Newsletter of the

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

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Changes in Procedure for Pro Hac Vice Admissions

By Sarah A. Zylstra

As of October 1, 2011, the procedure for moving for pro hac vice admission in the Western District of Wisconsin has changed. The new procedure requires that each attorney seeking pro hac vice admission to make his or her own motion to be admitted. Thus, if multiple lawyers from the same firm seek admittance, each one must file a separate motion requesting admittance. A $50 filing fee will be assessed for each motion for admission pro hac vice. The fee will go to the Attorney Admission Fund (see related article, *District Court Adopts Attorney Admission Fund,* in this newsletter).

To file a motion for pro hac vice, a movant must take three steps:
(1) Register for CM/ECF at https://attorneyreg.wiwd.uscourts.gov/. This must be done before the movant files his or her motion for pro hac vice.
(2) File the motion for admission pro hac vice electronically via CM/ECF. A form motion may be found on the Court's website at: http://www.wiwd.uscourts.gov/sites/default/files/Pro_Hac_Motion.pdf
(3) Pay the $50 fee. The fee may be paid via pay.gov in response to the prompt that appears automatically upon filing the motion. This is the preferred method. Alternatively, a movant can pay the $50 fee in advance by check and enter the receipt number in response to the prompt.

District Court Adopts Attorney Admission Fund

By Peter Oppeneer, Clerk of Court

On October 1, 2011, the district court for the Western District of Wisconsin established an attorney admission fund to be used exclusively to benefit the bench and bar in this district. Attorney admission funds, which are common among United States district courts, allow courts to collect fees from attorneys seeking admission to the court to be used for expenses not permitted by Congressional appropriations.

The primary motivation for creating the fund was to enable the Court to contribute to the Western District Bar Association Pro Bono Fund for the reimbursement of out-of-pocket expenses of attorneys accepting pro bono appointments. Other examples of permitted expenditures are furnishings for the attorney room, expenses for attorney events and meetings, and expenses for public educational events on federal law and the federal courts. Any judge or member of the bar may make a recommendation for expenditures from the fund.

To fund these expenditures, the Court is collecting a $50 fee from each attorney seeking admission *pro hac vice.* No fee has been added to the cost for attorneys seeking permanent admission to the Court. Based on the history of motions for admission *pro hac vice*, it is anticipated that the fund will collect about $20,000 per year.

YOU'RE NOT SAYING WHAT I NEED TO HEAR

by Richard Briles Moriarty

Appellate courts do not give trial courts what they need, according to UW Madison Professor Cecelia Klingele, and we all suffer because of it. Combining different perspectives developed over the years as a close observer of judicial systems, Professor Klingele, in her Keynote Address at the 2011 WDBA Annual Meeting, talked about deficiencies in appellate court decisions and how practitioners can facilitate decisions that are more useful to trial courts. Her caveat, that she was never a judge or full-time practicing lawyer herself, did not diminish the worth of her insights, which hit home with the judges and practitioners in the audience.

Human factors, she suggested, may contribute to appellate decisions being less helpful to trial courts. Appellate judges may be reticent to reverse a colleague, even though the colleague is at a different level. Guidance, through reversal and explanation, may be appropriate, so that reticence can stand in the way of needed correction beneficial to the system as a whole.

Also, while actors in judicial systems understand their own roles and authority, she noted, they often misunderstand other system actors. Appellate judges simply may not realize what trial judges actually do on a daily basis. Sitting by designation, she suggested, can be a remarkable tool for breaking down those misunderstandings. When appellate judges sit as trial judges, they often come away with a lot of good insights. Similarly, when trial judges sit as appellate judges, they can see the review role – and absorb appellate decisions - with new eyes.

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President's Corner

by Lynn M. Stathas

Judicial Vacancies: A Growing Threat to Our Judicial System

We rely on courts to promptly and fairly address cases when we are unable to resolve them without resort to the law. Among others, Supreme Court Justice Anthony Kennedy has observed that the "rule of law is imperiled" when important judicial vacancies are not filled.

The Alliance for Justice ("AFJ") Judicial Selection Snapshot (updated November 28, 2011) reports that there are currently 68 district court vacancies, with 17 additional future district court vacancies (those for which a judge has notified the President that the judge will be leaving active service). Of those vacancies, three are pending renominations from the 111th Congress; one here in the Western District of Wisconsin.

The Administrative Office of the U.S. Courts has determined 23 of those vacancies to be judicial emergencies. Appellate and district court judicial emergencies affect courts in 30 states in all regions of the country, including Wisconsin. Yes, the vacancy here in the Western District of Wisconsin has been determined a judicial emergency.

Judicial vacancies in our federal courts are reaching historically high levels. The Department of Justice's Office of Legal Policy estimates that 50% of the federal bench will be vacant within a decade if confirmation rates do not improve. While judicial vacancies persist, federal caseloads are increasing. In 2010, filings in U.S. District Courts grew 2% to 361,323. In the first seven months of fiscal year 2011, total court filings in the Western District of Wisconsin were up; if that trend continues, a projection to year-end would indicate a 50% increase in civil filings here over 2010.

Despite the judicial vacancy here, in fiscal year 2010 the Western District of Wisconsin remained the fastest district in the Seventh Circuit from filing to disposition of civil matters (5.1 months), and from filing to trial (15.1 months). Nationally, the Western District of Wisconsin ranked fourth in both categories.

The AFJ report concludes that the judicial emergency vacancies harm "litigants, judges, and, ultimately the public's confidence in our judiciary," noting that individuals and businesses are denied quick case resolution. Additionally, sitting judges in affected districts are burdened with increased caseloads. Ultimately, the lack of sitting judges threatens to undermine public confidence in the judicial system's ability to provide timely justice and to uphold the rule of law.

The Western District Bar Association's mission is to promote the just, speedy, respectful and efficient determination of every action filed in the District. We do this by striving to act as an effective liaison among the 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.

You will see many indications of our efforts, from our pro bono fund and mentoring initiatives, to our continuing educational programs, to our soon to be unveiled, newly-designed website and newsletter intended to facilitate and enhance communications. However, despite such efforts, and despite the good will and hard work of the members of our bar and of our Court and its staff, the unfilled seat here challenges our collective ability to promote and achieve prompt, fair and efficient justice for our constituents.

Professor Klingele

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Professor Klingele identified three assumptions that cause appellate decisions to be unhelpful to trial judges.

The first assumption is that appellate judges believe that details are best left to the experts. Appellate courts recognize that for the most part, trial courts are the experts – with the exception of when they are interpreting appellate decisions. As a result, appellate decisions are often impractical. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), for example, completely changed pleading rules. But the *Twombly* Court did not hint at the scope of the change, instead leaving it to trial courts – the perceived experts - to flesh out and implement those changes.[1]

Practitioners can help avoid problems caused by this assumption, she suggested, by recognizing that the consequences of potential rulings they seek from appellate courts may require trial courts to substantially change perspectives. Practitioners with the foresight to anticipate those likely changes can then, within their appellate briefs, discuss potential implementation issues and provide guidance on solutions. Appellate courts look to practitioners for expert advice in many of the same ways that they leave those issues to trial courts. This type of briefing would reduce the disruptive effects of appellate decisions that result in major shifts in legal practice, without associated guidance, such as occurred with *Twombly* and its progeny.

A second assumption that makes appellate decisions unhelpful to trial judges is that it is important for everyone to get their two cents in – which results in decisions becoming longer, more fractured and less clear. The splintered nature of the reasoning by which appellate judges resolve cases is often attributable to legal theory rather than practical applications. But this conflicts with trial courts needing clarity on how to apply the holdings in those decisions in concrete ways.

Once again, practitioners can assist in avoiding or minimizing these problems through good advocacy and clear and pointed writing styles. Generally, if practitioners frame the issues and arguments clearly and concisely, and in practical terms, so will the courts.

A third assumption that leads to appellate decisions being less helpful to trial judges is that it is generally appropriate to yield to trial court discretion. Quite naturally, trial courts do not want anyone to cabin their discretion, since no one likes to be told what they can and cannot do within their power. But appellate courts take that too far, Professor Klingele observed. Sometimes, deferring to trial court discretion results in appellate court failure to properly evaluate legal decisions. Avoidance of second-guessing may actually be avoidance of giving needed guidance.

Practitioners can help the system work better in that regard as well. When practitioners ask appellate courts to evaluate discretionary areas of the law, they can articulate the parameters of proper and improper discretion, so that appellate decisions maintain the right balance between deferring to discretionary rulings and providing genuine guidance and correction when those rulings go awry.

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1. The author notes that Twombly, as Professor Klingele argued, left many questions unanswered. The resulting confusion is conveyed by searching court citations to Twombly on Westlaw and limiting "Depth of Treatment" to those which "Examined" or "Discussed" it - i.e., those that conducted detailed analysis of its holdings. Excluding all other citations, including those that just "Cited" or "Mentioned" Twombly, yields well over 20,000 lower court citations. Had Twombly taken the extra steps of detailing the changes it made and defining implementation standards, subsequent lower courts could have merely cited it – and the Court would not have had to clarify its intent through Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

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Professor Klingele

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Responding to questions, Professor Klingele advised appellate practitioners to make choices among potential arguments to keep briefs concise and focused. Practitioners understandably want to avoid waiver, but strong arguments can easily get lost amongst weaker arguments. The solution may be to talk with clients about choosing among arguments – so that the strong arguments stand out with clarity.

Questioned about the increase in fractured decisions, she did note that the Supreme Court has recently sought consciously to reach consensus in recognition that fractured decisions are not helpful. This could be furthered on the Supreme Court, she believed, by a practice of assigning one Justice to speak for dissenters, rather than having multiple dissents.

She agreed with a questioner that there is increased politicization on appellate courts, but suggested that practitioners should approach cases with the view that all people like to do a good job. If a practitioner clearly and persuasively communicates to an appellate court that the practitioner's position is the way to go, the tendency of judges, like others, to want to do a good job could result in success and acceptance of that position regardless of the judge's political proclivities.

She concluded by advocating for the increased publication of appellate decisions, noting that limited shelf space is no longer a valid excuse for non-publication and that it is difficult, with access through computerized research services, to justify burying decisions through non-publication.

District Court Contact Information

Clerk of Court - Main Office
Telephone: (608) 264-5156
Fax: (608) 264-5925

Office Hours: 8:00 AM - 4:30 PM Central Time
CM/ECF Help (866) 241-7123
or
wiwd_ecfhelp@wiwd.uscourts.gov

Jury Administrator	(608) 261-5711
Finance Department	(608) 261-5723
Human Resources	(608) 261-5726

Emergency - After Hours:
Peter Oppeneer, Clerk of Court: (608) 287-4875
Joel Turner, Chief Deputy Clerk: (608) 354-8004

Bankruptcy Court (608) 264-5178
U.S. Court of Appeals - 7th Circuit (312) 435-5850
U.S. District Court - Eastern District (414) 297-3372

WDBA

MISSION STATEMENT

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Western District News

Western District Bar Association
Post Office Box 44578
Madison, WI 53744-4578

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