Western District News

NEWSLETTER OF THE

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

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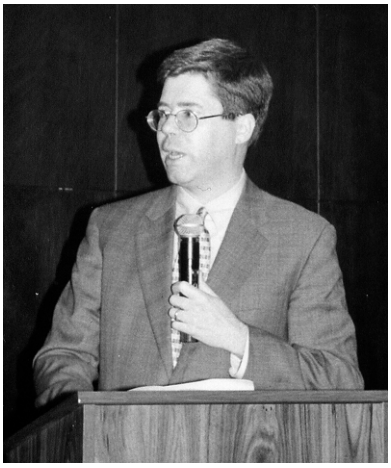
Joseph D. Kearney Provides Thought-Provoking Keynote Address at Annual Meeting

Joseph D. Kearney, Dean of the Marquette University Law School, provided the keynote address at the WDBA's annual luncheon. In addition to serving as Dean, Kearney stated that he serves on the Board of Directors of the Eastern District of Wisconsin Bar Association, which is modeled on the WDBA. Kearney thanked the WDBA membership for the group's leadership.

Kearney noted that his speech, entitled "Some Observations on the Wisconsin Court System," had nothing to do with the *federal* courts, but inquired (with a smile), "Is it not the prerogative of the tenured academic to speak on whatever he or she wishes?" Kearney indicated that while he has not made the study necessary to give some large-scale assessment of the Wisconsin courts, he stated that he does "have fairly extensive experience with the Wisconsin Supreme Court," and that he does "have a reflection that [he wishes] to share."

Before doing so, however, Kearney commented that he has a "somewhat unusual relationship with the Court: in some instances, [he is] its agent, as when by the Court's appointment [he] serve[s] on its Board of Bar Examiners, this year as vice-chair." In other instances, Kearney stated, he is an advocate before the Court, although like his predecessor, Dean Howard Eisenberg, he does "this in [his] capacity as a member of the Wisconsin bar (and through [his] p.o. box) and not through any affiliation with Marquette Law School." And in other instances still, Kearney remarked, in his academic capacity, he is an independent observer and commentator concerning the Court. It is in the third of these roles – as an academic – that he "reflect[s] on matters of public policy."



By way of background, Kearney briefly discussed the restructuring in the late 1970's of the Wisconsin appellate system. "The intent in creating the Court of Appeals and in essentially eliminating mandatory review in the Wisconsin Supreme Court was not merely to lighten the workload of the Supreme Court. It was also (or even primarily) to preserve the ability of the Supreme Court to concentrate its energies on important cases posing substantial legal questions with implications for other cases or situations. In short, and to use phrases heard at the time, while the Wisconsin Court of Appeals was to be an *error-correcting* court, the Wisconsin Supreme Court was to be a *law-developing* court." Kearney then went on to evaluate how the Wisconsin Supreme Court has done.

To make that assessment, Kearney discussed two factors that are relevant in answering this question: (1) "the Court's inputs—the cases that it takes, in particular as measured against the cases it declines to take"; and (2) the "Court's outputs—its decisions." Kearney noted that the former "is exceedingly difficult to measure." Kearney discussed that in 2001, he began

(See Kearney on page 4)

Western District of Wisconsin Bar Association 2004-05

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Western District Bar Association Begins New Year with New Officers and Board

The 2004-05 Officers of the WDBA are, from left to right: Todd Smith, Past-President; Jim Troupis, President; Mike Modl, Vice-President/President Elect; Jennifer Sloan Lattis, Secretary; and Greg Everts (not-pictured), Treasurer.

WDBA President Jim Troupis presents an award to Todd Smith in recognition of his service as Association President for 2003-04

President's Commentary

By
James R. Troupis
President
Western District of Wisconsin Bar Association

Lawyers have made the difference time and time again. This fundamental goal – to make a difference – is accomplished with each client, with each case, and with the causes we choose to champion. Perhaps we would be wise to consider that high calling as the four-year cycle of national campaigns turns yet again.

I recall rather vividly the first time I was actually asked my opinion on a matter of public policy. It was my second year of law school and the then-rookie Congressman Tom Corcoran of Illinois asked if I would participate on an advisory committee with others from around the district. My new found status as an 'almost lawyer' stood as my most important qualification for selection to the committee. As so often happens, that chance request led to innumerable changes in my professional life, including a career-long participation in legislative redistricting – the ultimate combination of law and politics – beginning with a representation of a fellow member of that advisory group. (*See*, Schrage v. State Board of Elections, 88 Ill. 2d 87, 430 N.E.2d 483 (1981) (Gerrymandering by Illinois legislature overturned)).

But, of course, the difference a lawyer makes in the life of a given client does not often rise to national prominence. Rather, our obligation to fully and effectively represent someone is measured in the dedication spent each day for each client. The sum of those acts is a better standard against which to measure our profession and ourselves. The respect each of us is accorded is the result not only of our individual effort, but of the effort all of us make each day. The long hours, aggressive advocacy and seemingly constant anxiety are rewarded by a belief that we do make a difference.

In reflecting on the role of attorneys in our country, John Adams once commented:

> *Now to what higher object . . . can any mortal aspire than to . . . assist the feeble and friendless, to discountenance the haughty and lawless, to procure redress to wrongs . . . to assert and maintain liberty and virtue, to discourage and abolish and tyranny and vice?*

What today seems a controversial battle, may be tomorrow's accepted standard, and at the forefront in making that possible are lawyers willing to champion the cause. It is an unfortunate byproduct of society's predilection for the simple and popular answer that causes a lawyer's role to be both misunderstood and vilified. Yet we persist, knowing that there is more at stake than a single case or simple cause.

In this coming election campaign, lawyers will be asked time and time again their opinions, and there will, of course, be no lack of lawyer bashing. Yet, no amount of 'lawyer jokes' belies the reality that your neighbors, friends and others will ask your opinion because they rightly expect each of us will be concerned and knowledgeable. The precious respect given our profession is, in no small measure, a tribute to the day-to-day difference each attorney has made for those who have placed their trust in that counsel.

In this election year it is important to reflect on the stature we have been given. Whether in a courtroom or in a campaign, the role each of us chooses can make a difference to "maintain liberty." There is no excuse for sitting on the sidelines. Attorneys make a difference.

Kearney Keynote

Continued from page 1

"to undertake a study reviewing each of the one thousand or so petitions for review that were filed in the Wisconsin Supreme Court in a particular year." Kearney explained that "[t]he idea was to compare the cases that the Court accepted with those that it declined to hear. Just to review the petitions was quite an effort, and the vast bulk of the undertaking was conducted by one of [his] students, Maureen Lokrantz . . . ." Kearney indicated that they received "tremendous cooperation from the Wisconsin Supreme Court Clerk's office." Although Kearney did not formalize or publish the results of the study, he stated that his lasting impression was that the Wisconsin Supreme Court "generally does a creditable job in selecting cases."

Kearney then remarked that the Wisconsin Supreme Court's outputs are more accessible. Getting to the point, Kearney offered some constructive criticism on the Court's opinions. Kearney commented, "[h]aving read scores—indeed, hundreds—of Wisconsin Supreme Court opinions, particularly from the quarter-century since court reorganization, I have been struck and at times dismayed by what seems to me to be the Court's increasing tendency to suggest that it is limiting its decision to the allegedly 'unique facts' in the case being decided. On the one hand, I am not quite certain what to make of these pronouncements. It seems to me that appellate courts almost necessarily announce (at least implicitly) principles of law when they decide cases. Thus, it remains available to litigants in future cases to argue that a Supreme Court decision that purported to speak only to the 'unique facts' before the court in that case nonetheless, by logic or other principles of reasoning, is relevant to the new case. On the other hand, it should not come to this, and not only because of the costs that it imposes on future litigants. [¶] Simply put, it is inconsistent with its role as a law-developing court for the Wisconsin Supreme Court frequently to announce that its decisions are limited to the unique facts of the cases in which they are made."

Kearney doubted that limiting decisions to their "unique facts" can be "announced consistently with basic principles of law, and the suggestion that a decision is limited to the unique facts of the case suggests that in that particular case the Court is interested in reaching a particular result but does not wish to embrace the implications of its decision for other, analogous cases." He noted that "repeated statements to the effect that some or another judicial decision is (to borrow a phrase from Justice Roberts in a slightly different context) a 'ticket good for this day and train only' suggest an unwise use of the scarce resources of a law-developing court." As an aside, Kearney noted that the "phrase 'unique facts' appears in the Supreme Court's decisions substantially more frequently since 1977 than in all the 130-some years previous thereto."

Not resting on that observation alone, Kearney stated that he conducted some reasonably substantial and broader research in the case law, and it supports his "suggestion that the Wisconsin Supreme Court too often—and increasingly often in recent years—seeks to limit the effect of the opinion that it is announcing (or of some precedent) by suggesting that the decision is (or was) based on something unusual about the case. Of course, the criticism is especially strong with respect to cases where the Court states that there is something unique about the case before it but does not amplify adequately upon just what distinguishes the case from other fact situations that to many of us would appear to be analogous."

Noting that the "facts of *every* case are unique," Kearney stated that the way a law-developing court undertakes its duty is by selecting a "case that seems to present issues that should be resolved and then deciding that case." Kearney went on to explain that "[w]hen the next case comes along that differs in some respect, it is the advocate's role to persuade the court that the difference is (or should be seen as) material. It is possible that the real problem underlying the phenomenon of announcing that some cases are limited to their unusual circumstances is a mistaken view that the Court should generally legislate (i.e., by deciding generally and 'laying down' the law). This is not within the comparative advantage of courts. It is particularly difficult for a court which presides over a common-law body of law."

In admitting that it is difficult to determine the root cause of departing from the Court's general approach, Kearney raised the possibility that it may be that "such limitations are prices that other Justices increasingly exact in exchange for joining an author's opinion." In all events, as a consumer of the Court's opinions in both of his teaching and practicing capacities, Kearney asked that his observations "be considered for whatever persuasive force" they may have. Given these two positions, Kearney emphasized that he did not want to "create some misimpression that [he was] simply interested in making observations about others. Although that is surely a core function of the legal

academy, Marquette Law School is itself interested in criticism." Indeed, Kearney stated, "We ask rather constantly questions such as, 'What do we do not so well, and how could we do it better?' We ask it not only of ourselves but of the bench and the practicing bar."

In closing, Kearney stated, "Just as I feel free to make my observations, *you* should feel entitled, perhaps even obligated, whether you are a Marquette Law School alumnus or not, to pass along constructive suggestions or criticisms to me. I will welcome them—I answer my own phone and e-mail."

Notes from the WDBA Annual Judges' Panel Discussion

Magistrate Judge Crocker, Chief District Judge Crabb and Bankruptcy Court Judge Martin participate in the annual WDBA Judges' Panel.

The WDBA was fortunate, once again, to have all of its judges participate in a question and answer session with the WDBA membership. While not exhaustive, below are some highlights garnered from the interactive discussion.

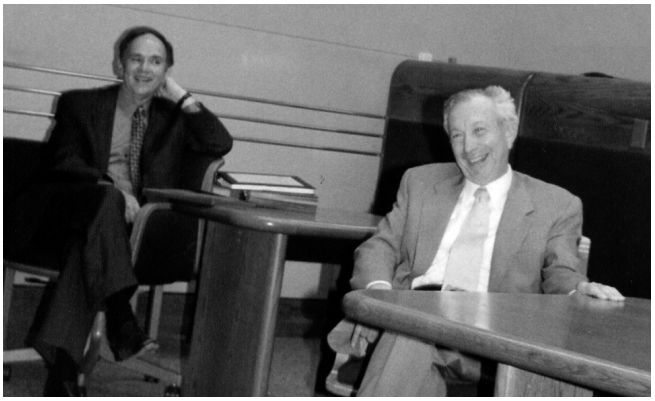
Both district court judges were asked whether they had any "pet peeves" arising from litigants' mistakes that they had noticed during the past year. Judge Crabb listed several issues:

(1) Parties regularly fail to plead facts showing jurisdiction, such as the citizenship of all parties. One common mistake is to fail to state the citizenship of each member of a limited liability company.

(2) In briefs and proposed findings of fact, Judge Crabb noticed a lack of sufficient background material or content necessary to "set the scene" so that the Judge understands the factual context. She noted as an example that litigants often fail to state the specific parties to a contract.

(3) A minor error she notices is when parties include venue as a factual finding; it is a legal conclusion.

(4) A significant issue in briefing arises when responses to proposed factual findings fail to oppose the finding, or "miss the point" raised in the finding. Judge Crabb stressed that parties should make sure to address each fact raised, or it will be deemed admitted.



Judge Shabaz responds to a question from a WDBA member as WDBA President Jim Troupis moderates the Judges' Panel session.

Judge Shabaz noted that his primary "pet peeve" was parties who include too much background information and fail to address the issues promptly. Judge Shabaz noted that he, unlike Judge Crabb, prefers less in the way of facts. He believes it is necessary to include facts only to provide context.

Both district court judges were asked to comment on their perception of trials during the past year, and if they have observed good or bad practices by attorneys at trial. Judge Crabb observed that there appeared to be a pattern in employment law cases; namely, that the defendant's attorney's demeanor is often perceived by the jury as representative of the way the defendant employer treats its employees. If the attorney is rude or overbearing, the jury will believe the employer treats its employees the same way; conversely, if the attorney is polite and patient, the jury will be more likely to believe that the employer treated the employee fairly.

Judge Shabaz stated that he believed the actions of the attorneys at trial ultimately had little effect, because witness credibility is ultimately the dispositive factor in most or all trials.

Aetna Health Inc. v. Davila
The U.S. Supreme Court Holds that ERISA Pre-Empts State Law Claims Alleging HMO Malpractice

Todd G. Smith, LaFollette, Godfrey & Kahn

In a unanimous decision, the United States Supreme Court has held that patients receiving care from managed care companies cannot sue those companies for refusing to provide treatment recommended by a physician but not covered under the terms of the patient's employee health care plan. In *Aetna Health Inc. v. Davila*, No. 02-1845, the Court held that the laws of Texas and nine other states purporting to provide such a remedy were pre-empted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. Instead, while ERISA permits suits to recover wrongfully-denied benefits, its comprehensive remedial scheme pre-empts suits for any other damages attributable to the HMO's conduct, such as tort damages typically sought in medical malpractice claims.

The *Aetna* decision, authored by Associate Justice Clarence Thomas, considered the consolidated cases of two plaintiffs from Texas. Each case presented a conflict between the treatment recommendation of a medical professional and the determination by the HMO that the recommended treatment was not covered under the terms of the plaintiff's health care plan. Ruby Calad had a hysterectomy and other abdominal surgery and her surgeon recommended that she stay several days in the hospital to recover. However, Calad's health care plan only covered a one-day stay, and the HMO's discharge nurse refused to authorize the longer stay. Calad later developed complications at home and had to return for further treatment. The other plaintiff, Juan Davaila, was prescribed Vioxx, an expensive prescription medication, for his severe arthritis. However, his health care plan only authorized Vioxx for patients who had first tried other, less-expensive medications without success. After attempting treatment with the less-expensive medication, Davaila developed severe internal gastrointestinal bleeding, a well-known side effect of that medication. The plaintiffs sued their HMOs in state court under the Texas Health Care Liability Act, asserting that the HMOs' actions violated the "duty to exercise ordinary care when making health care treatment decisions."

In reaching its decision, the Court stated that Congress intended ERISA to provide uniform federal regulation of employee health benefit plans. Toward that end, Congress included broad preemptive language within ERISA's civil enforcement scheme, evidencing an intent to ensure that disputes over the terms of employee benefit plans remained exclusively a federal concern. Citing its past decisions, the court noted that these purposes "would be completely undermined" if participants and beneficiaries such as the plaintiffs "were free to obtain remedies under state law that Congress rejected in ERISA."

After examining the facts of each case, the court concluded that the plaintiffs' claims arose from disputes over "denials of coverage promised under the terms of ERISA-regulated employee benefit plans." Accordingly, the court held that these disputes were subject to ERISA's broad preemptive provisions limiting the remedies available. The Court rejected the plaintiffs' contentions that the duty of "ordinary care" imposed under state law provides an "independent" duty separate and apart from the duties imposed under ERISA. Instead, the court concluded that the decision whether a particular treatment is covered, and therefore should be provided to a patient, "derives entirely from the particular rights and obligations established by the benefit plans."

The court's decision draws a distinction between the cause of the plaintiffs' injuries, rejecting the plaintiffs' claims that their injuries were caused by negligent treatment decisions by providers, the traditional basis of medical malpractice claims. Instead, Justice Thomas stated that the plaintiffs' injuries were caused by the terms of their employers' health plans, which limited the scope of treatment they would provide. So long as the managed care company "correctly concluded that, under the terms of the relevant plan, a particular treatment was not covered," the HMO could have no liability.

Profiles in Pro Bono

Pro Bono Chair, David Harth, Leads by Example

By Kevin J. Palmersheim

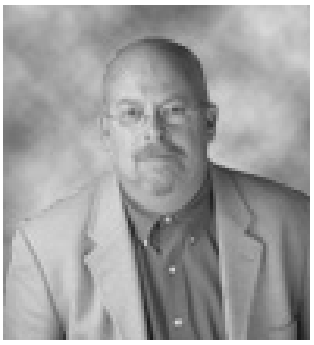
David J. Harth is not only the keeper of the list for the WDBA Volunteer Counsel Program, he is also willing to put his name at the top. Harth, Chair of the association's Pro Bono and Pro Se Committee, was recognized at the annual meeting of the WDBA for volunteering his time to take a prison inmate case concerning conditions at the Supermax prison in Boscobel.

In fact, Harth has been involved in one § 1983 case or another almost nonstop for the last 15 years. At first blush, it may seem odd for a commercial litigator who concentrates his practice in patent litigation to be involved in prisoner cases. However, David has not allowed expectations to dictate his personal or professional interests, as is evident from the fact that he turned a film history major at the University of Wisconsin into a successful legal career. Harth is currently a partner in the Madison office of Heller, Ehrman, White & McAuliffe.

Harth acknowledges that his clients are not always the most likeable characters, but it only took one look at the confinement conditions in Wisconsin maximum security prisons to spark his interest in taking on this type of pro bono work.

After graduation from UW law school, Harth clerked for Judge John Reynolds in the Eastern District of Wisconsin. After working with the Judge on several prison inmate cases, he finally had the opportunity to view the isolation wing at the old Waupun Green House prison. "It was a medieval dungeon," comments Harth. Harth does not see how someone can visit these maximum security prisons and not be affected by the conditions faced there. Even with modern technology, the conditions still amount to little more than "space-age confinement pods." "The inmates are confined for years on end with virtually no human contact and without recourse of the legal system."

Harth has taken a variety of other pro bono cases over the years in addition to his paying legal work. He currently has a death penalty case pending in the state of Georgia. David is also a volunteer lawyer with the American Civil Liberties Union of Wisconsin, and was appointed in 1999 to represent parents and students challenging the censorship and removal of books on gay themes from the Barron High School library. Harth was successful in obtaining an injunction in that case.



David Harth, Chair of the WDBA Pro Bono-Pro Se Committee

David obviously feels strongly enough about pro bono services to volunteer his own time and to coordinate the pro bono efforts of the Western District Bar Association. "Pro bono is the price we should pay for a monopoly on the courts," says Harth. As far as his choice to represent prison inmates, David comments, "it is hard to think of a class of individuals with a more dire need of services, and who are without the ability to pay for them."

Although his pro bono work is not directly connected with his regular practice, the cases he volunteers for often end up going to trial. Harth notes that the litigation skills one needs to try cases does not change much based on the type of case. The pro bono work keeps his skills sharp, even if that is not the most important reason for taking on the work.

David has recognized one other major benefit from getting involved so extensively in his pro bono efforts. As a young partner at Foley & Lardner about 15 years ago, he took on an excessive force case in which his client was maced and beaten in his jail cell. Because the case would ultimately be tried to a jury, Harth drafted Julie Genovese, one of the newest Foley associates at the time, to assist him.

Harth and Genovese were successful in the jury trial, but unfortunately for the litigators the verdict was thrown out by Judge Shabaz and the Judge's decision was affirmed on appeal.

This was the first and only case that Harth and Genovese litigated together, but that did not end their collaboration. They recently celebrated their 13th wedding anniversary in Madison, along with their four children.

David cannot guarantee similar results for all volunteers, but he encourages pro bono work nonetheless. If you are interested in adding your name to the list of WDBA volunteer lawyers, call David Harth at (608) 663-7470 or send an e-mail to dharth@hewm.com.

Annual Meeting Offers Wide Range of CLE Presentations

This year, the CLE Program covered a variety of developments in Federal Practice. In addition to thanking Dean Joseph D. Kearney for providing the keynote address, the WDBA wishes to thank the following speakers for providing interesting and informative presentations to its membership: J. Donald Best, Michael, Best & Friedrich; Eugenia Carter, LaFollette, Godfrey & Kahn; Stephen E. Ehlke, U.S. Attorney's Office; Theodore J. Long, Lathrop & Clark; Roy L. Prange, Jr., Quarles & Brady; Lester A. Pines, Cullen Weston, Pines & Bach; Rita Rumbelow, U.S. Attorney's Office; and John S. Skilton, Heller, Ehrman, White & McAuliffe.

A copy of the CLE materials may be found on the WDBA's website at www.wisbar.org/bars/west/sem/. The CLE Program has been approved for 3.0 credits in Wisconsin, and 2.5 credits in Minnesota.

Western District of Wisconsin State of the Court Report

During the WDBA annual meeting on May 27, 2004, Clerk of Court Theresa Owens presented the "State of the Court Report" to the WDBA Board of Governors, Committee Chairs, and membership. The following topics were highlighted:

Federal Defender Office

The United States District Court for the Western District of Wisconsin announced that a federal public defender's office will open in Madison this fall. The office will be a branch of Federal Defender Services of Wisconsin, Inc., a charitable, non-profit Wisconsin corporation established in 1999. Federal Defender Services of Wisconsin, Inc., has been operating since 2000 in the Eastern District of Wisconsin. Dean Strang, Executive Director, is managing the establishment of the Madison office.

Probation Office Relocation

The probation and pretrial office will be relocating to leased office space in close proximity to the courthouse. Kent Hanson, Chief Probation Officer, is working with General Services Administration staff to locate space and coordinate the move. A date has not yet been scheduled for the move.

Automated Financial System

In February, staff from the district court, bankruptcy court, and probation and pretrial office began implementing a new disbursing module for their financial accounting systems. The module, called FAS4T - Financial Accounting System for Tomorrow, will interface with the existing accounting system. Implementation is scheduled for August.

Electronic Filing

The court continues to encourage attorneys to electronically file their documents. District court automation staff has worked with bankruptcy automation staff to streamline the filing of documents electronically between the two offices.

Statistics

Filings, both civil and criminal, are increasing. For the twelve-month period from May 2003 through April 2004, 791 civil cases have been filed and 184 criminal cases (213 defendants) have been filed. These figures compare to 722 civil cases and 152 criminal cases (193 defendants) from May 2002 to April 2003, and 729 civil cases and 108 criminal cases (138 defendants) from May 2001 to April 2002. Average civil case filings for the past 12 months is 66. That number of filings would place the court's civil filings for the fiscal year at 794 by the end of September.

The number of jury trials is also rising. Since October 2003 the District Court for the Western District of Wisconsin has held 20 jury trials. This figure already equals the total number of jury trials held from October 2002 to September 2003.

See table on next page for detail.

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It is the mission of the Western District of Wisconsin Bar Association to promote the just, speedy, respectful and efficient determination of every action filed in the District Court: by acting as an effective liaison among the District Court, federal practitioners, litigants and the public; by encouraging, fostering and supporting educational opportunities that improve the practice of law in this District; and by serving the needs of the District Court, federal practitioners, litigants and the public.