Rule 1

" . . . just, speedy, and expeditious . . . "

Western District Of Wisconsin Bar Association

Volume 23, Number 2 May 2014

Confirmed!

By Jeffrey A. Simmons, President

A collective sigh of relief was heard across the Western District of Wisconsin this week. After more than five years, our district court's judicial vacancy was filled when the U.S. Senate approved President Obama's appointment of James Peterson to be a district court judge. I think we'll find it was worth the wait.

Judge James Peterson

Judge Peterson is the immediate past president of the WDBA. It is fair to say that everyone on the WDBA board thinks the world of him. He will be missed. Although as a direct result of his good fortune, I am now stuck writing this column.

I have had the privilege of knowing Judge Peterson since we were both first-year law students at the UW-Madison Law School in 1995. Like most people in our class, I first knew him as "that annoying guy in the front row who is always asking questions." Over time, I came to appreciate that Judge Peterson can't help himself, he is a person with a genuine and intense intellectual curiosity about the law.

After law school we found ourselves at different law firms and on opposite sides of copyright and patent infringement cases. He was a zealous adversary, but always a model of civility. And when the case was over, I could count on him to continue debating the interesting legal issues in the case and laugh about the humorous events that inevitably cropped up during the proceedings. I don't know if we'll ever see it on the bench, but Judge Peterson has a wicked sense of humor. My advice to those who will be appearing before Judge Peterson is be prepared, because Judge Peterson will be (use of esoteric movie references may also score points, he is a former film professor). He will know your case as well or better than you do and he will be interested in all of the legal issues it raises. He will always be asking questions, because he just can't help himself.

The WDBA invites all of its members to attend Judge Peterson's formal investiture as a United States District Judge on Friday, May 30, at 4 pm at the Overture Center.

The investiture is the same day as the WDBA's annual luncheon and CLE program. Our luncheon is being held at the Madison Central Library, located at 201 W. Mifflin Street, just a block away from the courthouse. Our luncheon speaker is renowned legal author Bryan Garner, the co-author with Justice Antonin Scalia of *Making Your Case: The Art of Persuading Judges and Reading the Law: The Interpretation of Legal Texts*, the editor-in-chief of *Black's Law Dictionary* and a frequent contributor to the *ABA Journal*. It will be a great day in the Western District. We hope to see you all there.

Western District of Wisconsin Bar Association 2013-2014

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Clerk's Corner

By Peter Oppeneer, Clerk of Court

PACER and "Why do I have to pay?"

I am often asked questions about the federal system for accessing court records commonly called PACER, an acronym for Public Access to Court Electronic Records. This Clerk's Corner provides some history of the service, a discussion of how the PACER fees came to be and thoughts about the future of PACER and its cousin CM/ECF (Case Management / Electronic Case Filing).

In 1988, when personal computer ownership was increasing exponentially and cutting edge users were sending e-mail, the Judicial Conference of the United States authorized PACER as a new portal to court records. Of course, at that time, court records were entirely paper, so access was limited to docket sheet information accessed via dial-up modem. In 1990, Congress required the Judicial Conference to prescribe user fees for electronic access to fund the cost of providing public access. The initial user fee was set at one dollar per minute of dial up access, later reduced to seventy-five cents and then sixty cents.

PACER use multiplied when courts began implementing electronic filing in the late 1990s and entire court files became available to anyone with a PACER account. Still under the mandate to fund electronic access with user fees rather than general tax appropriations, the Judicial Conference shifted to a per-page fee of seven cents, an analogy to the copy charge (then 50 cents per page) that courts and users were accustomed to in the paper system. Like the old paper system, anyone can access all documents in a particular court for free by using terminals physically located at the court.

Subsequently, the Judicial Conference made adjustments with the fee structure, providing a free look to all attorneys on a case, capping the per document total cost, providing for exempt access to certain categories of users and raising the fee to eight, and then ten cents per page. Fee income from PACER is being used to develop, maintain and update PACER and CM/ECF to provide web-based juror services, develop and maintain the Voice Case Information System, and other programs designed to enhance public access to court electronic records. Among ongoing improvements scheduled for delivery in the near future, are a major CM/ECF revision and a single Pacer and CM/ECF sign on for all federal courts.

It is possible that the Judicial Conference will alter the rate or type of fee for accessing records in the CM/ECF data base. However, unless there is a legislative policy shift from a user fee to a tax supported model for funding access to electronic court records, it seems likely that some access fee will remain.

Western District of Wisconsin Bar Association
Annual Luncheon & CLE Program
May 30, 2014

Featuring
Professor Bryan Garner

Our annual luncheon and CLE program is May 30, 2014. Our speaker this year is renowned author and legal writing professor Bryan Garner. Professor Garner is the co-author with Justice Antonin Scalia of the books *Making Your Case: The Art of Persuading Judges* and *Reading Law: The Interpretation of Legal Texts.* He is also the editor-in-chief of Black's Law Dictionary and a frequent contributor to the ABA Journal. After speaking at our luncheon, Professor Garner will also provide a one-hour CLE program on legal writing.

Our luncheon will be held at Madison's new Central Library, 3rd Floor Community Room, located at 201 W. Mifflin Street, just one block from the Federal Courthouse. Registration begins at 11:30 a.m. and lunch begins at noon. After lunch, our CLE program will be held at the Federal Courthouse, beginning at 1:45 p.m.

If you are interested in attending, please return the registration form on the other side of this page by Friday, May 23, 2014.

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

ANNUAL MEETING REGISTRATION FORM
Friday, May 30, 2014

Lunch: Madison Central Library, 201 West Mifflin St., 3rd Floor Community Room

Business Meeting/CLE Program: Federal Courthouse, 120 N. Henry St.

Name: _____

Firm/Agency: _____

Address: _____

_____

Phone: _____ E-mail: _____

I will be attending: ☐ 11:00 a.m. Business Meeting ☐ 1:45 p.m. CLE Program
☐ 12:00 p.m. Luncheon

Luncheon Menu Selection ($25, includes tax & gratuity)

☐ Chicken Breast
Served with brown butter and shallots
Salad of bibb lettuce, shaved radish, lemon vinaigrette

☐ Vegetarian Lasagne
With spinach and house-made ricotta
Salad of bibb lettuce, shaved radish, lemon vinaigrette

Please enclose a check payable to the Western District Bar Association to cover the following expenses:

Lunch ($25) _____

Membership dues for 2014-2015 ($35; free for new lawyers) _____

Cost of CLE Program ($25 for non-members; free for members) _____

Please return this form with your payment by May 23, 2014 to:

Western District Bar Association
P.O. Box 44578
Madison, WI 53744-4578

Summary Judgment Pointers for Federal Litigators

by
Assistant Attorney General Monica Burkert-Brist
and
Assistant Attorney General Anne Bensky

Effective use of summary judgment motions can be a powerful tool in any litigator's practice. However, to be both effective and successful, the tool needs to be put to good use. Knowing when to file, what types of claims or matters to include in your motion, and how to support your motion properly are essential to your success. Luckily, for the federal practitioner in the Western Federal District, both the Federal Rules of Civil Procedure and the court's own scheduling orders and standing orders give a practitioner plenty of guidance to help ensure an orderly and well-supported motion.

The purpose of summary judgment is to dispose of claims "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those parts of the record and affidavits, if any, which it believes demonstrate the absence of a genuine issue of fact. An adverse party may not rest upon mere allegations or denials of his pleadings, but his response must set forth a specific showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

A good practitioner will ask early: what are my material facts and are they disputed based on this evidentiary record? The mere existence of some alleged factual dispute does not defeat a properly supported motion for summary judgment, as "the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). A dispute concerning facts not material to a determinative issue does not preclude summary judgment. Donald v. Polk County, 836 F.2d 376, 379 (7th Cir. 1988). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of a suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248.

It is also important to remember what summary judgment is not: Summary judgment is not a trial on paper. The judge's function at the summary judgment stage "is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Id. "If the evidence is merely colorable … or is not significantly probative, … summary judgment may be granted." Id. at 249-50 (internal citations omitted). Indeed, one of the purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Celotex, 477 U.S. at 323-24.

That said, from an evidentiary perspective, summary judgment presents a "put up or shut up" moment for the movant and his counsel. Evidence submitted for the court's review must be from a witness who can provide an affidavit or other testimony based on personal knowledge and contain "such evidentiary facts as would be admissible in evidence." Fed. R. Civ. P. 56(e). Furthermore, the Rules of Evidence apply: there must be appropriate foundation and authentication of documents and information upon which the court is expected to rely in making a ruling.

In making a decision about whether or not to file a summary judgment motion, start with the pleadings of the case. Evaluate the elements of each claim and the governing law. Ask yourself if there is sufficient evidence on pleadings alone to make a motion for judgment on the pleadings as opposed to a motion for summary judgment. Fed. R. Civ. P. 12(c).

If not, then move to the next step and ask yourself: what facts do I need to prove in order to be entitled to judgment as a matter of law? These are your outcome determinative, material facts. Finally, as to each material fact, ask: is there a genuine dispute which would defeat a summary judgment motion on that claim?

(Continued on next page)

Summary Judgment

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While the court will view the facts in the light most favorable to the non-moving party; this favor does "not extend to drawing inferences that are supported by only speculation or conjecture." Harper v. C.R. England, Inc., 687 F.3d 297, 306 (7th Cir. 2012). Ask yourself: what has my discovery to date, my uncontroverted documents, or other admissible evidence established on this particular claim?

Do not shy away from partial summary judgment motions. Even if you cannot dispose of a case entirely, such motions can often be effective ways to eliminate one or more parties or claims. Streamlining your case for trial makes it easier for your clients, the court, and ultimately, the jury to understand and to adjudicate.

Once you decide to file a motion, invest the time and effort required to make it effective. Do not waste the court's, or your own client's time with a poorly thought out, poorly organized presentation of facts and law. Confirm which judge is assigned to your case and review carefully any particular rules applicable in that court. The pretrial conference order usually will contain such particulars. Pay attention to it and follow it carefully. The orders change from time to time so don't rely on an older one from an earlier case. Similarly, FRCP 56 is your friend: get to know it and spend time together often!

As you move forward with your preparations for your motion and supporting materials, your goal should always be to make it as clear and as user-friendly for the court as possible. Witness affidavits should tell the story but stick to the facts. Affidavits should lay the foundation for and properly authenticate documents. Exhibits to affidavits should be clearly marked, paginated and readily referenced in proposed findings of fact according to the requirements of the pretrial order. Deposition transcripts should be e-filed in advance so that they can be referred to by their own docket number and pagination.

Attorney affidavits are appropriate only for certain limited purposes. They can be used to authenticate and file such items such as discovery responses or public documents that are self authenticating. An attorney affidavit should not consist of testimony, even if made from personal knowledge, explain what other witnesses would testify to, or make legal argument.

Proposed Findings of Fact should be well organized, concise and clear. Do not abuse the "one fact per proposed finding of fact rule" and avoid run on paragraphs masquerading as proposed factual findings. Ultimately the court is going to rely on the proposed findings as the operative factual record. You should assume that if it is not in the proposed findings, a fact does not exist even if it is filed somewhere else in your submissions. If you are the movant, you need to anticipate the facts you need not only for your first submission but for the likely reply you will be filing. Do not assume you can supplement your record on reply: the opportunity to do so is very limited. For complicated cases, consider sub-headings and group your findings in a way that makes it easy for a reader to follow. Be sure to follow the specific directions from each court as to citations in the findings to the evidentiary record.

The same basic organizational concepts apply to the development of the legal argument in your brief. For longer briefs, use a table of contents. Organize your facts in a way which summarize the proposed findings and point to overarching themes to tell your client's story. Facts are persuasive. Include a short summary of your argument which gives the court a glimpse into the basis for your motion. Use a reliable standard of review section but update it each time to anticipate the non-moving party's facts or unique elements of the case at hand. Insert "turn signals" in your brief so the court can anticipate where you are going next in your legal argument.

Finally, if you are the movant rather than the responding party, save a little for reply. Anticipate in your primary brief what you expect from the other side in response and strategically head those arguments off at the pass. However, there is no need to raise and rebut every possible opposing argument you can imagine. Wait and focus your energy in reply after reviewing your opponent's response.

Not every case is a good candidate for a summary judgment motion. However, when properly prepared, summary judgment motions are a great way to limit a party's risk and dispose of cases which need never reach a trial.

Rocket 'Round the Docket:
Not just Trials, Try the Trails

by Richard Briles Moriarty

Within the bounds of the Western District of Wisconsin are a rich variety of off-road bike touring trails – former railroad corridors re-purposed as paved or limestone-surfaced "Rail-Trails." Bikers (and walkers/runners) familiar with "Rail-Trails" will appreciate that these remnants of resource extraction from Wisconsin's earlier days help make western Wisconsin one of the best biking places in the country.

Consistent with the "firsts" for which the Western District is well known, the District is home to the first Rail-Trail project in the country, Elroy-Sparta. That project started up in 1965, nearly fifty years ago.

See http://www.elroy-sparta-trail.com.

Listed on the next page are the Rail-Trails located wholly (or, in two cases, mostly) within the territory of the Western District. The list, excluding trails entirely in the Eastern District, is adapted from http://dnr.wi.gov/topic/parks/activities/bike.html#touring.

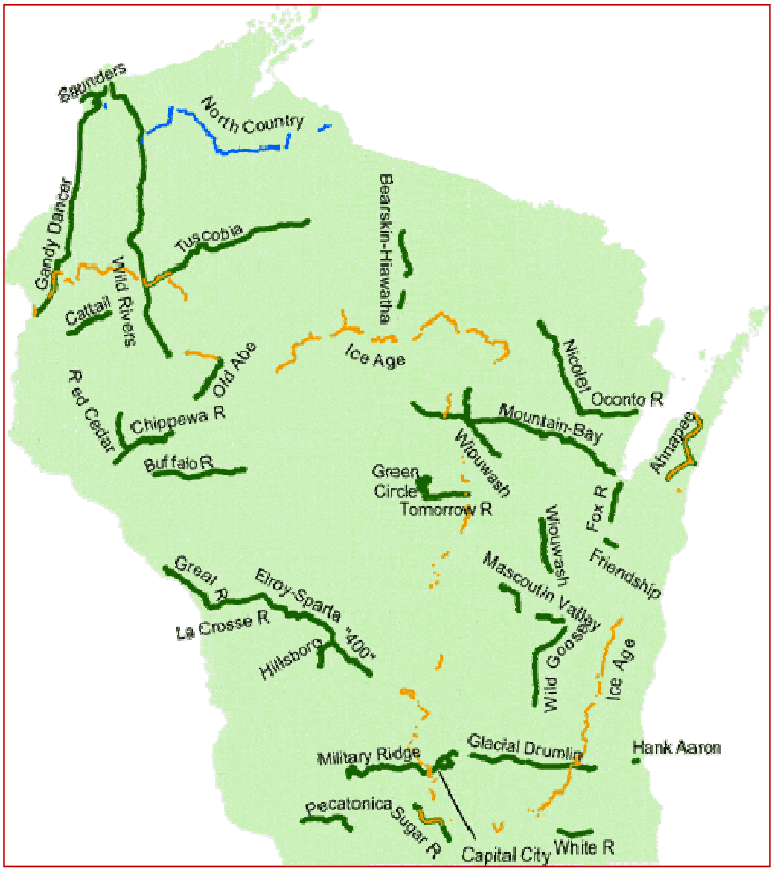
Many detailed maps of Wisconsin biking opportunities are available (http://www.dot.wisconsin.gov/travel/bike-foot/bike-maps.htm) and a 2009 book is helpful (http://www.amazon.com/Best-Rail-Trails-Wisconsin-Throughout/dp/0762746769).

But one joy of riding the Rail-Trails is that, once your wheels are turning, you can let them carry you forward – and let your mind take a vacation - without much chance of getting lost. The Rail-Trails await you and your wheels.

Wisconsin bikers don't wait for perfect weather to hop on their bikes (particularly those who, like your author, bike commute year-round and wouldn't have it any other way). In 2014, Wisconsin moved up from the 8th to the 3rd most bike-friendly State in the US. http://bikeleague.org/sites/default/files/2014_state_ranking_chart.pdf.

Bike smart and "be careful out there."

Happy Trails!



Wisconsin Rail-Trails

Park, Forest, or Trail Name	Miles	Fee	Surface
400 State Trail	22	$	Limestone (7.5 miles have parallel horse trail)
Badger State Trail	40	$	Asphalt 6 miles, limestone 34 miles
Bearskin State Trail	18.3	$	Granite
Capital City State Trail	10	$	Asphalt
Chippewa River State Trail	26	$	Asphalt 10 miles, seal coat 10 miles
Elroy-Sparta State Trail	32.5	$	Limestone
Gandy Dancer State Trail	47.3	$	Limestone
Glacial Drumlin State Trail	52	$	Asphalt 7.5 miles, limestone 41.5 miles
Great River State Trail	24	$	Limestone
Green Circle State Trail	24	--	Asphalt and granite
Hillsboro State Trail	4	$	Limestone
La Crosse River State Trail	21	$	Limestone
Military Ridge State Trail	40	$	Asphalt 3 miles, limestone 38 miles
Mountain-Bay State Trail (western part)	89	$	Limestone
Old Abe State Trail	20	$	Asphalt
Red Cedar State Trail	14.5	$	Limestone
Sugar River State Trail	23.5	$	Asphalt 1 mile, limestone 22.5 miles
Tomorrow River State Trail	18	$	Limestone
Wild Goose State Trail (western part)	32	--	Limestone (4.1 miles have parallel horse trail)

The Admissibility Of Electronically Stored Information Under The Federal Rules Of Evidence - Part II

Timothy D. Edwards
Cullen Weston Pines & Bach LLP

In the first section of this Article, we examined the unique nature of electronically stored information and basic principles of authenticity. This section will address the hearsay rule and the best evidence rule.

A. Hearsay

After the proponent of ESI establishes that the evidence is relevant and authentic, the proposed evidence must overcome any hearsay objections. With ESI, the main issue is whether electronic documents and writings constitute "statements" by a declarant within the meaning of Rule 801(a), Fed. R. Evid. A statement is "an oral or written assertion or … nonverbal conduct of a person, if it is intended by the person as an assertion."[1] Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[2] A declarant is a "person who makes a statement."[3]

The application of the hearsay rule to ESI depends on whether the information a "person" has made the statement, i.e. whether the information is computer generated or "computer stored" (i.e., input by a person into the system). Often, computers generate metada that includes assertions. They also create "data sets" (i.e., information from a computer generated analysis), such as a breathalyzer result, results from a speed detection device, or information on an ATM receipt. While court are split as to whether computer generated information is hearsay,[4] it is difficult to ignore the fact that a computer system often makes "statements" that could be offered to "prove the truth of the matter asserted." Despite any ambivalence about whether ESI is "hearsay," there is no doubt that computer stored information includes statements by people and systems that invite various exceptions to the hearsay rule if it is, in fact, applied. In the context of ESI, there are several exceptions that can be used to admit such evidence.

i. Present sense impression

This hearsay exception applies for a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[5] Such statements are an exception to the hearsay rule because given the contemporaneous nature of the statement concerning the event; the dangers of a poor memory are minimized.

As it relates to ESI, this exception applies to statements made in emails or other human-generated computer records. Even though such statements are in electronic form, the present sense impression exception applies the same way as traditional, hard-copy formats. Further, social networking messages or posts may also qualify under this exception.

1 FRE 801(a).
2 FRE 801(c).
3 FRE 801(b).
4 For example, compare State v. Armsted, 432 So.2d 837 (La. 1983)(computer generated data not hearsay) with United States v. Briscoe, 896 F.2d 1476, 1493-95 (7th Cir. 1990)(computer telephone metadata constitutes hearsay).
5 FRE 803(1).

(Continued on next page)

Electronically Stored Evidence

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ii. Excited utterance

These statements relate to "a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[6] Like the present sense impression, such statements are considered trustworthy because statements made in an excited emotional state reduces the possibility of inaccurate statements. Therefore, electronic communications, such as e-mails and social media postings can all be excited utterances as long as they were created under the stress of excitement caused by an event or condition.

iii. Then-existing state of mind or condition

Similar to the previous two exceptions, statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" are admissible based upon the contemporaneous nature of the statements. And, like the previous two exceptions, e-mails and social media postings contain considerable amounts of these statements and are good examples for this exception.

iv. Business records

This hearsay exception is often discussed in conjunction with the authentication of certified domestic records of regularly conducted activity pursuant. These records include "memorand[a], report[s], record[s], or data compilation[s], in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge."[7] The records must be generated in "the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness." E-mails and computer-generated records and documents may qualify under the business records exception, provided that they meet these requirements.

B. The Best Evidence Rule

After the proponent establishes that the evidence is relevant, authentic, and not hearsay, she still must overcome the best evidence rule. Under this rule, "[t]o prove the content of a writing, recording or photograph, the original writing, recording or photograph is required."[8] For electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information."[9] This principle is confirmed by case law that consistently recognizes that "so long as it accurately reflects the data," printout or duplicate copies of electronic evidence are admissible.[10]

Proving that the document "accurately reflects the data" can be quite difficult given the malleable nature of ESI and the limited information provided by a mere copy of the most recent version. To overcome this obstacle, the proponent must establish that the information, or data, has not changed since it was first created. Absent such proof, the document does not "accurately reflect the data" that gave rise to its creation. Of course, these problems do not apply if the proponent of the evidence is only trying to establish that the proposed information is the most recent version of the document in question.

6 FRE 803(2).

7 FRE 803(6).

8 FRE 1002.

9 FRE 1001(d).

10 Lorraine, 241 F.R.D. at 163.

(Continued on next page)

III. Conclusion

Electronic evidence poses interesting evidentiary challenges. Traditional rule applications such as relevancy and probative value apply to ESI just as they would if the evidence were in traditional, hard-copy form. However, it is often difficult to authenticate ESI because of its dynamic and ever-changing format, requiring a new analysis that focuses on the reliability, or integrity, of the information instead of its originality. Once authenticated, the proponent of the ESI must determine whether computer stored information raises hearsay problems and, if so, whether an exception to the hearsay rule will allow the evidence to be admitted. Finally, the proponent of the evidence must satisfy the best evidence rule by showing that the document in question accurately reflects the "data," which is established by showing that the information in the document has not changed since its creation. If these evidentiary foundations are overcome, the ESI should be admitted and the jury should decide its weight.

FALL CLE PROGRAM:

PRO BONO OPPORTUNITIES AND REPRESENTATION IN THE WESTERN DISTRICT OF WISCONSIN

If you are interested in volunteering to take a case pro bono or if you simply need credit, the WDBA will sponsor a CLE program, Pro Bono Opportunities and Representation in the Western District of Wisconsin, on September 18, 2014, from 1 p.m. to 4 p.m., at the federal courthouse. The program will provide up to 3 hours of information for practitioners interested in taking a case pro bono, featuring Chief District Judge William Conley, Magistrate Judge Steven Crocker and Clerk of Court Peter Oppeneer along with members of the Wisconsin Department of Justice and private practitioners, who frequently handle cases filed by pro se litigants. Topics will include an overview of pro bono opportunities presently available at the court, as well as substantive and procedural issues that commonly arise in the course of litigating the type of case filed by a pro se litigant.

Currently, almost half of the civil docket in the Western District of Wisconsin (396 cases out of 916 in 2013, or 43%) consists of cases filed by individuals who are indigent and lack the means to employ trained counsel. Many of these cases would benefit from having the assistance of legal counsel and a select few present circumstances in which the court is obligated to recruit a volunteer on the plaintiff's behalf. A majority of pro se cases are filed by individuals who are incarcerated, although a substantial minority of the court's pro se caseload (128 out of 396) come from non-prisoners.

The court is always in need of volunteers for both categories, which include opportunities to conduct discovery under the federal rules, respond to dispositive motions or even take a case to trial. Limited term volunteer opportunities also exist for the purpose of evaluation, mediation or settlement discussions in an appropriate case.

The court deeply appreciates lawyers who graciously volunteer their time to represent other, less fortunate individuals in the community. To help defray costs associated with undertaking this type of case, the Western District has implemented a pro bono fund to compensate some of the expenses incurred by volunteers. Volunteers are recognized each year at the WDBA annual meeting.

Please plan to attend if you have ever considered performing this important service to the court and to the public. For additional information, or if you would like to volunteer for a pro bono opportunity, please contact Judge Conley's judicial assistant, Melissa Hardin, at (608) 261-5718 or email at: Melissa_Hardin@wiwd.uscourts.gov.

Note Change Of Venue at 2014 Annual Meeting

Our luncheon will be held at Madison's new Central Library, 3rd Floor Community Room, located at 201 W. Mifflin Street, one block from the Federal Courthouse.

Registration begins at 11:30 a.m. and lunch begins at noon. After lunch, our CLE program will be held at the Federal Courthouse, beginning at 1:45 p.m.