/grouptermife to download a form or apply online. Please call the Plan Agent, Bultman Financial Services, at (800)-344-7040 to speak to a representative. Providing this protection to your family could be one of the most important things you ever do for them.



*Accelerated Death Benefit option is a feature that is made available to group life insurance participants. It is not a health, nursing home, or long-term care insurance benefit and is not designed to eliminate the need for those types of insurance coverage. The death benefit is reduced by the amount of the accelerated death benefit paid. There is no administrative fee to accelerate benefits. Receipt of accelerated death benefits may affect eligibility for public assistance and may be taxable. The federal income tax treatment of payments made under this rider depends upon whether the insured is the recipient of the benefits and is considered terminally ill. You may wish to seek professional tax advice before exercising this option.

IMPORTANT NOTICE - THIS POLICY DOES NOT PROVIDE COVERAGE OF FINANCIAL SERVICES FOR SICKNESS This policy provides ACCIDENT insurance only. It does NOT provide basic hospital, basic medical or major medical insurance as defined by the New York Department of Financial Services. The State Bar of Wisconsin Group Term Life Insurance is issued by The Prudential Insurance Company of America, 751 Broad Street, Newark, NJ 07102. Contract Series 83500. The Prudential Insurance Company of America issues the insurance and is authorized to conduct business in all states, the District of Columbia, Guam, Puerto Rico and the United States Virgin Islands. Principal offices are 751 Broad Street, Newark, NJ 07102. (973) 802-6000. The Plan Administrator is Pearl Insurance, 120 East Glen Avenue Peoria Heights, IL 61614-9348, 800-447-4982. Group Contract Series Contract number 83500.

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Be Part of the Messenger

Please send your articles, editorials, or anecdotes to bwegner@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, we have seats available on the *Messenger* Committee. 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
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Letter From the Editor



Charles Barr, *Editor*

The Milwaukee Justice Center dedicated its new quarters in Room G-9 of the county courthouse in a Grand Reopening ceremony on September 15. (See page 10.) The MJC, as most of you know, is the MBA's signature public service project, in partnership with Milwaukee County, Marquette University Law School, and the MBA Foundation. Conceived in honor of the MBA's sesquicentennial anniversary, the MJC dispenses basic, practical guidance to those who must navigate the civil legal system without an attorney because they cannot afford one and cannot obtain publicly funded legal aid.

The MJC started its life in G-9, then moved to the fifth floor temporarily while the county remodeled the space as a permanent home for it to share with the Legal Resource Center and a dramatically downsized Records Center. The MJC's refurbished digs are functional and not at all posh, but evidence of intelligent design abounds.

This is a big step in the MJC's evolution, one that significantly enhances its capacity to serve its clients. The Grand Reopening cements a truly groundbreaking cooperative venture between a community's government, law school, and bar association. It certainly is an occasion for celebration.

But not one for complacency. To discover why that is so, pull a two-hour shift as a volunteer attorney at the MJC's Brief Legal Advice Clinic. It is an eye-opening experience. In terms of the vicissitudes of day-to-day life, the MJC's clients are not unlike the rest of us. The difference is that people who live in poverty, even those who scrape by just beyond the jaws of poverty, simply can't afford a mistake or a bit of bad luck. What would be a minor hassle for you or me is for them real economic cataclysm. There is not a dollar in reserve for the slightest mishap. There is no one to whom they can turn for assistance; all their friends and family, however well-meaning, are in the same boat.

One case in particular stays with me. A young woman lent her beater of a car to a relative, who used it to visit a friend in an apartment complex. The relative accidentally parked the car in another tenant's reserved spot—a tow-away zone. And the car was towed. Some of us have had that unpleasant experience, and have cursed, but nonetheless paid without further ado, the exorbitant ransom charged by the towing company. Well, this woman simply didn't have the ransom. Nor did the relative who made the mistake, or any other

relative or friend. For want of a few hundred bucks, her car was gone forever, along with her subsistence-level job to which she could no longer get.

When you finish your shift at the MJC, you think about the mass of people you saw in the waiting area. You think of the people who were turned away, because the MJC still lacks the capacity to serve everyone who needs it. You think of those who need it but can't get to it or don't know about it. You think of a major American city—one of many—filled with block after block, neighborhood after neighborhood, of people who live on the knife-edge of poverty.

Yes, the Milwaukee Justice Center is a heroic undertaking, and our community needs it. But that community and thousands of others across the nation ultimately need much more: the political will to address the poverty epidemic broadly, systematically, and effectively. Until the day we rise up and instill that motivation in our leaders—local, state, and national—America will never fulfill its promise.

What's in this edition of the *Messenger*? We explore the complications arising from the flux of same-sex marriage litigation in Wisconsin, which has resulted in marriages with varying prospects of validity, as well as varying packages of rights and obligations, depending on when and where they occurred. We review changes to Wisconsin's informed consent law that arguably swing the pendulum away from patient autonomy and toward a supposedly bygone era of paternalism in deference to physicians. Our article from the ever-constant Michael Best looks into the new phenomenon of union-free strikes.

The aforementioned Milwaukee Justice Center is in the news, not only for the dedication of its new home but also because it has won a Wisconsin Innovation Award for the unique service model of its Mobile Legal Clinic. The Milwaukee County Circuit Court reveals its emergency preparedness plan, known as the Continuity of Operations Plan (COOP). The Office of the United States Attorney details its multi-faceted mission and the sources that inspired it. The "Reel Law" examines a law-themed film in an unlikely sub-genre—the musical!

We hope you enjoy this edition of the *Messenger*, as we leave the summer doldrums behind and our pulses quicken along with our dockets. Here's to another resplendent Wisconsin autumn. If you can squeeze in the time to bang out that article percolating in your subconscious, we'd love to hear from you.

Member News



Kevin J. Spexarth joined Andrus Intellectual Property Law as an associate. Kevin focuses his practice on domestic and international patent and trademark prosecution and enforcement.



Kevin J. Spexarth



Hannah A. Rock

Hansen & Hildebrand announced that **Hannah A. Rock** has joined the firm as an associate. She concentrates in family law, mediation, and collaborative practice.



Leslie M. Tector

Hupy and Abraham announced **Tyler C. Patrick** as a new addition to the firm in the Des Moines office.



Tyler C. Patrick

Quarles & Brady announced that **Leslie M. Tector** has joined the firm's Milwaukee office as a partner in the Health Law Practice Group. The firm hired **Seth Goettelman** as an associate in the Corporate Services Practice Group, also in the Milwaukee office.

von Briesen & Roper announced the promotion of **Jeffrey A. Evans, Laurel Johnson, Kelly J. Noyes, and Lauren**

A. Triebenbach to shareholders of the firm. Evans, Johnson, and Noyes are members of the Litigation and Risk Management Practice Group in the firm's Milwaukee office. Triebenbach, also in the Milwaukee office, focuses on real estate and banking law.

The firm also announced that **Alan Marcuvitz, Andrea H. Roschke, and Nicholas J. Boerke** have joined the firm. They focus on land use, real estate, eminent domain, and real property taxation.



Alan Marcuvitz



Andrea H. Roschke



Nicholas J. Boerke

Tom Hruz Appointed to Appellate Bench

Tom Hruz, who served on the MBA's Board of Directors, was appointed to the Wisconsin Court of Appeals by Governor Scott Walker on July 21. Tom, a partner at Meissner Tierney Fisher & Nichols at the time of the Governor's announcement, will serve in District III, which is based in Wausau and serves 35 northern counties.



Tom Hruz

Tom is a *magna cum laude* graduate of Marquette University Law School, and was editor of the *Marquette Law Review*. He clerked for the late Judge John L. Coffey of the U.S. Court of Appeals for the Seventh Circuit, as well as Wisconsin Supreme Court Justice David T. Prosser, Jr. He has served as chair of the State Bar's Appellate Practice Section and as an adjunct professor of appellate writing and advocacy at Marquette.

The governor appointed Tom to replace retiring Judge Mark Mangerson. The MBA wishes Tom well as he ascends to the appellate bench.

Volunteer Spotlight



Elizabeth K. Miles



Elizabeth K. Miles

Attorney Elizabeth K. Miles is a 2009 Marquette University Law School graduate. She is an associate at Davis & Kuelthau practicing commercial litigation with experience in environmental, construction, and appellate litigation. Liz grew up in Wasilla, Alaska. (Does that ring a bell? It is also the hometown of Sarah Palin.) She is a Wisconsin transplant by way of Pennsylvania and Massachusetts, but now happily calls the east side of Milwaukee home.

Liz has contributed to the *Messenger* for the past several years by writing articles and editing the magazine. Contributing to the *Messenger* has given her the opportunity to meet Milwaukee lawyers doing interesting and important work in the community.

In addition to her work with the *Messenger*, Liz has accepted several *pro bono* referrals from the U.S. District Court for the Eastern District of Wisconsin. Most recently, she helped represent a plaintiff in a prisoner's rights case at the summary judgment stage in the district court and on appeal. She also recently helped coach Marquette's Evans Competition moot court team.

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

Message From the President



Attorney David G. Peterson, Reinhart Boerner Van Deuren



As a member of the Milwaukee Bar Association, you are part of a unique and innovative organization. The MBA offers an impressive array of opportunities to get involved and stay connected: there are CLE sessions every week, our many sections and committees are active and diverse, our annual events such as Judge's Night are great networking occasions, the Milwaukee Justice Center provides *pro bono* assistance to people who really need legal help, and the Justice Center's Mobile Legal Clinic takes the *pro*

bono help to those who cannot make it to the courthouse. This is, of course, only a partial list of what the MBA does on an ongoing basis, which makes our association truly unique.

Our innovation was recognized in August when we won one of the inaugural Wisconsin Innovation Awards for the Mobile Legal Clinic—the traveling arm of the Milwaukee Justice Center. On weekends, the clinic's bus goes to areas on the south side and in the northwest corner of Milwaukee, and volunteer lawyers provide free legal assistance to people from those neighborhoods. The bus is an innovation of the MBA in partnership with Marquette University and the donors who made the bus possible.

I mention the unique and innovative nature of the MBA because it is only through your membership that we are able to offer all that we do.

We have a robust membership of more than 2,000. Our membership covers virtually every demographic. Our diversity, combined with the variety of programming and events we offer, allows each of us to leverage and enrich our careers and practices through our membership. So, thank you for being a member of the MBA!

The MBA has been run efficiently for many years, making the most of our membership dollars. Our dues have held steady since 2008, when they increased by \$10. At its most recent meeting, the MBA Board adopted a dues increase for two membership categories: \$25 for regular members, and \$15 for associate members. All other membership categories will not see a dues increase. We also agreed to expand the newly-licensed membership category from three years out of law school to five years out, effectively delaying the dues increase for newer members. For firms in the 100% Club, the dues increase is delayed until January 1, 2016.

This dues increase, effective January 1, 2015, will help us to offset costs that have increased over the last six years, and to offer the great programming and events that we enjoy and expect. If you have any questions about the dues changes, or suggestions of events or programs we should consider, please contact me at dgpeter@reinhartlaw.com or contact Jim Temmer, the MBA's Executive Director, at jtemmer@milwbar.org.

I hope you have a great fall season, and hope to see you at the annual State of the Courts Luncheon on October 22 at the Wisconsin Club.

Beth Hanan Wins Mentoring Award

The Association for Women Lawyers named Beth Hanan, immediate past president of the MBA, as the winner of its Mentoring Award. Beth was selected because of her longtime commitment to mentoring and supporting young women lawyers, as well as grade school and high school students who are interested in careers in the law. She has taken students to observe oral arguments, spoken with Girl Scouts about opportunities in law, and met individually with women law students to discuss career choices and strategies for achieving their goals. She also coached Alverno College's first mock trial team and, under Beth's leadership, the women were named "Best New Team" at Marquette University's Mock Trial Competition.

Beth is an attorney with Gass Weber Mullins and has been a member of AWL for over 15 years. The award was presented at AWL's Annual Meeting luncheon on Tuesday, September 16.

Update your contact and section/committee info.

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2014 Milwaukee Bar Association Law and Technology Conference

Event Information:

Date: Wednesday, December 3, 2014

Time: 7:30 AM to 5:00 PM

Credits: 6.0 CLE credits including 2.0 ethics credits

Location:

Italian Conference Center • 631 East Chicago Street
Milwaukee, WI 53202



Conference Schedule

8:00 – 8:30

Registration

8:30 – 9:30

Social Media and the Ethics of Marketing

Mark Goldstein, Goldstein Law Group, and Tim Pierce, State Bar of Wisconsin

9:30 – 10:30

Track 1: Mandatory e-Filing: Are You Ready?

A review of CCAP e-filing procedures and statutes. A closer look at the benefits of e-filing prior to the possible requirement that all documents must be e-filed in 2016.

John Barrett, Clerk of Milwaukee County Circuit Court

Track 2: Billing and Collections: the Art of Getting Paid

Are your bills getting out and being paid on a timely basis? In this session, you will learn techniques to help your firm bill more effectively and get paid sooner. What types of bills get paid? What reports should you be running? Which collection practices actually work? An experienced law firm administrator will answer these questions and more.

Lori Kannenberg Dorn, Lawton & Cates

10:30 – 11:00

Sponsor Break

11:00 – 12:00

Track 1: Technology at the Deposition and Beyond and How HIPAA's Effect on Court Reporters Can Impact Attorneys

Learn about the latest in court reporting technology currently available to attorneys. As most businesses are learning, HIPAA can be an imposing force to deal with as a general matter. Learn how HIPAA requirements are changing the way in which compliant court reporting firms must interact with lawyers and law firms.

Robert Gramann and Scott Marcus, Gramann Reporting

Track 2: Forms and Resources

Hon. Kevin Martens, Milwaukee County Circuit Court

12:00 – 1:00

Lunch

This year's conference will feature two plenary topics and eight additional sessions within two tracks. Ethics sessions discuss the ethics of technology in the practice of law. Practice management sessions will show you ways to practice more efficiently, effectively, and profitably.

To register: http://milwbar.org/content.php?page=Law_Technology_Conference

\$149.00 MBA Member • \$199.00 Non-member • \$99.00 Support Staff

1:00 – 2:00

Track 1: e-Discovery (Session Title TBD)

Hon. Michael R. Fitzpatrick, Rock County Circuit Court

Track 2: Cloud Storage, Collaboration, and Synchronization

Jeff Krause, Solfecta, and Nerino Petro, Holmstrom & Kennedy

2:00 – 3:00

Track 1: iPads and Apps for Trial and Everyday Use

Matt McClean and Pam Oren

Track 2: How I Chose a Practice Management System

Nate Cade, Cade Law

3:00 – 4:00

50 Tips, Tricks, Tools, Sites, and Gadgets

Jeff Krause, Solfecta, and Nerino Petro, Holmstrom & Kennedy

4:00 – 5:00

Reception

co-sponsors

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PROTECTING YOUR PRACTICE IS OUR POLICY.™

Welcome New MBA Members!

Lauren Adrian, *John Marshall Law School*
Chad Bement
Garrett Bishop, *Foley & Lardner*
Kenneth Brooks, *Quarles and Brady*
Elizabeth Bush
Kurt Carlson, *Carlson Dash*
Daniel Clark
Jillian Davis
Angela Dean, *Lakeside Law Offices*
Frank DiCastri, *Whyte Hirschboeck Dudek*
Michael Edwards, *Marquette University Law School*
Ralph Ehlinger, *Ehlinger Law Office*
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David Frank, *Simpson & Deardorff*
Carolyn Garski, *Marquette University Law School*
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Thomas Haese
John Hansen
Cord Harris, *Wirbicki Law Group*
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Brittany Kachingwe
Philip Kappell, *Foley & Lardner*
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Lauren Koehler, *Marquette University Law School*
Rebekah Kopec-Farrell, *Legal Services Program of Wisconsin*
Molly Madonia, *Marquette University Law School*
Shauna Manion
Kelly Martyka
Ann Reinke, *Foley & Lardner*
Andrew Robinson, *Mallery & Zimmerman*
Nick Schaefer, *Marquette University Law School*
Ryan Session
Kurt Simatic, *Whyte Hirschboeck Dudek*
Shantanu Singh, *Decision Insight Information Group*
Kevin Spexarth, *Andrus Intellectual Property Law*
Emily Stedman
Richard Stoll, *Foley & Lardner*
Walker Stutzman, *Kasdorf, Lewis & Swietlik*
Adam Vanderwerff, *Marquette University Law School*
Aaron Wegrzyn, *Foley & Lardner*
Henry Juergens Weiner, *Meissner Tierney Fisher & Nichols*
Amy Wochos, *Milwaukee County Register in Probate Office*
Clayton Zak, *Foley & Lardner*

CLE Calendar

October 2014

October 7, 2014

Estate & Trust Section

A Retirement Template, Suitable for Baby Boomers and Others

This presentation will focus on (i) determining the level of assets required to retire; (ii) integrating social security options; (iii) health insurance options for retired persons before and after Medicare eligibility; (iv) long-term care options; (v) what to do with existing life insurance and disability coverage; (vi) estate planning options for the 99.98%; and (vii) psychological aspects of retirement, including advice for the normal as well as the compulsive worker.

Presenter: John Bannen, Quarles & Brady
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

October 9, 2014

Civil Litigation Section

Cases Litigators Need to Know From the Wisconsin Supreme Court's 2013-2014 Term

A quick review of everything you need to know about the Wisconsin Supreme Court's 2013-2014 term. The presentation will focus on key cases affecting civil litigation in Wisconsin.

Presenter: Phillip Babler, Foley & Lardner
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

October 10, 2014

Employee Benefits Section

Smooth "Sale-ing": Compensation and Benefit Tips for an Easier M&A Experience

The sale of a business can be like a stress test for a company's compensation and benefit arrangements as the due diligence process puts them under a microscope. While every transaction poses its own unique challenges, some compensation and benefit issues recur more frequently than others. This presentation will focus on practical suggestions to help clients navigate some of these common issues. Presenters: Casey Fleming and Joshua A. Agen, Foley & Lardner

Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

October 16, 2014

Taxation Section

Like-Kind Exchanges When Partners Want to Split Up: Traps for the Unwary and Steps to Follow

When the partnership or LLC owns real estate and the partners want to separate, there are some safe steps and some risky steps. Should the LLC or the partners sell the relinquished property and acquire the replacement property? All of this and more will be discussed in depth.

Presenter: Robert E. Dallman, Whyte Hirschboeck Dudek
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

October 17, 2014

MBA Presents

Four POWERFUL STRATEGIES to Manage Your Life (WITHOUT LOSING YOUR MIND)

Are you stretched to the limit for time and energy? Do you drive home from work wondering when the tide will turn? There is surprising news coming out of the field of neuroscience regarding the idea of flourishing versus languishing. Rediscover the power of full engagement. Come learn four critical evidence-based strategies to get on a more fulfilling path. These strategies form a solid framework for managing your life.

Presenter: Julie Henszey, Executive Coach and Owner, Next Step Goals LLC
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 pre-approved CLE credit

October 20, 2014

Real Property Section

New Market Tax Credits—the Tip of the Iceberg

Presenters: Hal Karas and Rebecca Mitich, Whyte Hirschboeck Dudek
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

October 21, 2014

Intellectual Property Section

Advising on the Impact on Patentability of Commercial Use of a Trade Secret

After the passage of the America Invents Act (AIA), there is ambiguity in the law relating to whether commercial use of a trade secret for more than a year works a forfeiture of the ability to obtain a valid patent on the trade secret. The matter is governed by *D.L. Auld v. Chroma Graphics*, 714 F.2d 1144 (Fed. Cir. 1983). Provisions in the AIA and the USPTO interpretation of that language in its Examination Guidelines have created an

continued page 22

Back to the Future:

Wisconsin's Revised Informed Consent Law Eases Burden on Health Care Providers

Attorney Kelly L. Centofanti, Centofanti Law

Discussion of a physician's duty with respect to informed consent must start by differentiating "informed consent" from the idea of obtaining a patient's consent before performing an invasive procedure. The "informed consent" doctrine discussed in this article is entirely distinct from the signing of a consent form prior to undergoing a medical procedure.

"Informed consent," as that term is used in Wis. Stat. § 448.30 and Wisconsin case law, refers to the duty of a physician to disclose the risks of proposed treatments and methods of diagnosis. This article discusses the history of informed consent in Wisconsin and then explores the Legislature's recent changes to § 448.30.

The traditional physician-patient model was that the doctor knew best and told the patient what was best. The patient listened to the doctor and did what the doctor said. This paternalistic approach was grounded in the idea that the doctor was the expert and the patient need not (and should not) interfere with the doctor's plan.

Slowly, that approach has changed. Today, most jurisdictions have adopted the modern doctrine of informed consent. This modern view—as reflected in § 448.30 before the recent changes—recognizes the value of patient autonomy, the fiduciary relationship between the physician and the patient, and the patient's right to control his or her own body.

In Wisconsin, this doctrine was enunciated in *Scaria v. St. Paul Fire & Marine Ins.*, 68 Wis. 2d 1, 227 N.W.2d 647 (1975), and subsequently codified in Wis. Stat. § 448.30. The standard was, simply, "what would a reasonable person in the patient's position want to know in order to make an intelligent decision with respect to the choices of treatment?"

In *Martin v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995), the court reiterated the *Scaria* holding and then stated:

A physician who proposes to treat a patient or attempt to diagnose a medical problem must make such disclosures as will enable a reasonable person under the circumstances confronting the patient to exercise the patient's right to consent to, or to refuse the procedure proposed or to request an alternative treatment or method of diagnosis.

Id. at 176.

The original informed consent statute, codifying Wisconsin case law, read as follows:

448.30 Information on alternate modes of treatment. Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:

(1) Information beyond what a reasonably well-qualified physician in a similar medical classification would know.

(2) Detailed technical information that in all probability a patient would not understand.

(3) Risks apparent or known to the patient.

(4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.

(5) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.

(6) Information in cases where the patient is incapable of consenting.

The amended statute, effective December 15, 2013, reads as follows:

448.30 Informed consent. Any physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments. *The reasonable physician standard is the standard for informing a patient under this section. The reasonable physician standard requires disclosure only of information that a reasonable physician in the same or similar medical specialty would know and disclose under the circumstances.* The physician's duty to inform the patient under this section does not require disclosure of:

(2) Detailed technical information that in all probability a patient would not understand.

(3) Risks apparent or known to the patient.

continued page 21

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* American Bar Association Standing Committee on Lawyers' Professional Liability, (2012), *Profile of Legal Malpractice Claims, 2008-2011*, Chicago, IL: Vail, Jason T and Ewins, Kathleen Marie.

Grand Reopening Marks New Era for Milwaukee Justice Center

Justin A. Metzger, Milwaukee Justice Center



“An amazing collaboration” is how Milwaukee County Circuit Court Chief Judge Jeffrey Kremers characterized the partnership between the MBA, the MBA Foundation, Marquette University Law School,

and Milwaukee County that resulted in the Milwaukee Justice Center. Judge Kremers spoke at the September 15 Grand Reopening of the MJC, the Records Center, and the Legal Resource Center in the refurbished Room G-9 of the Milwaukee County Courthouse. He described the new G-9 facility as a “one-stop shop for unrepresented and under-represented litigants.” Numerous members of the judiciary, including Supreme Court Justice Annette Ziegler, attended the lunchtime ceremony along with representatives from other branches of county government. Clerk of Court John Barrett emceed the ceremony.



Former Chief Judge Michael Skwierawski, who was the driving force behind the MJC from the earliest planning stages, recounted the genesis of the project in his remarks at the ceremony. He declared that the MJC has already succeeded “beyond the wildest dreams” of those who first imagined it. With the assistance of five major Milwaukee law firms staffing clinics, and 120 lawyers who regularly volunteer, the MJC has helped over 10,000 clients in each of the past two years. Judge Skwierawski noted that the vast majority of those helped had incomes below the federal poverty level—a significant statistic given Milwaukee’s unenviable status as one of America’s poorest cities.



Attorney Fran Deisinger, President of the MBA Foundation

Francis Deisinger, President of the MBA Foundation, reminded the audience that the MBA long ago helped to found two pillars of the legal community: the Legal Aid Society, and what became Marquette University Law School. He predicted that the Milwaukee Justice Center will be thought of as the third pillar. Fran noted that over 500 MBA

members have made almost half a million dollars in charitable contributions to the MJC, not to mention the thousands of hours of volunteer work they have devoted to the project.



Judge Michael Skwierawski

Professor Matthew Parlow, Associate Dean for Academic Affairs at the law school, summed up the MJC’s mission as “important work that furthers human dignity.” He remarked, as well, on the immeasurable benefit to law students of their volunteer work at the MJC, declaring that there is no more important lesson for those students than the value of giving back to the community through *pro bono* work.



Chief Judge Jeffrey Kremers

In November of 2013, the MJC moved from G-9 to temporary space in Room 511 of the courthouse,

where it was able to serve only six clients at a time, often spilling out into the hallway, while hammer met nail and jackhammer met concrete in G-9. At the same time, the Legal Resource Center remained in its temporary space in G-10-1, and the Records Center moved to the main floor of the Clerk of Court Office in Room 104.



Prof. Matt Parlow, Associate Dean of Academic Affairs, Marquette Univ. Law School



Dawn Caldart, MJC Executive Director, received recognition at the ceremony.

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The Reel Law



Attorney Fran Deisinger, Reinhart Boerner Van Deuren

Chicago

Directed by Rob Marshall
2002; 113 min

In Brian De Palma's 1987 reboot of *The Untouchables*, a Chicago cop played by Sean Connery admonishes straight-laced Elliott Ness about "the Chicago way"—shorthand for the no-holds-barred methods of the Windy City. Despite its dramatic if somewhat absurd courtroom denouement (not surprisingly, written by David Mamet), this review is not about *The Untouchables*. But that little phrase kept occurring to me as I watched the film that is the subject of this review: *Chicago*, Rob Marshall's 2002 film version of Bob Fosse's 1976 stage musical retelling of a story first filmed in 1927. It is the story of Roxie Hart (Renee Zellweger) and Velma Kelly (Catherine Zeta-Jones), two fictional jazz-age Chicago murderesses, and their flamboyant lawyer Billy Flynn (Richard Gere).

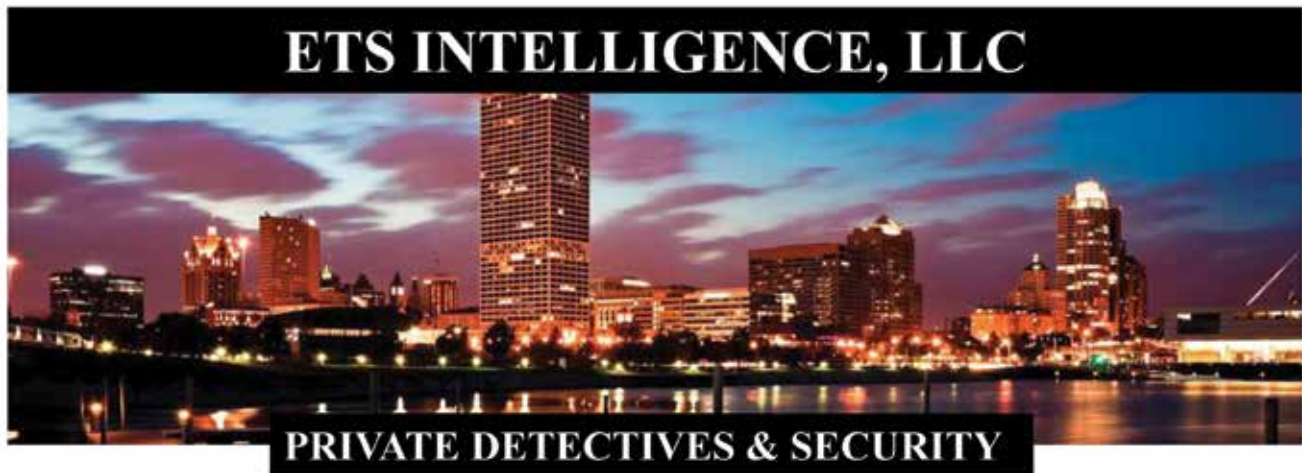
Chicago is a brassy musical arranged around a series of show-stopping song and dance numbers. But if your taste or experience in musicals runs to such genteel fare as *Oklahoma* or *My Fair Lady*, be forewarned that this film is very different thematically. The stunning opening number, "All That Jazz," happens in the real time of the story, as Velma, an accomplished performer, fronts the sister act at a local club—minus the sister, whom we learn Velma has just plugged after finding her *in flagrante* with Velma's husband, who gets the same treatment. Watching

Velma's on-stage performance, Roxie, a hopeful young hooper, is transfixed until being hustled back to her apartment by her escort Fred, who it turns out does not really have a contact for Roxie at the theater as he has claimed and is actually just a furniture salesman. With a wife and five kids. As this is revealed *after* the two disorganize the bed, Roxie, enraged, grabs her husband's pistol from a drawer. Down goes Fred.

As Velma and Roxie take up pretrial residence in jail, the musical numbers become detached from reality, happening mostly in Roxie's imagination as she navigates her way to a strategy to beat the rap and, equally important to her, to make it big. Enter Billy Flynn, the lawyer with the perfect acquittal record. Tough cookie Velma has already engaged Billy but Roxie sets her sights on him, imagining musically that he does it all for love. Fat chance. This is *Chicago*, and Billy makes clear to Roxie's auto mechanic schlub of a husband (a well-cast John C. Reilly) that he doesn't care if Roxie is guilty or innocent; he only cares that someone pays him \$5,000.

That taken care of, Billy manipulates a newspaper sob sister and the rest of the press to portray Roxie as a sympathetic waif seduced by jazz and booze. This is hardly true but it works, and Roxie's skyrocketing celebrity elbows Velma's case to the side, escalating a nasty rivalry between the two. Billy cleverly uses this friction to the advantage of both his clients. At Roxie's trial, Velma cattily shows up as the

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Steve Hayes, Judge Michael Skwierawski, Judge Michael Guolee, Judge Frederick Rosa ▼



John Feldbruegge, Terrence Cerni, ▲ Bill Croke, Steve Nelson



John Gelshenen, Dave Peterson, ▲ Michael Levine, Matt Falk



Wisconsin Supreme Court Justice ▶ Annette Ziegler and Attorney John Rothstein head to the course.

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Golf co-chair Aaron Olejniczak emcees ▶ the dinner program.

MJC 5K Run Breaks Records Once Again

Justin A. Metzger, Milwaukee Justice Center

The Milwaukee Justice Center's 5K Run for Justice escaped the rain and ran away with another fundraising record. It raised about \$12,000 through the generosity of 21 sponsors and 176 runners. Another 21 volunteers came out to help make the run ... run.

Anthony Holgun took top honors in the event with an 18:27 time, while Amanda Beggs was the top woman runner at 20:25. The "Team Spirit" award went to the runners from Hupy and Abraham.

Thanks to all of our sponsors for the event. We can't wait to see everyone next year!



▲ Race participants included Gregg Herman, Judge Richard Sankovitz, Judge Kitty Brennan, Judge Mel Flanagan, and Judge Rebecca Dallet.



▲ Molly Skwierawski and Shannon Allen pause for a photo-op.



The Hupy and Abraham Team exudes confidence. ▶

photos by Tom Caldert and Omar Mallick



Honorable Mike Skwierawski, emcee, organizes the starting line. ◀



◀ MJC Summer Fellows Matthew Ackmann, Morgan Wilz, Brian Kane, and Dawid Szymanski, all students at Marquette University Law School, enjoy the runner-friendly weather.

Mission River Band performs. ▶



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11th Annual State of the Court Luncheon

*Partners in the
Administration
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Details

Date:

Wednesday,
October 22, 2014

Time:

Noon - 1:30 p.m.

Place:

Wisconsin Club
Grand Ballroom
900 W. Wisconsin Ave.
Milwaukee

Cost:

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

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

The Milwaukee Bar Association and the First Judicial District are important partners in the administration of justice. They ensure that the legal needs of citizens, businesses, and the community are met in an efficient and effective manner.

The 11th Annual State of the Court Luncheon will provide members of the MBA an opportunity to hear directly from the judiciary on issues facing the court and the impact these issues have on the Milwaukee legal community.

Judges and court personnel will be seated at tables during lunch to engage in dialogue and answer questions about the court.

The Milwaukee Bar Association will present its annual *Pro Bono Publico* Awards to recognize outstanding efforts and commitment to *pro bono* work.

Agenda

11:30 Registration

Noon Welcome and Opening Remarks
David G. Peterson, MBA President

12:05 Lunch

12:30 State of the Court Address
Hon. Jeffrey A. Kremers, Chief Judge

1:00 *Pro Bono Publico* Awards
David G. Peterson

To register online please visit www.milwbar.org

Registration Form

*Please make checks payable to "Milwaukee Bar Association" and send to:
State of the Court Luncheon, MBA, 424 E. Wells St., Milwaukee, WI 53202*

Individual Registration: Enclosed please find a check in the amount of \$_____ to register the person(s) listed below.

Table Registration: Enclosed please find a check in the amount of \$_____ to purchase _____ table(s) of nine.

Name: _____

Organization: _____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ Fax: _____

E-mail: _____

Table Registration Names:

1. _____ 2. _____ 3. _____

4. _____ 5. _____ 6. _____

7. _____ 8. _____ 9. _____

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*For questions or special needs, please
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Mobile Legal Clinic Recognized as Wisconsin Innovation

The Milwaukee Justice Center Mobile Legal Clinic garnered one of ten inaugural Wisconsin Innovation Awards at an August 26 ceremony in Madison. The Wisconsin Innovation Awards showcase Wisconsin-based projects with innovative and groundbreaking ideas. The Mobile Legal Clinic was the only legal-services project honored among the 150 nominees and 31 award finalists. The Wisconsin Innovation Awards steering committee recognized the Mobile Legal Clinic not only for its innovative approach to serving Milwaukee County residents, but also for the opportunity for volunteers to serve as professional role models to law students and to young people within the communities served.

The awards ceremony was part of Forward Fest (formerly the Forward Technology Conference), an annual “celebration of innovation and entrepreneurship in the Midwest.” The evening featured a keynote address by Nolan Bushnell, founder of Atari and Chuck E. Cheese, and Steve Jobs’ first boss. Bushnell spoke about his career as an entrepreneur and what he believes is required for innovative projects to succeed. Present to accept the award on behalf of the MJC were Dawn Caldart, Executive Director; Mary Ferwerda, MJC Legal Director; and Frank Daily, partner at Quarles & Brady and Mobile Legal Clinic donor.

Of the ten inaugural award winners, five are Milwaukee-based projects: the Mobile Legal Clinic; the BREW Accelerator from the Milwaukee Water Council, an accelerator program for water technology start-ups;

the Design Futurist Internship Program at Discovery World, a summer internship for youth interested in developing technologies; Microbe Detectives, a DNA-based water-testing program; and Scanalytics, developer of technology that senses, analyzes, and stores information on movement in physical spaces.



In its first year, the Wisconsin Innovation Awards were led by a steering committee that included Dan Armbrust, Gener8tor (Milwaukee); Joe Boucher, co-founder and attorney at Neider & Boucher (Madison); Zack Brandon, President of the Greater Madison Chamber of Commerce (Madison); David Burkardt, an associate vice president in the University of Wisconsin system (Madison); Wade Huseth, partner at Baker Tilly Virchow Krause (Madison); Lisa Johnson, Vice President of Innovation and Entrepreneurship at Wisconsin Economic Development Corporation (Madison); Rachel Larrivee, owner of Props Unlimited (Milwaukee); Dawn Mortimer, Innovation Director at American Family Insurance (Madison); Jeff Rusinow, angel investor (Milwaukee); and Matthew Younkle, co-founder and CEO of Murfie.com (Madison).

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Reel Law continued from p. 11

“surprise” prosecution witness, clutching both Roxie’s alleged jailhouse diary—passed to her by jail matron “Mama” Morton (Queen Latifah) and including some rather incriminating admissions about the Fred-plugging—and an immunity deal from the DA in return for her testimony. It looks like Roxie is cooked until Billy, in a great theatrical number, “tap dances” through his cross-examination of Velma to show she doesn’t really know where the diary came from, simultaneously implying that *maybe* it came from the DA. The jury acquits Roxie, Velma walks free on her deal, and Billy’s record stays perfect.

The ersatz diary, of course, really came from Billy. That’s the Chicago way. The story ends with Roxie and Velma teaming up as a song and dance sensation, their notoriety transported to fame.

Beneath *Chicago*’s masterful dance pieces, hot jazz, and syncopated editing, there is an almost Brechtian examination of the cynical interplay between celebrity, crime, the media, and the law. To say Billy Flynn plays fast and loose with legal tactics understates the case. But ultimately *Chicago* is entertainment more than social commentary. So just enjoy it. This is a voluptuous film. The athletically bawdy Fossean choreography is showcased by wonderful cinematography and lighting and highly stylized sets. (Indeed, there may not be a single shot of the real city of Chicago in *Chicago*.) And the sound recording and mixing are exceptional. Many of the “lawyer” films I write about would be perfectly satisfying watched on a 19-inch black and white television. Not this one. If you can, rent it on Blu-ray, play it on the biggest screen you have, and crank up the surround sound system. In *Chicago*, all that jazz pays off.



Milwaukee Courts Join in County-Wide Continuity of Operations Planning

Beth Bishop Perrigo, Deputy District Court Administrator, Milwaukee County Circuit Court

What would the Milwaukee County courts do in the event of another fire or catastrophic event that threatens to disrupt court services? Be prepared.

That is the goal set by Milwaukee County officials for all county functions. Since the beginning of 2014, Combined Courts and departmental representatives have been developing a Continuity of Operations Plan (COOP) to ensure that services will continue during a wide range of emergencies, including localized acts of nature, accidents, and technological or attack-related emergencies.

The process has been arduous, requiring all participants to begin by defining their Mission Essential Functions (MEFs), orders of succession, delegations of authority, continuity facilities, continuity logistics, and vital records. "This process has been in place for some time at the federal level through National Security Presidential Directives and Homeland Security Presidential Directives," said Chief Judge Jeffrey Kremers. "While the process is clear, it does take time and commitment to develop a plan. The courts have fully committed to this process."

Court and county government staff met regularly to establish shared services in order to implement the continuity plan. As the Deputy District Court Administrator, I was tasked with representing the office of the Chief Judge in that process. New relationships and connections were created to establish a network of county-wide partnerships that will be critical in supporting future recovery efforts. Planning sessions were lead by Christine West Rich, an employee of Emergency Management who has extensive experience in COOP development at the federal government level.

The COOP process consists of four phases: Phase I, Readiness and Preparedness; Phase II, Activation and Relocation; Phase III, Continuity of Operations; and Phase IV, Reconstitution. Milwaukee County has identified team leaders to carry out these phases. These team leaders will notify staff of an emergency and of what action to take. As the plan development process unfolds, it will be the responsibility of these individuals to train and lead others in their respective courts, departments, and immediate work areas.

Developing a COOP requires not only time, but also information and expertise on the part of those who participate in its development. Knowledge of MEFs is key, as is the willingness and ability to think beyond the current work environment, which may not exist for an extended period of time, particularly if relocation is required.

For the courts, Mission Essential Functions include: (1) prioritizing and processing cases in the system; (2) conducting general management functions; (3) performing statutorily mandated duties related to filing, fees, dockets, and record keeping; (4) performing customer service and self-help services; and (5) performing statutorily mandated duties related to juries. Additional considerations include the impacts on constituencies if tasks are not performed and whether such tasks can be absorbed by an adjoining county's court system.

MEFs are prioritized, county-wide, in a four-tier system. Tier 1 MEFs are mandated services, or those that can brook no interruption, such as radio connectivity and inmate detention. Tiers 2-4 are based on allowable service interruption from 12 to 72 hours. These rankings will assist leaders in efficiently prioritizing emergency services.

Orders of succession include triggers for leadership change when necessary, limitations on the new leaders' authority, and how others would be notified of the changes. By identifying successors for all leadership positions, departments also identify personnel to staff Emergency Operations Centers, where decisions are made on recovery and resource allocation.

In the event of relocation, even for just one department, alternate space must be identified. Other relocation considerations include memoranda of understanding with the facility owners, insurance liability, indemnification, utility fees and services, the effects of geographic dispersion, availability of voice and data communication, transportation, security, and notification of constituents.

In all phases, reliable communications within the courts and throughout the entire county are essential. A system to provide notification via texting, e-mail, and voice has been established for emergencies that might affect the delivery of services.

The use of effective and proven planning for continuity of services in Milwaukee County through the COOP process is providing the road map for employees to respond to a catastrophic event in a logical, methodical way that is understood and shared by those responsible for providing continued services to citizens.

Upcoming Events

October 9

Introduction to the First
Judicial District
Milwaukee County Courthouse
10:00 a.m.–noon

Networking Reception
Wisconsin Club
6:00–7:30 p.m.

October 22

State of the Court Luncheon
Wisconsin Club
Noon–1:00 p.m.

October 29

Pro Bono Cocktail Reception
Milwaukee Bar Association
5:30–7:30 p.m.

November 1

Girl Scout Event
Milwaukee Bar Association
8:30 a.m.–3:00 p.m.

February 10

Judges Night
Grain Exchange Room
5:30–8:00 p.m.

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U.S. Justice Department Strives to Fulfill Diverse Mission

James L. Santelle, U.S. Attorney, Eastern District of Wisconsin

In a seminal address to the nation and to the employees of the United States Department of Justice some three and a half years ago, Attorney General Eric H. Holder, Jr., said: “Boundless ... are the opportunities now before us [T]oday, as we look to the future, we will take action in four key areas to fulfill one core mission: protecting the American people. These priorities will allow us to build on the record of success that we’ve established, and they will guide our future efforts.” These four areas have been and remain the animating cornerstones of the mission and activities of the Justice Department, including the 93 United States Attorneys’ Offices:

- Protecting Americans from terrorism and other threats to national security and safety, both at home and abroad;
- Protecting Americans from violent crimes that ravage communities, devastate families, and steal promising futures;
- Protecting Americans from financial and economic fraud that devastates consumers, siphons taxpayer dollars, and impedes the economic recovery; and
- Protecting the most vulnerable Americans—our children; the elderly; and victims of hate crimes, human trafficking, and exploitation.

Within the structure of these principal missions, Holder announced the Justice Department’s “Smart on Crime” Initiative in his commissioning address to a community of lawyers and to the people of our country some 14 months ago. The broad design and the practical implementation of that program are premised on five goals:

- Ensuring that finite resources are devoted to the most important law enforcement priorities;
- Promoting the fair enforcement of the laws and addressing disparate impacts of the justice system;
- Accomplishing just and appropriate punishments for low-level, non-violent criminals;
- Encouraging prevention and re-entry efforts to deter crime and reduce recidivism; and
- Strengthening all available protections for our most vulnerable populations.

Although the “Smart on Crime” Initiative places principal emphasis on reforms in the criminal arena, its five “touchstones” and the four benchmarks identified by the Attorney General in April of 2011 are unmistakably applicable to the civil litigation in the United States Attorneys’ Offices, as well.

In the Eastern District of Wisconsin, the attorneys and professional staff of the Justice Department pursue their work on behalf of our diverse constituencies in a manner that both responds to and anticipates the particular interests, concerns, challenges, events, and circumstances of this 28-county region. Consistent with the directives of Attorney General Holder and his predecessors for local design and district-specific implementation of civil and criminal investigative and litigation work, the Office of the United States Attorney—in close partnership with and collaboration among federal, state, local, and tribal law enforcement and investigative agencies—includes these areas of concern, among others, in its purpose and concentration:

- Threats to our national security, including domestic and international terrorism;
- Financial and economic crimes, including lending and mortgage

fraud, investment and securities violations, banking and transactional fraud, and tax and income-related crimes;

- Violent crimes, including national and international gang activity, traditional organized crimes, firearms offenses, kidnapping, illegal drug trafficking, and bank and commercial robbery;
- Cybercrimes and infrastructure intrusions, along with identity theft, credit card fraud, and counterfeiting;
- Defense of civil claims against government agencies, and the financial enforcement and collection of debts due and owing to victims and to the federal government;
- Child exploitation and human trafficking, including production and distribution of images, labor, sex trafficking, and offender registration violations;
- Civil rights offenses, including hate crimes; police misconduct; voter access violations; violence to vulnerable victims; and denial of rights to housing, education, health care, and employment;
- Government program fraud, both civil and criminal, involving health care programs and other forms of federal financial support and grant awards;
- Public corruption and related offenses involving breaches of the public trust;
- Immigration and customs offenses, including border security and international safety;
- Environmental offenses, both civil and criminal, involving degradation of air, water, and land, along with clean-up obligations;
- Native American-Indian Country crimes, including domestic violence, gang activity, gaming violations, and illegal drug trafficking;
- Law enforcement officer safety and security, including training, education, and other forms of professional support; and
- Crime prevention, intervention, and treatment; and community re-entry, re-integration, and engagement initiatives.

This non-exhaustive description reflects the vision of Attorney General Edward H. Levi nearly 40 years ago. During his tenure as our nation’s chief federal law enforcement officer, as well as during his academic career as a law professor at the University of Chicago Law School, Levi frequently observed that the “agenda of the [Justice] Department is inevitably unfinished ... [and] is also always boundless.” It is consistent with that vision that the people of our nation expect from their public servants, including those in the Office of the United States Attorney for the Eastern District of Wisconsin, a continuing commitment to pursue justice, promote safety and security, and advance the rule of law fairly and steadfastly.

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MJC Center continued from p. 10

After eight months of nails, jackhammers, paint, mastic, and steel, the new space opened July 7, 2014, with the MJC taking up residence first, the Legal Resource Center moving in a couple weeks later, and the Records Center move completed just in time for the rededication.



The MJC's expanded quarters can now accommodate up to 14 client consultations at a time. Carrels for client consultations enhance privacy, and two conference rooms are available for particularly sensitive consultations and those in which small

children must be present. Windows are configured to make the most of the limited natural light available on a floor that is partially below ground, while the color scheme, interior lighting, and sight lines convey a sense of dignity and tranquility. The new space also includes a training room, a supervised children's play area adjacent to the waiting area, and staff offices. As Judge Skwierawski noted, gone are the days when legal guidance essential to the well-being of poverty-stricken clients was dispensed over a countertop.



Michael Hupy was recognized as principal benefactor of the MJC.

The Grand Reopening ceremony recognized the MJC's four principal benefactors: Foley & Lardner, Attorney Robert Habush, Linda and Bob Davis, and Attorney Michael Hupy. With contributions of \$100,000 each, they enabled the MJC to evolve from an idea into a reality.



Clerk of Court John Barrett



Supreme Court Justice Annette Ziegler



Amy Wochos and Dawn Caldart share the moment.

Are Union-Free Strikes Protected? The NLRB Thinks So.

Attorneys David W. Croysdale, Robert W. Mulcahy, and Benjamin T. Johnson, Michael Best & Friedrich

In June 2013, we wrote about the efforts of unions and the National Labor Relations Board to target the primarily union-free big box retailer and fast food industries. After describing how Target had come under scrutiny from the NLRB, we reported that the United Food & Commercial Workers Union (UFCW) and the UFCW-backed group “OUR Walmart” had been coordinating strikes and filing charges with the NLRB against Walmart. We then foreshadowed: “[g]iven the Board’s recent penchant for union activism, do not be surprised if it takes a close look at Walmart’s policies and practices in the coming months.”

As predicted, the Board filed a consolidated complaint against Walmart on January 14, 2014, alleging the union-free retailer violated workers’ rights in response to coordinated strikes across 13 states. The complaint alleges that dozens of Walmart supervisors and one corporate executive threatened, disciplined, surveilled, or terminated more than 60 workers in response to the union-free strikes.

The complaint is significant for two reasons: (1) the Board is taking the position that union-free workers have a protectable right to strike, and (2) the Board is testing its position against the nation’s largest employer. The Board views the union-free strikes as a form of protected concerted activity, and its press release stated that the National Labor Relations Act guarantees employees the right to “act together to try to improve their wages and working conditions with or without a union.”

The complaint alleges Walmart violated the NLRA by maintaining a policy that treats absences for participation in strikes as unexcused. The complaint also details alleged retaliatory disciplinary actions taken by Walmart supervisors at particular store locations, though at many of the listed locations only a single worker was absent.

From an employer perspective, the Board’s position raises many questions. For example, how is a supervisor to know whether a non-union worker is participating in a “strike” or just absent? Can a single worker go on strike, or is there a minimum number of strikers for the activity to be “concerted”? Can strikers be permanently replaced? Are “intermittent” strikes prohibited? It is easy to see why union-free strikes create tough questions for union-free employers.

The Board’s actions against Walmart are worth watching, as they come amidst a larger backdrop of worker protests and political debates over minimum wage and working conditions that are likely to remain in the spotlight for the foreseeable future. How courts ultimately grapple with the Board’s position, and the resulting questions, could have far-reaching effects on the labor market in 2014 and beyond.

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Status of Same-Sex Marriage in Wisconsin Is Complicated, but Not for Long

Attorney Christopher S. Krimmer, Balise & Roberson

Wisconsin currently has a three-tier system of marriage. The top tier consists of opposite-sex marriages. A husband and wife are subject to the hundreds of state-based benefits of marriage, as well as the 1,138 federal rights, obligations, and benefits of marriage. The second-tier marriages are gay and lesbian couples who reside in Wisconsin but who married in a state or jurisdiction that recognizes same-sex marriages. These couples are married for most federal purposes but lack any of the state rights associated with marriage. Finally, the third-tier marriages are those gay and lesbian couples who wed in Wisconsin between June 6 and June 13, 2014: after U.S. District Court Judge Barbara Crabb declared our state’s ban on same-sex marriage unconstitutional in *Wolf v. Walker*, but before she issued her stay of that decision pending completion of the appellate process. Those marriages are in legal limbo and it is uncertain whether they enjoy any of the state or federal benefits of marriage.

Within a matter of months, the marriage landscape should be much different. The U.S. Supreme Court will have decided whether or not to accept *Wolf v. Walker* for review. In a unanimous decision on September 4, 2014, the Seventh Circuit Court of Appeals affirmed Judge Crabb’s decision and held that Wisconsin’s “Marriage Amendment”—Article XII, Section 13—violates the equal protection rights of gay men and lesbians. The “Marriage Amendment” prohibits the state from recognizing same-sex marriage or any legal status substantially similar to marriage. The Seventh Circuit expedited the briefing schedule in *Wolf* and, remarkably, rendered a decision only nine days after oral argument. The court may have been eager to have the U.S. Supreme Court consider its decision for review along with other same-sex marriage cases seeking review. At the time of this publication, the U.S. Supreme Court can choose among five “marriage cases” issued

by federal appellate courts. All five decisions have been in favor of marriage equality for same-sex couples.

Although the Seventh Circuit bypassed a due process analysis in the *Wolf* decision, the U.S. Supreme Court will be asked whether denying same-sex couples the right to marry infringes the fundamental right of marriage. The analysis will turn on how the Court frames the due process issue. In order for a right to be a fundamental right, thereby invoking the stringent standard of strict scrutiny, the right must be “deeply rooted in our Nation’s history and traditions.” If the Court frames the issue to ask whether there is a “fundamental right to same-sex marriage,” the likely outcome is that no such fundamental right exists. Same-sex marriage itself is a fairly new phenomenon in the United States; Massachusetts in 2004 became the first state to grant the right to same-sex marriage. But if the Court frames the due process analysis to ask whether “the fundamental right to marriage” extends to same-sex couples, then the likely answer is “yes.”

At the district court level in the *Wolf* decision, Judge Crabb held that the due process analysis should not be framed in the context of the very exclusion at issue. For example, in *Loving v. Virginia*, the U.S. Supreme Court deemed it a violation of due process to deny interracial couples the right to marry. The Court did not frame the due process inquiry to ask whether there was a “fundamental right to interracial marriage.” Rather, the Court’s due process analysis asked whether the “fundamental right to marriage” was being denied to interracial couples.

If there is a fundamental right to marriage, the State of Wisconsin must establish a compelling state interest to justify denial of the right to gay men and lesbians. Although a variety of reasons has been offered, the most

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- (4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.
- (5) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
- (6) Information in cases where the patient is incapable of consenting.
- (7) Information about alternate medical modes of treatment for any condition the physician has not included in his or her diagnosis at the time the physician informs the patient.

(Italics added.)

The differences between the original version and the amended version are significant:

1. *The standard has been significantly altered.* Instead of a duty to provide information necessary for a reasonable person to make an intelligent decision, the duty now is to disclose what a “reasonable physician” in the same or similar specialty would know and disclose to a patient.
2. *The requirement to disclose is lessened.* The old law required that the doctor disclose the availability of all alternative, viable medical modes of treatment and their risks and benefits. Now, doctors need only disclose “reasonable alternative modes of treatment.”
3. *An exception to the duty to disclose has been added.* A doctor need not disclose information about alternative medical modes of treatment for any condition that the doctor has not included in his or her diagnosis at the time he or she informs the patient.

The reality of the new law is that plaintiffs will now be required to hire experts to testify about what a reasonable physician would know and disclose, what alternative treatments were available at the time, and whether they were reasonable.

The Civil Jury Instruction Committee has drafted a proposed instruction. Other groups have responded to the draft. A new draft has not yet been circulated, but the Committee meeting was scheduled in September, so a new instruction may come out of that meeting.

On April 24, 2014, the Legislature passed informed consent laws, §§ 446.08, 447.40, 448.697, and 449.25, for chiropractors, dentists, podiatrists, and optometrists, respectively, which essentially mirror the physicians’ informed consent law.

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Pro Bono Corner



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.

The Milwaukee Bar Association’s Sixth Annual *Pro Bono* Cocktail Reception will take place on Wednesday, October 29 from 5:30 to 7:30 at the MBA, 424 East Wells Street. The event is generously sponsored by the State Bar of Wisconsin and Quarles & Brady. All members of the legal community—law students, attorneys, and judges—are invited to attend.

The event will include a short program featuring representatives from several legal service organizations, who will discuss the wide variety of *pro bono* opportunities available in our area. The remainder of the evening will provide attendees networking opportunities to share information about *pro bono* and public service in and around Milwaukee. Whether you’re already a *pro bono* practitioner or public service attorney who can share your experiences, or a law student or new attorney interested in beginning *pro bono* work, this event is for you! Appetizers, beer, and wine included.

There is no charge to attend the reception. To RSVP, go to <http://milwbar.org/meetinginfo.php?id=70&ts=1410556257> or contact Britt Wegner at (414) 276-5931, or bwegner@milwbar.org.

Same-Sex Marriage continued from p. 20

consistent throughout the nation, including the Wisconsin litigation, is that marriage offers a state-sanctioned relationship for couples who accidentally procreate. In effect, the state points to the sole factual distinction between same-gender and opposite-gender relationships and then relies on that distinction as the core of the institution of marriage. This argument has failed in the great majority of cases addressing same-sex marriage in the past year. Of the 41 federal and state court decisions, same-sex couples prevailed in 39 on due process or equal protection grounds. Of the two decisions upholding a ban on same-sex marriage, one was issued by a Tennessee circuit court judge and the other by a U.S. District Court judge in Louisiana’s Eastern District.

In the Louisiana decision, the judge held that sexual orientation does not constitute a suspect class deserving of any heightened scrutiny. The state simply needed to provide a “rational basis” for enacting the ban. The rational basis was that the states have traditionally defined marriage and if the definition of marriage is altered, it should be altered through the democratic process. “[I]n this Court’s judgment, defendants assert a legitimate state interest in safeguarding that fundamental social change, in this instance, is better cultivated through democratic consensus. This Court agrees.” *Robicheaux v. Caldwell*, 13 CV 5090, slip opn. at 15 (U.S. Dist. Ct., E.D. La. Sept. 3, 2014).

The Seventh Circuit panel in Wisconsin’s marriage case came to exactly the opposite conclusion. The State of Wisconsin raised the same argument adopted by the federal district court in Louisiana—namely, the democratic process and not the courts should determine the definition of marriage. The Seventh Circuit offered a pointed rebuke to this argument: “Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.” *Wolf v. Walker*, No. 14-2526, slip opn. at 37 (7th Cir. Sept. 4, 2014).

CLE Calendar continued from p. 8

ambiguity as to whether *D.L. Auld* is still good law. The presentation addresses how to advise a client with regard to this issue.

Presenter: Lawrence Pope, Lawrence S. Pope Attorney at Law

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

October 23, 2014

Corporate Counsel

The \$64,000 (or \$1,000,000) Question: Is This Covered?

Whether it is mass tort, an SEC investigation, or a competitor alleging infringement of a patent, insurance considerations play a crucial role in how companies manage and mitigate risk. With the aid of a series of hypotheticals, brush up on the insurance issues you should be thinking about both when coverage is placed and when you think you need it.

Presenters: Jeff Davis and Patrick Murphy, Quarles & Brady

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

October 24, 2014

Bench/Bar Probate Committee

Annual Probate Seminar—Common Probate Issues and Current Hot Topics

Medicaid; estate recovery issues; changes to trust accounting; differences between informal, formal, and special administration; ethical issues and best practices

Presenters: Elizabeth Ruthmansdorfer, Moertl, Wilkins & Campbell; Kristin Occhetti, Quarles & Brady; Tim Pierce, State Bar of Wisconsin

12:30 – 1:00 p.m. (Lunch/Registration)

1:00 – 4:00 (Presentation)

3.0 CLE credits

October 27, 2014

Family Law Section

Identifying and Navigating the Mental Health Related Elements of Divorce

Discussion of the various topics related to the divorce process and family changes, including specifics on: (1) common mental health issues in divorce; (2) identifying clients with mental health issues; (3) strategies for working with clients who have mental health issues; and (4) treatments for clients with mental health issues

Presenter: Casey Holtz, Ph.D., licensed psychologist, Casey A. Holtz, Ph.D. LLC

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

October 28, 2014

Elder Law Section

Powers of Attorney and Competing Guardians: Using Mediation to Move On

Families easily become deadlocked when people hear the words “guardian” or “agent” as a license to wield total power. Elders in the middle can lose out quickly on what may matter the most to them, especially when health emergencies are looming. Learn from an expert and trainer on elder mediation about how the mediation process is being used successfully to help families resolve disputes.

Presenter: Rachel Monaco-Wilcox, Rachel Monaco-Wilcox LLC

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

October 29, 2014

Labor & Employment Law Section

Less Rights for Thou: Religious Discrimination and the Aftermath of *Hobby Lobby*

A presentation on the rights of religious freedom for employers and the protection of employees against religious discrimination

Presenter: Randy Enochs, Enochs Law Firm

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

October 31, 2014

MBA Presents

Ethics Nightmares: Tales from the Dark Side of Law

It's Halloween again, so it's time to scare you with true stories of lawyer misconduct. This presentation will take you through multiple ethical horrors. It will review various approaches to ethics, as well as how to better incorporate ethical conduct into your practices. Expect to be shocked and amused.

Presenter: Attorney Andrew Franklin, Adjunct Faculty, Cardinal Stritch University

Noon – 12:30 p.m. (Lunch/Registration)

12:30 – 3:30 (Presentation)

3.0 pre-approved ethics credits



Same-Sex Marriage continued from p. 21

The appellate panel in *Wolf* took a unique approach to the legal analysis of the equal protection claims. Instead of determining whether gay men and lesbians constitute a “suspect class” or determining which level of judicial review (i.e., rational basis, heightened, or strict scrutiny) applies to bans on same-sex marriage, the court relied on a “costs and benefits” analysis. It is within this analytical structure that the court determined that the State of Wisconsin failed to identify any real harm to the state or society if same-sex marriage were recognized; and that the harm to same-sex couples, especially those who are parenting children, is substantial in the absence of such recognition: “A degree of arbitrariness is inherent in government regulation, but when there is no justification for government’s treating a traditionally discriminated-against group significantly worse than the dominant group in society, doing so denies equal protection of the laws.” *Id.* at 24.

Married same-sex couples in Wisconsin can celebrate the Seventh Circuit’s decision in *Wolf*, and can also take solace in the federal court decision from Louisiana. The latter is the first federal court decision against same-sex marriage, creating a conflict among the federal courts, which is typically a criterion for the U.S. Supreme Court to accept a case

for review. There is a real possibility that the Supreme Court will accept *Wolf v. Walker* for plenary review. Wisconsin, the first state to enact nondiscrimination protections for gay men and lesbians, may thus offer the U.S. Supreme Court its *Loving v. Virginia* opportunity of this generation: to declare same-sex marriage legal throughout the entire country.

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