



Messenger

MILWAUKEE BAR ASSOCIATION, INC.

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Spring 2011

Volume 1

MBA Judges Night at the Grain Exchange Building



Picture courtesy of Kevin Harnack, the Wisconsin Law Journal

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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.



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Letter From the Editor



Charles Barr, Editor

Current events should demonstrate to any of the world's remaining autocrats that while he may govern without the consent of the governed, the governed can nonetheless show him the door at any time. It doesn't matter how long a dictator has been in power, how firmly entrenched he appears to be, how wealthy he is, or how subjugated his people appear to be. He is liable to get the boot quite summarily, as it turns out. As long as the military lacks a taste for slaughtering its own people, then a large, centrally located public square and enough freedom-craving, unified, courageous, and perseverant people to fill it are all that is required. Shake vigorously and, voilà—exit dictator, stage right.

As amazing as these current events are, this edition of the *Messenger* includes a story that may be even more amazing. It is the story not of tens of thousands of protestors but of one individual who, in 1985, took on the massive, monolithic edifice that was the Government of the Union of Soviet Socialist Republics. The individual, a young student, staged a hunger strike to call attention to the USSR's years-long refusal to allow one of its citizens, a human rights activist, to travel to the West for life-saving cancer treatment. In this political face off between a solitary American student and the most powerful autocratic institution on the planet, it was the Soviet Government that backed down. No, it didn't collapse in a pile of rubble—then. But it showed the world a crack. Other cracks appeared, and a few short years later, the Soviet Union *did* collapse.

The student who made the Soviet Government blink a quarter century ago now practices law in Milwaukee and lives in Shorewood with her husband and two daughters. *Swimming in the Daylight* is the title of her new book looking back at this remarkable struggle. Our feature article (page 10) recounts her story.

What else is in the *Messenger*? Our “hard law” article surveys recent case law on the validity of covenants not to compete. Moving on to “soft law,” regular contributor Doug Frazier savors the delicious and surprisingly

nuanced tax ramifications of—wait for it—ice cream cakes. Judge Richard Sankovitz, the undisputed Maharishi of Local Rules, previews new Milwaukee County rules governing practice and procedure in Chapter 128 cases. From the legal marketing desk, frequent contributor Michael Moore provides valuable insight on effective networking in the digital age. There are pics from Judges Night, the signature MBA social event of the season.

We have reports on the Family Court Mediation Program, the need for more foster parents in Milwaukee County, the MBA's Judicial Forum and judicial poll, and the MBA's remodeling project. We have the latest from the Milwaukee Justice Center, as well as other initiatives and luminaries in the *pro bono* world. Past MBA President Fran Deisinger is back with another “Reel Law” review, in which he finally finds a film to pan. And we have a blast from the past: the mysterious, long-lost, and reliably droll Wing Tipped Contessa drops in to sample another local lunch spot.

We hope you enjoy this edition of the *Messenger* and, though we must concede the absence of a logical connection between the following two wished-for events, we also hope that the promise of spring inspires you to contribute to our humble publication. We close with the same words we uttered a year ago, the mantra that gets us through this last slushy slog of winter: somewhere, thousands of miles away, pitchers and catchers have reported.

— C.B.

Effective Networking and the Lesson of the Pot Belly Stove

Michael Moore, Moore's Law

When I was young, we often spent our vacations in a small cabin in the North Woods. As the chill of the night air settled in, my grandfather would say, "That stove won't make heat all by itself, ya know." This was a signal for me to haul in some wood so he could make a fire. This was also my early introduction to the concept of "Give to Get." The next time you are working your network, keep in mind two simple questions: "Have I invested in my relationships within my network?" and "Have I been proactive in managing those relationships?" Effective networking requires a proactive Give to Get mentality.

The essence of Give to Get

A Give to Get mentality is more than just joining groups and attending functions. It requires participation, lending time and knowledge without regard for immediate payback. It requires genuine interest in those we hope to add to our network. Stephen Covey, author of *Seven Habits of Highly Effective People*, calls this expanding our Circle of Influence. By working on things we care about, we generate positive energy, which can magnify our personal influence. My involvement with an area association has led to several new client opportunities. My 13 years as a volunteer on a local school board created professional relationships that continue to return value to me. The more we give to our network, the more we will get from it.

Invest in your "relationship bank"

When you first meet someone who may be a potential addition to your network, ask questions about his or her interests. Listen effectively and build your knowledge of the contact. Then invest in building the relationship by periodically sending information of interest to your contact. It could be as simple as news clippings or industry statistics. Sending a personal note, even scrawled on a yellow sticky, is better than e-mailing attachments. Over time, invest further in the relationship by getting together on a regular basis and exchanging information. In this way you earn the right to ask for help, and when the time is right, your contact will gladly give it. If you don't make deposits into your own relationship bank, don't expect much when you go to make a withdrawal.

Being proactive increases effectiveness

Lawyers need to be proactive and build effective networks to be successful. Stephen Covey makes "Being Proactive" the first of his seven habits to becoming highly effective. It means more than simply taking initiative. Proactive people take responsibility for their own lives. Their activities are a product of choice, regardless of the conditions around them. My last office activity each day is making a short list of things I must proactively get done the next day. While events of the day may force me to alter my plans, I have a proactive reference point to effectively guide my activities throughout the day.

Give to Get enhances social networking

As social networking has exploded, lawyers are turning to these online communities as a way to maximize visibility, make introductions, and generate revenue. This requires a Give to Get mentality. One of the most effective examples of using social media for lawyers is creating a profile on LinkedIn, a site used primarily for professional networking. Be proactive. Take the time to learn and make use of the site's many benefits. Use LinkedIn as a personal Web site; share information about your personal, as well as your professional, interests and accomplishments. You are more than "a lawyer." Reach out to groups and individuals; offer your help or opinions on issues relevant to them. Recommend others' work and they, in turn, are likely to recommend you. These recommendations are one way to enhance your LinkedIn profile.

Remember, "That stove won't make heat all by itself, ya know." Embrace the concept of Give to Get. Be proactive, and enlarge your personal Circle of Influence. Spend the extra effort giving value to your network, and you will be rewarded by getting value from your network. In the words of the great country lawyer, Abraham Lincoln, "Good things may come to those who wait, but only things left by those who hustle."

Member News

The Wisconsin Supreme Court appointed **Michael J. Aprahamian**, a partner at Foley & Lardner, to a three-year term on the Wisconsin Judicial Commission. The Commission investigates and prosecutes allegations of misconduct or disability on the part of Wisconsin judges and court commissioners.

Galanis, Pollack, Jacobs & Johnson announced that **Aaron J. Bernstein** has become associated with the firm.

HawksQuindel announced its move, effective March 4, 2011, to 222 East Erie Street, Suite 201, in Milwaukee's Historic Third Ward. Hawks Quindel is an employment and labor firm representing individuals and unions, and also practices in the areas of family law, worker's compensation, and wage and hour claims.

Walter F. Kelly also announced the relocation of his office, effective March 4, 2011, to 222 East Erie Street, Suite 201. Kelly represents individuals in employment, labor, civil rights, trade regulation, and executive compensation cases.

Reinhart Boerner Van Deuren announced that **Nathan K. Johnson**, **Amy L. Lindner**, and **Lucas J. Pagels** have been named shareholders in the firm. Johnson is a member of the firm's Trusts and Estates Practice, Lindner of the Litigation and Intellectual Property Practices, and Pagels of the Employee Benefits Practice.

The firm announced the opening of a new office in Phoenix, Arizona. The firm also maintains offices in Milwaukee, Madison, and Waukesha; Rockford, Illinois; and Denver, Colorado.

The Wisconsin Attorney General's Office announced that **Maria S. Lazar** has joined that office in the State Programs Administration and Revenue Unit. Lazar is a Past President of the Milwaukee Bar Association.

Message From the President

Attorney Rachel A. Schneider, Harley-Davidson



Happy Valentine's Day! At least it is as I write this, so I'd like to use this issue's column to deliver some well-deserved valentines to the MBA staff.

My first valentine goes to Britt Wegner. In November, I was coincidentally in Washington, D.C., for a conference, which allowed me to accept the ABA's invitation to participate in a media event at the White House. One of the three initiatives announced at that event involves referrals by the Department of Labor to an ABA-sponsored 800 number, which then connects to local ABA-approved lawyer referral programs. As you may know, the MBA has a fantastic lawyer referral program, and it would not be what it is today without Britt's tremendous work and guidance. The MBA sponsors the only ABA-approved lawyer referral program in Wisconsin. Britt helped the ABA develop a workable program that would not burden thinly staffed local lawyer referral programs, while at the same time increasing the odds that people with potentially valid claims (as assessed by DOL) will find qualified lawyers to pursue their claims when DOL has determined that it cannot. It was a fantastic experience to have

the chair of the ABA committee that worked on this program just go on and on about how wonderful Britt is and what a terrific asset she is to the MBA. She is indeed!

My second valentine goes to Sabrina Nunley. Shortly after my trip to D.C., I received the type of letter I hope we all think about writing. It was from one of the presenters at one of our many excellent CLE programs. Sabrina is our Queen of CLE and she does one heck of a job. She does such a good job that this presenter took the time to let me know how appreciative she was of Sabrina's support and professionalism. I couldn't agree more! Thank you, Sabrina, for running the MBA's great CLE programming.

My third valentine goes to Jim Temmer. In January, Jim confirmed what we had seen each month as the Board reviewed the finances. In large part due to Jim's prudent expense management, the MBA finished 2010 in the black. Given the dismal economic outlook at the beginning of the year, it was not an easy task. Jim did it!

My fourth valentine goes to Katy Borowski. February means

Judges Night. Despite the bitter cold it was once again a terrific party. I never get the chance to talk with everyone, but I always have some great conversations. Katy makes it all happen seamlessly (at least as far as the attendees are aware!). Thank you, Katy!

My fifth valentine goes to the rest of the MBA staff: Pam Hill, Amy Enger, and Andy Clinnin. Pam has expertly performed the MBA's accounting functions for many years. Amy is the MBA's face to the public; she is always upbeat and a pleasure to work with. Andy is Britt's indispensable right-hand man, without whom the aforementioned lawyer referral service would not be what it is. Pam, Amy, and Andy round out an outstanding MBA staff. You all make this the terrific organization that it is. THANK YOU!

—Rachel

Welcome New MBA Members!

Jeremy Adelson, *Michael Best & Friedrich*

Zachary Corey, *Foley & Lardner*

Jay Einerson, *Michael Best & Friedrich*

Matthew K. McCasland

Jason M. Prekop, *Gutglass, Erickson, Bonville & Larson*

Kevin P. Rizzuto, *Michael Best & Friedrich*

Stacie H. Rosenzweig, *Gutglass, Erickson, Bonville & Larson*

David Samson, *Gray & Associates*

Courtney Schulz

Jenny Youn,

Simpson & Deardorff

Peter J. White,
Deloitte Tax

Graham P. Wiemer,
MacGillis Wiemer



Bill Robinson, ABA President-Elect; Rachel Schneider, Milwaukee Bar Association President; and Dave Bloomfield, Columbus (Ohio) Bar Association President-Elect.

Photo credit:
Lisa Helfert



MBA Seeks Nominations for Annual Awards

Do you know of a dedicated, innovative attorney or judge who deserves public recognition? The MBA honors individual or group achievements with our yearly awards at the Annual Meeting. We have four award categories: Lifetime Achievement, Lawyer of the Year, Distinguished Service, and the E. Michael McCann Public Service Award. The

criteria for these awards give us the flexibility to honor any outstanding individuals or groups. If you are interested in finding out more about our awards, including a listing of past winners, or if you wish to nominate someone, please contact Jim Temmer at 414-276-5934 or jtemmer@milwbar.org.

CLE Calendar

March - May 2011

March 3, 2011

MBA Presents

Traffic Crash Analysis

This is an analysis of a motorcycle and pickup truck crash at an intersection to establish which driver had the green traffic signal. The depositions of witnesses, detailed traffic signal plan, and timing and sequence of operation are used with field simulation of the motorcycle being detected for traffic controller input, and a timeline of events to instruct a jury on the expert conclusion. The combination of technical traffic controller timing and deposition statements leads to an opinion to a reasonable certainty as to the display of traffic signals at the time of the crash.

Speaker(s): Wayne R. Higgins, PE, PTOE, TSOS, President, Traffic Engineering Services, Inc.

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

12:30 – 1:30 (Presentation)

1.0 CLE credit

March 8, 2011

Taxation

The State of the IRS, Especially in Wisconsin, Along With a Discussion of Recent Developments and Initiatives

Jennifer Williams is the “Chief Executive” for the examination division in Wisconsin for large businesses (domestic and international), along with “high net worth individuals.” Her comments will also be helpful for representatives for other taxpayers.

Speaker: Jennifer D. Williams, CPA and IRS Territory Manager – Wisconsin, Large Business and International Division

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

12:30 – 1:30 (Presentation)

1.0 CLE credit

March 9, 2011

ADR (Alternative Dispute Resolution)

Mediation from the Plaintiff's Prospective

Discussion on preparing and dealing with the plaintiff/client; educating the mediator; preparing the submission; dealing with the mediator, opponents, and your client during the mediation; and post-unsuccessful mediation continuation of the dialogue

Speaker: Robert L. Elliott, Attorney at Law

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

12:30 – 1:30 (Presentation)

1.0 CLE credit

March 10, 2011

Civil Litigation

2011 Legislative Changes for Civil Trial Practice

Speaker: Ann S. Jacobs, Domnitz & Skemp

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

12:30 – 1:30 (Presentation)

1.0 CLE credit

March 15, 2011

Intellectual Property

A Sea Change: the Expert Discovery Changes to Rule 26

On December 1, 2010, amendments to the Federal Rules of Civil Procedure went into effect. These amendments include substantial changes to Rule 26's provisions regarding expert discovery. Specifically, the changes add work product protection to communications and draft reports between counsel and testifying experts. This extension of the work product privilege marks a sharp departure from the previous rule, which granted broad discovery of attorney-expert communications and drafts. This presentation will detail the changes to Rule 26, including consideration of where the pitfalls and areas of dispute may be.

Speaker: Kevin J. Malaney, Foley & Lardner

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

12:30 – 1:30 (Presentation)

1.0 CLE credit

March 17, 2011

MBA Presents

Litigation Implications of the Dodd-Frank Financial Reform Act

An overview of the new claims and causes of actions, possible defenses, and penalty provisions that this massive, complex act creates and of which litigators should be aware. In addition, the presentation will touch on some of the possible constitutional challenges to portions of the act, including those under the doctrines of the separation of powers, vagueness, and due process.

Speakers: Nathan Fishbach and Don Daugherty, Whyte Hirschboeck Dudek

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

12:30 – 1:30 (Presentation)

1.0 CLE credit

March 18, 2011

MBA Bench Bar Probate Committee and Milwaukee County Probate Division

Fifth Annual Probate Court Guardian Ad Litem Seminar

Wisconsin Individual-at-Risk Restraining Orders: Research Findings and Practical Application for GALs; Legal and Procedural Update

Speakers: Honorable Mel Flanagan, Milwaukee County Circuit Court; Jane Raymond, Department of Health and Social Services; Tess Meuer, Wisconsin Coalition against Domestic Violence; Patrice Baker, Probate Court Commissioner; Lindsey Grady, Deputy Register in Probate; Richard J. Baker, Probate Court Commissioner; Laura J. Petrie, Petrie & Stocking

Location: Marquette University Law School, Eckstein Hall, Room 444

Limited parking is available at Eckstein Hall for \$5.00.

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

12:30 - 4:00 (Presentation)

3.5 CLE/GAL credits

March 22, 2011

Elder Law

WisPACT Update

Speaker: Heather B. Poster, Becker, Hickey & Poster

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

12:30 – 1:30 (Presentation)

1.0 CLE credit

March 23, 2011

Labor & Employment

UI Hearings and Current Issues Regarding UI Benefits

Speaker: Honorable Carolina Stark, Wisconsin Department of Workforce Development

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

12:30 – 1:30 (Presentation)

1.0 CLE credit

March 24, 2011

Environmental Law

Wisconsin's Approach to Addressing Vapor Intrusion Issues at Remediation and Redevelopment Sites

Discussion of the background for the DNR's recently finalized vapor intrusion guidance, the approach recommended for determining whether investigation of the vapor intrusion pathway is necessary, and how sites with a vapor intrusion pathway can move through the investigation and closure process

The Reel Law

Attorney Fran Deisinger, Reinhart Boerner Van Deuren

A Few Good Men

1992; running time 138 min.

The films I have reviewed for the *Messenger* so far have all been old classics that were well-known favorites of mine—films made from the '40s through the '60s, all starring legendary Hollywood icons. For this review, I am moving forward in time substantially, to the 1990s, and a film that is much better known to modern audiences. But it was not better known to me. The film is *A Few Good Men*, from 1992, directed by Rob Reiner and starring Tom Cruise, Demi Moore, and Jack Nicholson. The film was written by Aaron Sorkin, later renowned for *The West Wing* on television and, very recently, *The Social Network*, a leading contender at the upcoming Academy Awards. The only clip from this movie that I had seen before last weekend was of the take-away line that entered the popular parlance at the time—a seething Jack Nicholson barking out the answer, “You can’t handle the truth!” while on the witness stand.

Rob Reiner was working on a hot streak of terrific films, from *This Is Spinal Tap* to *The Princess Bride* to *When Harry Met Sally*, when he directed this military courtroom drama in which a hot-shot young lawyer (Cruise, of course) with hidden doubts about his skills defends two marines accused of killing another marine as part of a disciplinary tactic. The incident occurs at Guantanamo—long before it became a convenient lock box for Presidents to store inconvenient prisoners.

With all of the talent involved in its creation, I went into this movie optimistically. I was greatly disappointed. Nothing about this film works very well. The story line is that the dead marine was killed (accidentally, as it turns out) because he had “gone outside his platoon” by sending a letter to a military investigator in which he requested a transfer and offered to provide evidence of a minor border incident. Nicholson, the base commander, plays a stereotypical caricature of an old military man who believes that American society doesn’t appreciate his role as a stalwart against the enemy. He attempts to cover up the true story of the death through the ignoble approach of letting the accused marines under his command twist in the

wind, even though he knows that they were ordered to rough up the marine who died.

Cruise, the son of a deceased U.S. attorney general, is cynically spending his time in the JAG corps playing softball and pleading out servicemen in courts martial, never trying the cases. He is selected to defend the two marines despite the request of Moore, a more serious lawyer, to do so. Cruise manages to insult Moore in just about every way possible and yet somehow she quickly gets dewy eyed about him, and convinces him that his plan to plead the defendants out is defeatist and that he should try the case. Even though there is no evidence he has ever tried a case before, Cruise of course turns out to be a gifted trial lawyer. The remainder of the plot plays out rather predictably, with the ultimate courtroom scene featuring Cruise cross-examining Nicholson and Nicholson stupidly falling into an obvious trap by virtue of which Cruise not only wins the case, but has Nicholson himself placed under arrest. Ah, realism!

Apart from the unbelievable plot and the woodenly written and completely unsympathetic characters, the worst problem in the movie is the hammy acting of Cruise. He carries the same bratty and unpleasant persona to this movie that he used in *Top Gun*, and the arc of his character’s story is pretty similar: He’s the hot shot who is faced with a challenge and then dealt setbacks (after one, he shows up swigging from a bottle of whiskey, a scene so hackneyed it’s almost comical), but who ultimately prevails with a good looking (and ostensibly professional, but ultimately feckless) woman at his side. Moore not only is handed the tough duty of being Cruise’s moral support, but she is also inserted into the trial as co-counsel, apparently so the writer can show how inept she is next to Cruise. This film is not a high water mark for the portrayal of female attorneys.

The courtroom scenes in the film are not impressive. There are a few set pieces to establish Cruise’s cross-examining skill, but these are not memorable. The courtroom itself is nice to look at, however, and once Nicholson enters for the showdown scene, he chews up the scenery with entertaining gusto. The biggest legal failing in the movie is that

midway through Cruise’s examination of Nicholson, he starts pulling out undisclosed evidence and essentially testifying to previously unknown facts so that he can set the trap. It drives the plot line along, but it would never happen in a real courtroom.

While it’s too much to ask that moviemakers follow the rules of evidence and courtroom procedure religiously, better writers have done a more creditable job without sacrificing the inherent drama that the big courtroom scene can provide. As in most other aspects, *A Few Good Men* fails in this regard. This one is not worth putting in your Netflix cue.



Milwaukee Bar Association 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.

New Local Rules Prescribe Forms and Procedures for Chapter 128 Debt Plans and Trustees

Honorable Richard J. Sankovitz, Milwaukee County Circuit Court



The Civil Division is about to roll out two new local rules mandating the use of special forms for those filing petitions to amortize debts under Chapter 128, and regulating those who would serve as trustees of amortization plans.

A bit of background: Chapter 128 governs a variety of remedies for debtors and creditors. It might be best known for its rules governing receiverships. It also includes section 128.21, which focuses on relief for persons “whose principal source of income consists of wages or salary.”

Recently, the court has seen a dramatic increase in filings invoking the protection of section 128.21. That statute has become a popular alternative to bankruptcy for individuals, particularly after access to bankruptcy court was constricted by reforms enacted about five years ago.

Section 128.21 is designed to give debtors some breathing room to catch up with their debts. The law allows a debtor to name all his or her creditors, authorizes the court to freeze any action those creditors might take to collect their debts (for example, garnishment), and gives the debtor three years to pay back what is owed. If it’s feasible for a debtor to catch up in three years or less, the court appoints a trustee to collect from the debtor, usually via a paycheck deduction, and distribute the debtor’s earnings to the various creditors.

The need for a new local rule arose because section 128.21 is none too specific about the procedures lawyers, clients, and trustees should follow in these cases. As a result, judges in the Civil Division have been struggling with inconsistent pleadings, form documents that vary from (and sometimes blatantly contradict) the terms of the statute, and the inefficiencies that result from a lack of uniformity. Furthermore, debtors representing themselves have no model for their submissions.

Judge Timothy Dugan, the Presiding Judge of the Civil Division, along with Judges William Brash and William Pohan, took the lead in drafting the new rules. Judge Dugan said that special rules were needed “to ensure compliance with the statute and uniformity in filings,” and to provide unrepresented litigants with “forms they could easily use.”

A separate concern of the court has to do with trustees who supervise debtor repayment plans. These trustees are responsible for large sums of money, but neither the court nor the law currently makes any provision for securing the funds or tracking them to make sure they reach their intended destination.

To address the concerns surrounding the burgeoning use of Chapter 128, two new rules have been proposed and are awaiting approval by the Chief Judge. One rule prescribes particular forms and procedures that must be used in these cases. Pertinent features of this rule include:

- Mandatory forms for the documents that must be filed in these cases: Petition to Amortize Debts, Affidavit of Debts, Order Appointing Trustee, Report of Trustee, Plan, and Proposed Order Approving Plan.
- The requirement that the court’s forms be used; substitutes will not be accepted, and the court will not grant any protection to the debtor until the appropriate forms are filed. (The rule establishes a 30-day grace period for getting the required documents on file, or else the case will be dismissed.)
- The minimum amount of each installment to be paid by the debtor, depending on payday interval.
- The number of copies that must be filed, along with a provision that the court will forward copies of certain documents directly to the trustee.

The other rule establishes a system for registering and regulating trustees. There are exceptions, but generally all persons seeking to be trustees must:

- Register with the presiding judge each year.
- Be willing to accept appointments from the court in cases in which litigants represent themselves.
- Maintain segregated, dedicated bank accounts to hold funds deposited by debtors.
- Secure an appropriate bond.
- Report annually on all funds received by the trustee and demonstrate that he or she is bonded.

The new rules, the required forms, and a list of approved trustees will be available on the court’s website and at the Milwaukee Justice Center.

Receive a call that your firm cannot assist?

Send them to the Milwaukee Bar Association’s Lawyer Referral Service!

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Swimming in the Daylight:

a Local Attorney's Memoir of Friendship, Hope, and Courage

Attorney Elizabeth K. Miles, Davis & Kuelthau

Today, Lisa Paul is a civil litigation attorney practicing in the Third Ward and living with her husband and two daughters in Shorewood. In 1984, Lisa was a college student living in Moscow and about to enter into a friendship that would defy an empire. Lisa's just-released book, *Swimming in the Daylight*, chronicles her remarkable friendship with Soviet activist Inna Kitrosskaya Meiman and provides a powerful message of hope, faith, and courage.

Lisa pursued a Russian Studies major at the University of Minnesota, and moved to Moscow in 1983 to work as a nanny for an American couple. A year later, Lisa became a Russian language student of Inna Kitrosskaya Meiman. From their first meeting, Lisa knew there was something special and important about Inna.

Although Inna had a doctorate in English language education from the prestigious Moscow Institute of Foreign Languages and taught there for years, she was forced to quit in 1979 after applying to emigrate. The Soviet government denied Inna's visa, and she was branded a *refusenik*, the term for Soviets who were denied permission to emigrate. Inna's husband, fellow *refusenik* Naum Meiman, was a well-known mathematician and member of the Helsinki Watch Group.

Through the consequences Inna and Naum suffered as a result of their involvement in the human rights movement, Lisa came to understand the harsh realities of life in the pre-Gorbachev Soviet Union.

Lisa and Inna's relationship quickly grew beyond student and teacher. As Lisa and Inna became closer, Lisa discovered that her friend had cancer and had been denied permission to travel to the West for potentially life-saving medical treatment. Inna feared she might die in Russia without the outside world understanding the plight of *refuseniks* and dissidents in the Soviet Union. Lisa returned to the U.S. in May 1985 determined to help however she could.

But what could she do? Lisa was a college student with no money, no political connections, and little time to accomplish her goal. Meanwhile, the news from the Soviet Union was getting bleaker. Inna's recent operation had made her condition worse, and the doctors had discovered a new, inoperable tumor. Yet, as always, Inna kept up hope and encouraged Lisa to do the same. In the midst of her frustration, Lisa realized she had all she needed: her family, her freedoms as an American, and her Catholic faith.

Lisa decided to go on a hunger strike to protest the Soviet government's denial of Inna's visa. An article about her efforts in the *Minneapolis Star Tribune* on day one of the strike triggered a wave of media coverage and, as a result, national attention to Inna's case and the struggle for human dignity in the Soviet Union. Lisa ended her hunger strike after 25 days with a press conference in the U.S. Capitol building. Although Lisa's hunger strike ended, the press coverage and political pressures on the Soviet government continued.

A year later, Inna finally received a visa to travel to the U.S. for medical treatment. Her husband Naum's request to accompany her, however, was denied. Lisa was at the front of the line when Inna arrived in Washington, D.C. Inna vowed to help all those left behind in Russia when she recovered. Sadly, three weeks into treatment, Inna passed away. The international community mourned a woman who courageously fought against her illness and for human rights in the Soviet Union.

Lisa's hope in telling this story is to inspire others to find daylight even during times of the darkest despair. *Swimming in the Daylight* is available now. More information, including information on upcoming events, is available at <http://swimminginthedaylight.com/>.

CLE Calendar continued from p. 7

Speaker: Terry Evenson, Hydrogeologist, Wisconsin Department of Natural Resources
12:00 – 12:30 p.m. (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 25, 2011

MBA Presents

Milwaukee Family Court Judges - Live and in Concert Part V!

The Milwaukee family court Judges discuss areas of family law practice, including advice on how to best present various issues before the court.

Moderator: Gregg Herman, Loeb & Herman
Panelists: Judge Michael J. Dwyer; Judge Michael D. Guolee; Judge Elsa C. Lamelas; Judge Daniel A. Noonan; Judge Francis T. Wasielewski; Commissioner Sandra Grady

12:30 – 1:00 p.m. (Registration)
1:00 – 4:00 (Presentation)
4:00 – 5:00 (Reception - hors d'oeuvres and wine)
3.0 CLE credits

April 15, 2011

MBA Presents

Personal Injury Cases: Calculating and Proving Damages

Speaker(s): Alex Flynn, Alex Flynn & Associates; Michael A. Mesirov, Kasdorf, Lewis & Swietlik; David J. Turek, Gass Weber Mullins
8:30 - 9:00 a.m. (Registration/Continental Breakfast)
9:00 – 12:00 (Presentation)
12:00 - 12:45 (Lunch will be provided)
12:45 - 4:30 (Presentation)
7.0 pre-approved CLE credits, including 1.0 ethics credit

May 20, 2011

MBA Presents

Shining Moments in the Courtroom: Outstanding Habits and Tactics that Impress Trial Judges

Speakers: Honorable Robert G. Mawdsley (retired); Honorable Michael J. Skwierawski (retired); Honorable William S. Pohan, Milwaukee County Circuit Court; Honorable Richard J. Sankovitz, Milwaukee County Circuit Court
8:30 - 9:00 a.m. (Registration/Continental Breakfast)
9:00 – 12:00 (Presentation)
12:00 – 12:45 (Lunch will be provided)
12:45 - 4:30 (Presentation)
7.0 pre-approved CLE credits

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Primary Candidates Speak at MBA's Judicial Forum

Noah Gehling, Milwaukee Justice Center



Supreme Court Justice candidates Marla Stephens and Joel Winnig participate in the forum.

On Thursday, January 27, the Milwaukee Bar Association hosted a noon-hour Judicial Forum open to both MBA members and the general public. More than 60 people attended, along with members of the press, to hear from the candidates who competed in the 2011 spring primary election on Tuesday, February 15.

The Forum began with the candidates for the Wisconsin Supreme Court: incumbent Justice David Prosser and challengers

JoAnne Kloppenburg, Assistant Attorney General; Marla Stevens, Director of the State Public Defender's Appellate Division; and Joel Winnig, a private practice attorney. All four candidates had the opportunity to address questions from the moderator—Richard Esenberg, a visiting Assistant Professor at Marquette University Law School—as well as from the audience.

Following the remarks of the Wisconsin Supreme Court candidates, the audience heard from the three candidates running for Branch 18 of the Milwaukee County Circuit Court: incumbent Judge Pedro Colón and challengers Christopher Lipscomb, a private practice attorney and municipal judge for the City of Glendale; and Roy Korte, Assistant Attorney General and Director of the Criminal Litigation, Antitrust, and

Consumer Protection Unit for the Wisconsin Department of Justice.

Each group of candidates made introductory and closing remarks and answered three to four questions during the hour-long forum. The top two voter-getters for each position in February's primary election—Prosser and Kloppenburg for the state supreme court, and Colón and Lipscomb for the circuit court—are competing in the 2011 spring general election to be held Tuesday, April 5.



Justice David Prosser listens as Assistant Attorney General JoAnne Kloppenburg responds to a question at the Judicial Forum sponsored by the MBA.

New Addition to Milwaukee Justice Center

Noah Gehling, Milwaukee Justice Center

Dayna Frenkel, a 2010 graduate of Washington University School of Law in St. Louis, joined the Milwaukee Justice Center (MJC) in January. Frenkel is a deferred associate at Michael Best & Friedrich, a partner of the MJC. She will be working at the MJC for the duration of her deferral year.

Frenkel works on administrative programming, which will help expand the hours and impact of the MJC. She also helps supervise the MJC's self-help desks during some of the Family Law Clinic walk-in hours.

"I'm very excited that this opportunity presented itself, allowing me to get such

good experience during my deferral year," said Frenkel. "The Milwaukee Justice Center is an important addition to the legal services available to low-income, self-represented litigants. I am confident that the lessons I learn over the next year will make me a better attorney at Michael Best and instill in me a lifelong commitment to *pro bono* work."

Welcome, Dayna!

Dayna Frenkel in the MJC's Self-Help Center



Judges Night

2011



U.S. Seventh Circuit Court of Appeals Judge Terence T. Evans, Cook & Franke attorney William A. Jennaro, and Gunta & Reak attorney Gary A. Gerlach



Michael Best & Friedrich attorneys Adam E. Witkov and Susan M. Sager; Milwaukee County Circuit Court Judge Maxine A. White; Gimbel, Reilly, Guerin & Brown attorney Thomas E. Brown; Michael Best & Friedrich attorney Joshua L. Gimbel; and District 1 Wisconsin Court of Appeals Judge Kitty K. Brennan



United States Attorney for the Eastern District Court of Wisconsin James L. Santelle, Kyle Mayo, Foley & Lardner attorneys Zachary J. Corey and James T. McKeown



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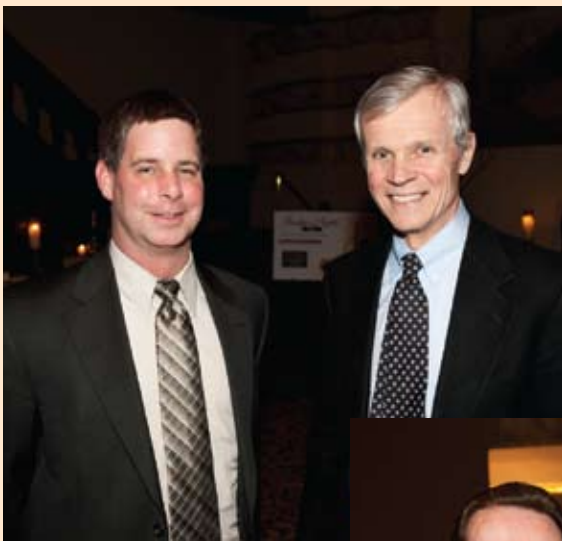
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Milwaukee County Circuit Court Judge Mel Flanagan; attorney Allison A. Luczak; and Gimbel, Reilly, Guerin & Brown attorney Christopher L. Strohhenn



Hupy and Abraham attorney Timothy W. Schelwat and Milwaukee County Circuit Court Judge Francis T. Wasielewski ↑



↑ Gimbel, Reilly, Guerin & Brown attorney Patrick J. Knight; Milwaukee County Circuit Court Judge Rebecca F. Dallet; and Chief Judge Jeffrey A. Kremers



McNally, Maloney & Peterson attorneys Thomas A. Strandberg and John F. Maloney →

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Judges Night

2011

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Beyond Civility: Promoting the Lawyer as Straight Shooter

The Rules of Professional Conduct for Attorneys (Supreme Court Rules, Ch. 20) prescribe our baseline ethical norms. Beyond that baseline, the manner in which lawyers interact with the general public, each other, and the legal system as a whole is largely a matter of self-regulation. As in any other community, we enhance or detract from the reputations of individual lawyers through our day-to-day conversations with one another about their conduct.

Occasionally, we go beyond those private evaluations and engage more publicly in what can loosely be called a “campaign” to improve our collective behavior. An example is the emphasis within the past decade or so on “civility”—an effort to cut down on rude or abusive treatment, whether verbally or in writing, of opposing counsel, parties, and witnesses. Individual judges have adopted civility codes that are posted in their courtrooms, and to which practitioners either implicitly or (in the case, for instance, of *pro hac vice* admissions) explicitly pledge to adhere as a condition of appearing in those courts.

The civility campaign has been essentially victorious. Almost all reputable attorneys are now “civil” in relationships with other counsel and the public. The few who persist in overtly rude and aggravating conduct are shunned by the mainstream legal community,

and their clients usually come out on the short end of the stick. While civil conduct remains important, we need to address a broader problem that can be described as abuse of the legal system.

What does “abuse of the legal system” mean? Simply put, it means any conduct designed to impede discovery of relevant facts and prompt resolution of disputes on that basis. The innumerable tactics employed in service of such abuse include burying an adversary with paper for no reason other than to do just that, not returning calls from opposing counsel, foot-dragging, obfuscation (most notably in discovery responses), idle threats or boasts, churning, erection of phony scheduling roadblocks, flat-out lies, and the list goes on and on. Too many lawyers are wasting their talents on diversionary tactics. Resolution of too many legal matters is unreasonably expensive and prolonged. Too many legal “victories” are, in the end, not worth the travail of achieving them, because it is so difficult to cut to the chase. The courts, as well as law firm conference rooms, are and always have been clogged with such matters.

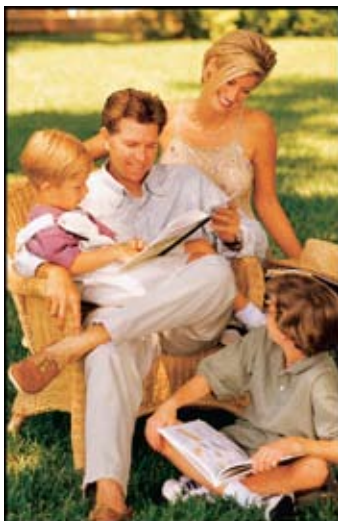
Not infrequently, abuse of the legal system is client-driven, either by means the client’s actually abusive motivation or simply his or her misunderstanding of the purpose and function of the legal system. More ominously,

we must also face the fact that there are lawyers who instill abusive motivations in their clients, or who choose to represent their clients abusively regardless of or even contrary to their clients’ wishes.

Therefore, we need a new campaign for the purposes of (1) encouraging attorneys to promote the integrity of the legal system by counseling against, and declining to participate in, its abuse; and (2) recognizing attorneys who best uphold the integrity of the legal system in the course of representing their clients. Such a campaign might be called “Beyond Civility.”

The importance of this issue can be illustrated by asking ourselves two questions. First, why does such a large proportion of the public at large continue to revile lawyers? We suggest that neither incivility nor incompetence is the problem. Rather, the profession has a bad reputation because lawyers, whether at the behest of their clients or of their own accord, so often impede rather than promote

continued page 22



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Volunteer Spotlight

John Bennett

John Bennett is a sole practitioner in Wauwatosa who focuses on elder law because of the great need he saw while working as a patient advocate for people with chronic illnesses. John is active in the MBA's Lawyer Referral and Information Service, the MBA's mentoring program, and speaking opportunities through the MBA's Speaker's Bureau. John has also served as a *pro bono* attorney for the AIDS Resource Center of Wisconsin (ARCW) for nearly two years,

focusing on Chapter 7 bankruptcy and estate planning. With the services John provides the ARCW, its clients can continue to find meaningful employment and enjoy a happy family life. John is assisting an acquaintance who is starting a non-profit organization for the benefit of people who have lost their jobs in the bad economy. For the past several months John has taken on the role of filing for non-profit status, developing by-laws, and structuring organizations as part of his focus on helping people who have been downsized. Thank you for all you do, John!



Milwaukee County's Children Need Help

Anthony D. Smith, Children's Hospital and Health System

Although more than 700 foster homes in Milwaukee County are available to children in need, there are approximately 2,200 children in foster care, and up to 100 new children enter each month. Many of those children will be placed in the homes of relatives. When a relative can't be found and a home isn't available, however, the child may need to be placed outside of Milwaukee County, away from everything and everyone he or she is familiar with. The need for strong foster homes is critical to the well being of our community.

Foster parents are often called "parents plus" because in addition to providing the food, shelter, care, and love a good parent would provide for their own kids, they also deal with the special circumstances of a foster child. Foster children may have special psychological needs. Many come from abusive environments, and all children removed from their biological families deal with the stress of being away. Nonetheless, foster parents understand their work is critical to a family and willingly take on the challenge.

Serving as a foster parent generally means working closely with Children's Service Society of Wisconsin. It also means having regular contact with a child's biological family. While not everyone will feel the calling to be a foster parent, we hope that you can help us increase the number of homes for children. Our goal is to increase awareness for the need of foster homes in Milwaukee. We also want to dispel the myths that come from the lack of knowledge and understanding. Public child welfare agencies do not intend to break up families. They work to ensure that children who are victims of abuse or neglect are protected from further harm, whether they remain in their homes or are placed in out-of-home care. Keeping children safe is the overriding goal.

We ask that you help us recruit more foster homes. Can you tell your neighbors about the need? Can you display information at your business? Will you allow us to conduct a lunch-and-learn for your employees? Do you know someone who would make a good foster parent? If so, consider referring them.

If he or she becomes licensed, you may be eligible for a referral incentive. This program is available for participating community organizations, faith-based organizations, and our current foster and adoptive parents. To learn more about the referral program, contact Reggie Riley at (414) 231-4859.

We believe there are organizations within our community that have the grace, kindness, and ability to help us carry out our mission. Children's Service Society of Wisconsin would like to partner with your organization. We believe that with your assistance, we can provide a better future for our community's children and families.

Children's Service Society of Wisconsin, a member of Children's Hospital and Health System, is the state's largest private, not-for-profit provider of child welfare services. Children's Service Society of Wisconsin has a 120-year history working with families to find loving, stable homes for children in need of a family through foster care and adoption. For more information about becoming a foster parent, please call (414) 264-KIDS.

Save the Dates!

May 1
Law Day

May 6
Memorial Service

June 14
153rd Annual Meeting

August 3
MBA Foundation Golf Outing

October 12
State of the Court Luncheon

Send in the Clowns: Sales Tax and the Ice Cream Cake

Attorney Douglas H. Frazer, DeWitt Ross & Stevens



Douglas H. Frazer

The birthday party was a bust. True, it had been a dream. But it unfolded, magically, like a Rocky and Bullwinkle show rewritten as a horror movie, understood by the six-year-old partygoers on one level and their parents on another. It was equally frightening to both.

The trouble started when Megan, the birthday girl, was passing out the goody bags. The clowns, having completed their portion of the program, revealed themselves to Megan's parents and the manager of the party space as Wisconsin Department of Revenue special agents. The object of the operation: the ice cream cake. The cake as a whole or each slice separately, stated clown 1, was taxable. The party invoice, stated clown 2, reflected no sales tax charged.

The clowns led the adults away. Lawyers were brought in. The clowns, it turned out, were right. Or were they? It depended, said the lawyers, on how the cake was prepared or whether the venue had offered the children napkins and plastic spoons.

Welcome to the world of streamlined sales tax. In an effort to harmonize rules and ease the burden on business, various states have agreed to common sales tax definitions. The downside of this program is distinctions so refined that birthday parties may become the occasion for drug bust-like enforcement efforts.

Is this far-fetched? On November 8, 2010, the Wisconsin Department of Revenue, in a "let them eat cake" moment, issued a news release on the subject (www.revenue.wi.gov/taxpro/news/). Permit me to share with you a "taste" of this discussion.

Sales of Ice Cream Cakes and Similar Items

Beginning October 1, 2009, whether or not an ice cream cake or similar item is taxable depends on whether it meets the definition of "prepared food."

"Prepared food" includes two or more food ingredients mixed or combined by the retailer for sale as a single item, but not including:

- The retailer's sales of bakery items;
- Two or more food ingredients mixed or combined by the retailer for sale as a single item if the retailer's primary North American Industry Classification System code (NAICS code) is manufacturing under subsector 311 but not including bakeries and tortilla manufacturers under industry group number 3118;
- Two or more food ingredients mixed or combined by the retailer for sale as a single item and sold unheated by weight or volume;
- Items that are only sliced, repackaged, or pasteurized by the retailer; or
- Eggs, meat, fish, poultry, or any food item containing them in raw form that requires cooking by the consumer.

Generally, if a person mixes ice cream and one or more other food items to form an ice cream cake or ice cream bar, the retail sale of the ice cream cake or bar is taxable as a sale of prepared food. If the ice cream cake or bar is prepared by someone other than the retailer, it is not taxable unless it meets one of the other prepared food definition categories (e.g., furnished with utensils).

Caution: There are additional categories of "prepared food" that are also taxable but are not addressed in this article. For more information, go to sec. Tax 11.51, Wis. Adm. Code (May 2010 Register).

The following examples illustrate the tax treatment of sale of ice cream cakes and ice cream bars by restaurants.

Example 1 – Restaurant A purchases various food ingredients (ice cream, fudge, and cookie bits) to make an ice cream cake. The ice cream cake is made by Restaurant A starting with a layer of ice cream, placing a layer of fudge and cookie bits on top of the ice cream, and then covering the layer of fudge and cookie bits with another layer of ice cream. Finally, the top of the ice cream cake may be decorated for a particular special occasion. The price of the cake sold will not vary based on weight or volume of the cake. The ice cream cake is "prepared food" and subject to Wisconsin sales or use tax since it is a combination of two or more ingredients mixed or combined by the retailer for sale as a single item.

Example 2 – Same as Example 1, except that the retailer does not make the ice cream cake. Instead, Restaurant A purchases the ice cream cake already made and decorated from its supplier and the ice cream cake contains four or more servings. Restaurant A sells the ice cream cake to its customer without physically giving or handing a napkin or other utensil to the customer. The ice cream cake is not "prepared food" and Restaurant A's sale of the ice cream cake is not subject to Wisconsin sales or use tax.

Example 3 – Same as Example 1, except that the retailer does not make the ice cream cake. Instead, Restaurant A purchases the ice cream cake already made and decorated from its supplier. Restaurant A sells a single serving of the ice cream cake to its customer. Napkins and other utensils are made available to customer for self-service. Restaurant A's sale of the single serving of ice cream cake is a sale of "prepared food" and is subject to Wisconsin sales or use tax.

Note: This presumes that the restaurant's sales of prepared food are more than 75% of its total sales of food and food ingredients, as computed in sec. Tax 11.51(4)(d)2., Wis. Adm. Code (May 2010 Register).

Behold, the plot thickens. **Example 4** involves Restaurant A decorating the cake with frosting and edible gel (taxable as "prepared food"). **Example 5** involves Restaurant B preparing ice cream bars by covering the ice cream bars in chocolate (taxable as "prepared food"). **Example 6** involves Restaurant B packaging said bars in boxes of six (taxable as "prepared food"). In **Example 7**, Restaurant B purchases pre-dipped bars but supplies customers with napkins and utensils (taxable as "prepared food"). In **Example 8**, Restaurant B packages the pre-dipped bars in boxes of six and sells them without supplying napkins and utensils (not taxable as "prepared food").

I invite the reader, Megan, Jesuits, and scholars of the Talmud, to consider the important policy distinctions expressed in Examples 9 and 10.

Example 9 – Restaurant C purchases various food and food ingredients (eggs, flour, sugar, ice cream, fudge, cookie bits,

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Non-Competition Law in Wisconsin:

Developments Since *Star Direct, Inc. v. Dal Pra*

Eric H. Rumbaugh, Michael, Best & Friedrich

On July 14, 2009, the Wisconsin Supreme Court decided the case of *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, 319 Wis. 2d 274, 767 N.W.2d 898, the most significant case in the area of non-competition agreements in Wisconsin since our non-competition statute (Wis. Stat. § 103.465) came into being. This article examines two of the most significant cases decided in the year and a half following *Star Direct*.

While there are several significant holdings in *Star Direct*, the two most important holdings relate to how courts interpret agreements, in general, and severability, in particular. Some pre-*Star Direct* decisions held that if one covenant restricting post-employment activities fails, there is no need to review the validity of the other covenants within the same agreement because the entire agreement fails. In *Star Direct*, the supreme court rejected this line of cases and held that there can be multiple covenants covered by § 103.465 within a single agreement, and the failure of one covenant does not affect the enforceability of other covenants unless the covenants are “textually intertwined.” The test for severability is “whether, if the unreasonable portion is stricken, the other provision or provisions may be understood and independently enforced.” 2009 WI 76, ¶ 78.

The most instructive post-*Star Direct* case on this topic is *Metso Minerals Industries, Inc. v. FLSmidth-Excel, LLC*, 2010 U.S. Dist. LEXIS 44964 (E.D.Wis. May 7, 2010). In *Metso*, the court was required to determine whether four sentences in a single paragraph were separate “covenants” and, if so, whether the covenants were severable under *Star Direct*. The court held that the four sentences were, in fact, separate covenants. The court found the second of the four sentences unreasonable, but the remaining sentences were still “easily understood and independently enforceable” even if the second sentence was deleted. *Id.* at *23-*24. This is a very expansive reading of “severability” under *Star Direct*, and if followed by other courts, will augment the significance of *Star Direct*.

Star Direct also changed how courts read agreements in the first place. Before *Star Direct*, non-competition litigation had devolved to “gotcha” status. In many

cases, courts looked for some off-the-wall interpretation of an agreement, which would obviously be “unreasonable,” and if that interpretation could be imagined, would declare the agreement to be invalid. In *Star Direct*, the supreme court instructed that while “it is true that we read restrictive covenants in favor of the employee, . . . this does not mean we make an effort to read a clause unreasonably in order to find the clause unreasonable and unenforceable against the employee. Though they are disfavored at law, our task is still to rightly and fairly interpret non-compete agreements as contracts. This means we must interpret them reasonably so as to avoid absurd results, giving their words plain meaning, reading as a whole, and giving effect where possible to every provision.” 2009 WI 76, ¶ 62.

In *Duggan v. Jarosch Insurance Agency, Inc.*, 2010 U.S. Dist. LEXIS 30691 (E.D.Wis. Mar. 30, 2010), the clause in question barred employees from “any conduct which would induce the policyholder” to replace insurance coverage. The employee argued that the word “induce” was unreasonable because it would prohibit the agent from discussing the reasons the agent terminated his relationship with an insurance company; such statements might indirectly “induce a policyholder” to obtain insurance quotes from some other company. The court, citing *Star Direct*, saw

this argument as a sophistic way to imagine some unreasonable outcome. Noting that the dictionary defines “induce” as “to lead or move by influence or persuasion,” the court held that the clause was reasonable and enforceable—thereby avoiding precisely the imagining of absurd results from which the supreme court directed courts to refrain. *See id.* at *25-*26.

In the short time since *Star Direct*, indications are that the judicial climate has indeed changed from overt hostility toward fair interpretation of non-competition agreements. This should result in more predictable outcomes and should make it easier for businesses to plan and protect their client relationships and intellectual property.

Volunteers needed for the MBA's Lawyer Hotline (2nd and 4th Wed. of the month from 5-7 p.m. at the MBA). You provide legal information to the public and we provide dinner!

It's Monday, the First Day of the Rest of Your Life.



Too bad last Friday was the last day to file the Bergstrom motion.

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* American Bar Association Standing Committee on Lawyers' Professional Liability. (2008). *Profile of Legal Malpractice Claims, 2004-2007*. Chicago, IL: Haskins, Paul and Ewins, Kathleen Marie.

MBA Memorial Service

The MBA will host its annual Memorial Service on Friday, May 6, at 10:45 a.m. in Room 500 of the Milwaukee County Courthouse. Chief Judge Jeffrey A. Kremers will preside. Below is a list of attorneys and judges who will be honored at the service. If you know of others who should be included on the list, please contact Katy Borowski at 414-276-5933 or kborowski@milwbar.org.

Donna Marie Arendt	John T. McCann
Paul Binzak	John E. McCormick
Norman L. Boebel	Paul F. Meissner
Catherine Blanchard Cleary	Jane M.R. Mulcahy
William J. Connell	James J. O'Donnell
John Howard Douglas	Alan Olshan
Katherine M. Drewek	James P. O'Neill
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Redesigned Milwaukee Family Court Mediation Program Is Up and Running Smoothly

Judge Michael Dwyer, Commissioner Michael Bruch, and Deputy Commissioner Sandra Grady

Mediation of custody and placement disputes has been mandatory in family court since 1987, but in Milwaukee County mediation has not lived up to its potential. The number of cases referred to mediation has generally been about 700 cases per year, but in less than 40% of those cases was mediation even attempted. Most couples either did not appear for mediation evaluation or declined to participate in mediation. As a result, Judge Michael Dwyer, Presiding Judge of the Family Division, convened a committee to review and improve Milwaukee County mediation procedures in 2009. The review revealed that the program had three major problems: (1) people were not attending the group orientation sessions (or were not attending together), (2) people did not recognize the benefits of mediation, and (3) the program was perceived by many within the legal community as a perfunctory “hoop” to jump through before getting to litigation. With the input of lawyers, mediators, and representatives from Marquette University and the University of Wisconsin–Milwaukee, the entire program has been redesigned.

The redesign has three goals: (1) to improve the mediation referral process, (2) to ensure the quality of the mediations, and (3) to better educate participants about the value of mediation.

The mediation referral process

The most common way to commence mediation is by court order after a hearing. The mediation statute (§ 767.405) mandates an initial mediation evaluation session, and requires that it be attended by both parties and conducted without charge to them. The purpose of this session is to screen the case for dangerousness (usually related to domestic violence) or hardship, either of which would prevent mediation, and to obtain the parties’ consent to mediate. Previously this was done in large group sessions, but under the new program the parties meet first individually and then as a couple with a mediator in Room 707 of the Courthouse to discuss mediation. This change has resulted in a dramatic improvement in attendance. In the first four months after the changes were implemented, 80% of the couples referred for mediation

appeared for the evaluation session.

In addition, mediation can be initiated by self-referral or by agreement. Where the parties have already agreed to participate in mediation and mediation is not deemed dangerous or a hardship by the referring judicial officer, the parties can be referred directly to mediation. Under these circumstances, fees are established and a deadline given for payment of the fee. Upon receipt of payment, mediation is scheduled. In the case of self-referral, a party (or attorney) can send a request for mediation to the Family Court Mediation Services (FCMS). The request must state with specificity the issues sought to be mediated. Upon receipt of the request, and if mediation is not deemed dangerous or a hardship, an order for mediation evaluation will issue. The benefit of either of these methods is the ability to move more quickly into mediation, in some cases even before a new motion is filed in an existing family court action. (A “new motion” is the document used to schedule a hearing in a case. Parties can request mediation in an existing case (for example, one where they are already divorced but are having problems with periods of placement before filing a request for a hearing on changing or enforcing the existing orders.) It is hoped that use of these two methods will increase over time.

Quality of mediations

We believe that we have an outstanding group of mediators, but the program’s success depends on users who have confidence in the mediators. A number of steps have been taken to ensure mediator quality. In addition to the statutorily-mandated 25 hours of family mediation training, all mediators are required to attend a mediation orientation presentation, attend annual mediation training offered by FCMS, actively participate in a peer consultation program consisting of facilitated group discussions on best practices in mediation and sharing experiences and techniques, agree to observations by mediation students and others, participate in user surveys after each mediation, and reapply annually. With

these measures, we are confident that the quality of our mediators will remain high.

Education of participants

Improving the users’ understanding of mediation is perhaps the biggest challenge, especially among the self-represented. We have begun the education process by giving to all parties, at the time they file, a one-page description of mediation and its importance in the system. We have also developed a detailed brochure about the mediation process. This brochure is given to parties when mediation or evaluation is ordered. While we know the process of educating the community about the advantages of mediation will not be an easy or short one, we are confident we have made a good start.

The new system started September 1, 2010. As mentioned, in the first four months we have seen 80% attendance at initial sessions. And of the couples agreeing to mediate, 60% have reached agreements. We have met or even exceeded our initial goals. We look forward to continued improvement in the program, and welcome your input or questions.

**Volunteers
Needed
2011 Law Day**

**Fox 6 phonebank and webchat
Friday, April 29 (evening
shifts), and Saturday, April 30
from 10:30 a.m.-2:30 p.m. at
libraries across Milwaukee**

**Contact Britt Wegner at
bwegner@milwbar.org
to sign up or
for more information.**

The Wing Tipped Contessa

The Anonymous Wing Tipped Contessa

Stuck in Neutral

Motor Bar and Restaurant

401 West Canal Street

Every once in a while the Contessa likes to get her motor running. She likes to head out on the highway. She's looking for adventure. Oh, who am I kidding? I'm usually looking for a handful of Xanax and a sugar daddy. But the other afternoon, I found my mind wandering to thoughts of riding a Fat-boy in Sturgis, and instantly the Contessa's starched-and-buttoned-up demeanor gave way to her full biker chick alter ego. It was just like the early 70's when I used to wake up each afternoon to Steppenwolf pounding in my head—not the music; John Kay inexplicably attempting to crush my skull. Weird, I know. Anyway, it was right then and there I had to motor to Motor.

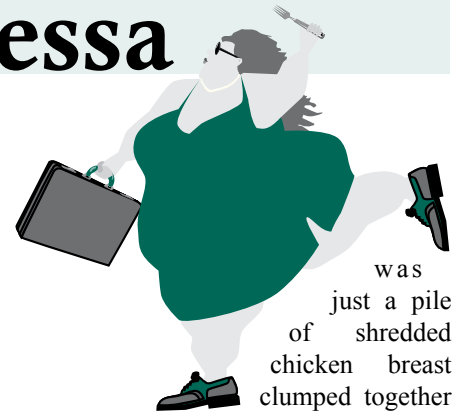
For those who don't know, Motor Bar and Restaurant is part of the Harley-Davidson Museum complex at 6th Street and Canal Street. The Contessa must admit she wasn't sure this was such a great idea. Bikers are not known for their culinary skills. The Contessa was a full-patch member of the Mongols for a couple of years, and the only thing she learned to cook—well, wasn't food but may have required a spoon. But after throwing caution to the wind and bourbon to the tonsils, the Contessa was ready to get her soft tail on her Softail.

The Contessa always wears as much leather as possible since her ill-fated tryst with Bob Barker, and for this excursion she adorned herself from head to toe in leather and picked up her trusty second chair (n/k/a Side Car) for a leisurely lunch full of beer swillin', hell raisin', and tattoo gettin'. Imagine the Contessa's surprise when we walked into Motor Bar and Restaurant (the Contessa loves a company that has its priorities straight) and discovered the minimalistic but nevertheless upscale décor, the largely professional clientele, and the suitably showered wait staff. This was more Hell's Kitchen than Hell's Angels.

The menu tends toward typical bar and casual restaurant fare: burgers, salads, chicken sandwiches, and the now ubiquitous sliders. There are, however, a couple of more interesting options: a selection of flat breads,

ribs and pulled pork, mac and cheese, and pan-roasted tilapia. Nothing unusual in the preparations; they were all, shall we say, traditional. Apparently bikers don't want too much creativity interfering with a time-tested recipe.

I opted for the turkey burger with cranberry-apricot chutney, brie, and a rosemary-spiced aioli. Now I know I just said that most of the preparations were not terribly innovative. Don't let this single item fool you about the rest of the menu—this was by far the most interesting and creative offering we saw. Side Car went with the HD Veggie Salad with chicken (which in any real biker bar would have gotten him a complimentary ticket for one to a boot party). The turkey burger was sinful, the brie was a creamy dream, and the blood-red chutney induced an acid flashback that the Contessa never wanted to snap out of. The salad was comprised of various chopped lettuces, kalamata olives, red onion, roasted red pepper, and garbanzo beans in vinaigrette. It was tasty, but nothing distinguished it from any of the thousands of other salads you've had. Strangely, the add-on chicken



was just a pile of shredded chicken breast clumped together at the front of the plate, as if placed there by some cook's meaty fist. Ironically, far from being a triumph, the salad was more of a Triumph than a Harley—it needed more work.

All in all, we had no strong reaction to Motor one way or t'other. It's nice enough, but the food is probably a little ordinary for a special business lunch. Motor is probably best being just what it wants to be: a place everyone feels comfortable having a drink and burger after visiting the Harley museum. You can't fault Motor for that, but the Contessa will probably not be back. Alas, she is hanging up her leathers, fully aware that this means now the only way she'll be able to stick it to Bob Barker is by not having her rottweiler neutered.

EDWBA Annual Meeting

The Eastern District of Wisconsin Bar Association's Ninth Annual Meeting and Presentation will take place on **Thursday, April 7**, at the Milwaukee Athletic Club. This year's meeting promises to be rewarding for all attendees.

The EDWBA's Annual Meeting is the highlight of organization's year. At the Annual Meeting, the EDWBA strives to offer several exceptional programs for civil, bankruptcy, and criminal practitioners alike. The program will begin with a general session discussion about the mortgage meltdown—how it happened, current efforts to stop the foreclosure crisis, and where we go from here. The panel will feature prominent members of the bench and bar, a renowned economist, and political leaders.

The Annual Meeting program will then offer breakout sessions on timely and relevant civil and criminal topics. Discussion during the civil breakout session will focus on

the Daubert standard, while the criminal breakout will feature a discussion of the federal post-conviction remedies under 28 U.S.C. §§ 2254 and 2255.

The luncheon program will feature a presentation by Judge Diane P. Wood of the Seventh Circuit Court of Appeals. Following her remarks, the program will conclude with awards. The award recipients include: Nathan A. Fishbach, recipient of the Judge Myron L. Gordon Lifetime Achievement Award; Thomas G. Wilmoth, recipient of the Judge Robert W. Warren Public Service Award; Judge Susan V. Kelley, recipient of the Judge Dale E. Ihlenfeldt Bankruptcy Award; and L. William Staudenmaier, recipient of the Judge John W. Reynolds Community Building Award.

For more information and to register for the EDWBA Annual Meeting, please contact Katy Borowski at 414-276-5933.

Pro Bono Corner: Sojourner Family Peace Center

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.

Sojourner Family Peace Center

Contact: Liz Marquardt

Office: Sojourner Family Peace Center
Advocacy and Administration

1400 North 6th Street
Milwaukee, WI 53212

Phone: 414-276-1911

Fax: 414-276-5001

Email: LizM@familypeacecenter.org

Website: www.familypeacecenter.org

The Sojourner Family Peace Center (SFPC) was created in 2009 through the merger of two trusted community resources—Sojourner Truth House and the Task Force on Family Violence of Milwaukee. According to Liz Marquardt, SFPC's Director of Victim Education and Strategic Initiatives, the new organization's mission is to create peaceful communities in which domestic respect and a life free from violence is the right of every woman, man, and child. SFPC's primary goals are to ensure the safety of victims of family violence, and provide a pathway out of violence for families, through opportunities to make positive and lasting changes.

The combination of the two longstanding agencies resulted in the largest domestic violence service agency in Wisconsin. Typically, SFPC houses nearly 600 women and children in its emergency crisis shelter in any given year, with an average stay of about 21 days. The courthouse advocacy program, which assists men, women, and transgendered people with safety planning and restraining orders, serves well over 5,000 people each year. Hundreds of men and women successfully complete Beyond Abuse, SFPC's batterers intervention program, while hundreds more women and children receive the benefits of child care, educational help, life skills programming, and group support sessions. The 24-hour Domestic Violence Hotline responds to over 15,000 calls annually.

Volunteer assistance, including work by *pro bono* attorneys, is an integral part of SFPC's mission. In particular, SFPC has collaborated for many years with Legal Action of Wisconsin, Inc., and attorneys who wish to provide direct *pro bono* representation to SFPC's clients can do so through Legal Action's Volunteer Lawyers Project (VLP). Last year, VLP attorneys contributed over 465 hours to cases involving SFPC clients, handling nearly 30% of Legal Action's SFPC-related cases, according to Pat Risser, VLP's Director.

"The partnership between Sojourner Family Peace Center and Legal Action of Wisconsin means that many survivors of domestic abuse can benefit from representation in injunction hearings and a variety of family law and other matters," noted Risser. The greatest need for *pro bono* attorneys is in divorce and custody cases.

SFPC and VLP are especially interested in working with groups of lawyers from firms, committees, and other organizations to represent clients, and they work together to provide training to both groups and individual volunteers. There currently are injunction representation projects run by Quarles & Brady, Reinhart Boerner Van Deuren, and Whyte Hirschboeck Dudek. Each of these law firms has teams of lawyers who take injunction cases at regularly scheduled intervals. SFPC benefits from other group projects, as well. For example, in addition to its other *pro bono* contributions, Quarles & Brady attorneys and non-attorney staff handle the restraining order clinic as volunteer advocates two times per month, providing relief to SFPC advocates so that they can have team meetings, attend training, and focus on administrative duties.

In addition to *pro bono* legal work, SFPC welcomes attorney and non-attorney volunteers in a myriad of other capacities. These include crisis support work on the Crisis Hotline and at the shelter, efforts in confidential advocacy programs at the District Attorney's Office and Milwaukee Police Department district stations, case management and support group programs for adults and children, and administrative support and child care. SFPC's Children's Program needs volunteers to help children with their schoolwork, and its Life Skills program uses volunteers to teach specific topics to groups and individuals. These

workshops and individual mentoring opportunities include topics such as budgeting, resume writing, business planning, health and wellness, civic participation, and parenting.

Finally, SFPC welcomes volunteers who are interested in serving on committees, working events, and assisting with fundraising activities throughout the year.

"Volunteers play an important role in our ability to help move families out of the violence they are experiencing and onto the path of safe and healthy living," said SFPC's Marquardt. "By volunteering, you are sending a message that this community cares about domestic violence and the survival of those involved."

Clowns continued from p. 16

etc.) to make cakes with an ice cream layer. Restaurant C makes a layer of cake using the eggs, flour, sugar, etc. Once the cake layers are baked and cooled, Restaurant C covers one of the cake layers with a layer of fudge and cookie bits. Restaurant C then places another cake layer over the fudge and cookie bits and covers the second cake layer with a layer of ice cream. Restaurant C decorates the top of the cake according to instructions provided by its customer. This cake is primarily a bakery item, which is excluded from the definition of "prepared food" and not subject to Wisconsin sales or use tax.

Example 10 – Restaurant D purchases various food and food ingredients (eggs, flour, sugar, ice cream, fudge, cookie bits, etc.) to make a layered ice cream cake. Restaurant D makes a layer of cake using the eggs, flour, sugar, etc. Once the cake layer is baked and cooled, Restaurant D places the cake layer between two layers of ice cream. Restaurant D decorates the top of the cake according to instructions provided by its customer. This cake is "prepared food" and subject to Wisconsin sales or use tax since Restaurant D mixed or combined 2 or more ingredients to make the cake. The ice cream cake is not primarily a bakery item.

This is what our tax policymakers have inflicted on us. A manual for the taxation of ice cream cake: acceptable to all and understandable to none. It is truly policy as parable. God (not defined by the Department of Revenue) help us.

Beyond Civility continued from p. 14

the prompt, efficient, and fair resolution of disputes.

The second question, of more recent vintage but equally important, is: what is the best way for practitioners to help the judicial system in this era of severe budget crisis? We suggest that the most important way lawyers can assist the courts is to discourage and to decline to participate in abuse of the legal system.

To be sure, it is sometimes difficult to draw the line between zealous advocacy and the abuse described here, but it is a line that can be drawn, and as lawyers we have a professional obligation to draw it. Moreover, because everyone has the right of access to the legal system regardless of motivation (or the motivation of his or her counsel), this is an issue of professionalism largely beyond the reach of the ethics code.¹

We need to promote the image of lawyers not so much as aggressive combatants or clever tacticians, but more as practical problem solvers whose advice and approach are always in the best interests of their clients *and* the legal system. In short, all lawyers should strive and we should encourage them to be straight shooters.

Here are the suggested criteria a lawyer must satisfy to qualify as a straight shooter:

- Responds promptly to communications from opposing counsel that call for a response
- Never deliberately misrepresents, misleads, fudges, or obscures
- Never says he/she doesn't know when he/she does
- Never says he/she is unavailable when he/she is
- Never hems, never haws
- Never clutters communication with irrelevant detail
- Never overcomplicates or oversimplifies
- Never pontificates
- Never puffs out his/her chest
- Never makes idle threats or boasts

- Never deliberately provokes or aggravates an opposing counsel or party
- To the full extent authorized by his/her client, is always willing to discuss the merits of a case in a frank, down-to-earth manner
- Actively seeks to resolve disputes as soon as reasonably possible
- Never drags his/her feet
- Never does anything with the motivation of increasing his/her time-based fee
- Never indulges a client's motivation to use the legal system as an economic weapon, for unjust or petty purposes, as a means of delay, or for any other abusive purpose
- Uses the legal system to discover the truth, obtain justice, and resolve disputes, never for any abusive purpose

Courts should consider promulgating a code of conduct similar to their civility codes but that goes beyond a mere commitment to act civilly toward others. Such a code should extract a commitment to uphold the integrity of the legal system by being a straight shooter—i.e., by living up to the foregoing standards. This, of course, covers conduct both inside and outside the courtroom. In addition, we should consider instituting a “Straight Shooter of the Year” award.

The abuse that frustrates and unnecessarily complicates the resolution of disputes is the core problem facing our legal system. While confronting it is an ambitious undertaking, it is a task we should embrace.

¹Sometimes the “heart” of a legal dispute is a “non-merits” legal issue such as a statute of limitations, exhaustion of remedies, or personal jurisdiction. Vindicating a client's rights in a case involving such issues in a straightforward manner promotes rather than denigrates the integrity of the legal system. In addition, the abuse problem must be analyzed with special caution in the case of the criminal defense bar, where the transparent motivation is to preserve the client's personal liberty. In that unique context, our society tolerates and expects the erection of any available legal roadblock serving that purpose.

Looking for plaintiff-side employment law attorneys that have 5+ years experience in FMLA/FLSA cases to join the MBA's LRIS new ABA DOL panel and receive referrals directly through the Department of Labor. Please contact Britt Wegner at bwegner@milwbar.org for more information.

CLE Calendar continued from p. 10

Fee Schedule for 1.0 CLE Credit Seminars

	W/Lunch	W/O Lunch
MBA member	\$45	\$35
Non-member	\$60	\$50
Support staff	\$45	\$35

Fee Schedule for 3.0 and 3.5 CLE Credit Seminars

	W/Lunch	W/O Lunch
MBA member	\$115	\$105
Non-member	\$139	\$129
Support staff	\$115	\$105

Fee Schedule for 7.0 CLE Credit Seminars

Including Continental Breakfast and Lunch

MBA member	\$115
Non-member	\$139
Support staff	\$115



Classifieds

Positions Available: Attorney—Milwaukee; established Milwaukee firm located on the East Side representing clients with a great variety of legal problems for generations wants to add an attorney with some existing clientele to expand firm's practice. Arrangement flexible. Contact John Germanotta at john@zgkclaw.com or (414) 272-2295.

Historic Third Ward: 2,900 square foot Attorney Suite. Recent build out: reception area, kitchen copy room, 4 principal offices, 4 paralegal offices, 2 conference rooms, 2 file rooms. 5th floor, northern exposure, hardwood floors, handicap accessible, basement storage available. (414) 271-8855 www.phoenixbuilding.net

The Down Syndrome Association of Wisconsin (DSAW) is looking for leaders in its organization at the Board, committee and general volunteer levels. More about DSAW can be found at www.dsaw.org. Please let DSAW know if you (or just as importantly, someone you know) might be interested in playing a role in the organization. Please direct all inquiries to Tom O'Day at today@gklaw.com.

MBA Judicial Poll — 2011

	Qualified	Not Qualified	No Opinion
Wisconsin Supreme Court			
JoAnne F. Kloppenburg	112	47	230
David T. Prosser, Jr.	296	46	75
Marla Stephens	145	44	212
Joel Winnig	45	72	274
Milwaukee County Circuit Court — Branch 1			
Maxine A. White	317	51	55
Milwaukee County Circuit Court — Branch 9			
Paul Van Grunsven	231	8	161
Milwaukee County Circuit Court — Branch 10			
Timothy G. Dugan	377	13	43
Milwaukee County Circuit Court — Branch 13			
Mary Triggiano	274	5	125
Milwaukee County Circuit Court — Branch 18			
Pedro Colón	168	119	136
Roy Korte	128	32	238
Christopher R. Lipscomb, Sr.	113	36	243
Milwaukee County Circuit Court — Branch 19			
Dennis R. Cimpl	306	16	92
Milwaukee County Circuit Court — Branch 33			
Carl Ashley	301	7	91
Milwaukee County Circuit Court — Branch 35			
Frederick C. Rosa	229	8	172
Milwaukee County Circuit Court — Branch 36			
Jeffrey A. Kremers	361	17	46
Milwaukee County Circuit Court — Branch 47			
John Siefert	120	196	101

MBA Renews Lease and Remodels Space

The Milwaukee Bar Association recently renewed its lease and, in the process, negotiated a substantial landlord subsidy for remodeling its space. The lease renewal followed a thorough investigation of alternatives in the market.

The interior remodeling has already begun. It features new carpeting in the entire office, new carpeting and rails on those cardio-challenging stairs, new tables and chairs in the Marshall Room (where most CLE presentations and large meetings are held), new blinds in that room, and new chairs in the board room. “No more ‘Price is Right’ curtains in the Marshall Room,” quipped

Britt Wegner, the MBA’s Lawyer Referral and Information Service Director. She also noted with approval that the remodeling will rid the MBA’s office of all brass.

Exterior remodeling, including a new awning and doors, will be completed at a later date. Also included in the project are key equipment upgrades to improve office efficiency.

MBA Executive Director Jim Temmer stated that the remodeling—particularly the new tables and chairs in the Marshall Room (pictured here)—will make the space more member-friendly. “Meetings and CLEs will

be more efficient if attendees are not worrying that their chair or table will collapse on them,” he opined. While Jim’s statement is somewhat tongue-in-cheek, in point of fact it was time for an upgrade.



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