



NEWSLETTER OF THE
WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

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Judge Crabb Finds PLRA Attorney's Fees Limitations Unconstitutional

This October, in *Johnson v. Daley*, 117 F. Supp. 2d 889 (W.D. Wis. 2000), Judge Barbara Crabb held that the attorney's fees limitations in the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(d)(2)&(3), violate the equal protection guarantees of the Fifth Amendment. The court found that the challenged provisions failed rational basis review because of the absence of any relationship "between [the PLRA's] disparity in treatment between prisoners and non-prisoners and the government's interest in reducing frivolous prisoner suits." *Id.* at 895.

While non-prisoners who prevail in section 1983 actions are entitled to "reasonable attorney's fees" under 42 U.S.C. § 1988, the PLRA limits the attorney's fees available to prisoners who prevail under section 1983. Specifically, under the PLRA, total attorney's fees are capped at 150% of the amount of the judgment; and an attorney's hourly rate is capped at 150% of the rate allowed for court-appointed counsel under the Criminal Justice Act.

In *Johnson v. Daley*, attorneys from Foley & Lardner represented Cedric Johnson, an inmate at Wisconsin's Fox Lake Correctional Institution, in a section 1983 action against the Wisconsin Department of Corrections' medical director. Johnson alleged that he was denied adequate medical care for a liver condition, in violation of the Eighth Amendment. He won the jury trial, was awarded \$40,000 in compensatory and punitive damages, and sought \$101,776.01 in actual attorney's fees and costs under section 1988—more than twice the amount otherwise permitted under the PLRA.

In the context of that fee petition, Johnson argued that the PLRA fee limitations were unconstitutional. The United States intervened to defend the PLRA, arguing that the PLRA's attorney's fee limitations were rationally related to the government's interest in curtailing frivolous prisoner lawsuits. Judge Crabb disagreed, holding that a prisoner contemplating a lawsuit "has no reason to take into consideration the size of the fee award to his counsel." *Id.* at 896. Nor, in the court's view, did the caps encourage a plaintiff's attorney to more rigorously screen a prisoner complaint, because "a lawyer has no incentive to represent a prisoner without the assurance that his claim is viable." *Id.* at 897. Moreover, Judge Crabb noted that in almost all prisoner cases, attorneys are appointed by the court. Thus, "[c]ontrary to what Congress seems to have believed when it enacted this legislation, there are no clouds of lawyers hovering at the prison gates, hoping to instigate civil rights cases that will bring them a windfall fee." *Id.* at 898.

These and other flaws led Judge Crabb to find that "[t]he cap bears no relationship to the goal of deterring frivolous lawsuits." *Id.* at 899. As a result, Judge Crabb reasoned that the distinction drawn by the PLRA, between prisoners and other civil rights litigants who are not subject to attorney fees limits, "can only be motivated by ignorance or a 'bare . . . desire to harm a politically unpopular group.'" *Id.* at 900 (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447 (1985)). In light of that finding, the court declined to follow the United States Courts of Appeals for the First, Sixth and Ninth Circuits, which had previously upheld the PLRA fee limitations, and concluded that the PLRA violates the Fifth Amendment "because of the lack of a rational basis between the government's interests and the classification in the statute." *Id.* at 903.

Defendants have appealed the court's ruling to the Seventh Circuit. Briefing on the appeal will be completed in February. Oral arguments have not yet been scheduled.

Professor Erwin Chemerinsky To Speak at 2001 Annual Meeting

Professor Erwin Chemerinsky, the noted University of Southern California law professor, is the keynote luncheon speaker at the Western District Bar Association annual meeting to be held Friday, April 27, 2001, at the White Horse Inn, Madison. Professor Chemerinsky has appeared frequently on CNN, Court TV and other prominent talk shows.

In addition to the Western District judges, Barbara Crabb, John Shabaz and Robert Martin, invitations to attend the luncheon will be extended to Sens. Herb Kohl, Russell Feingold, who are members of the Senate Judiciary Committee, and to Representatives James Sensenbrenner and Tom Barrett, who are members of the House Judiciary Committee.

Association Web Site Committee Appointed

At the December 15, 2000, meeting of the Executive Board and Board of Governors, President Paul Barnett appointed three members to serve on a committee to explore the feasibility of creating and maintaining an internet web page for the Association. The committee's members include Joel Aberg of the Eau Claire firm of Weld, Riley, Prenn & Ricci, S.C.; Leslie Herje from the United States Attorney's office in Madison; and Todd Smith of the Madison office of LaFollette, Godfrey & Kahn.

Anyone who is interested in serving on the Web Page Committee or has suggestions about the project is encouraged to contact Joel Aberg. Aberg's telephone number is on the back of the Newsletter. He can also be reached via e-mail at Jaberg@wrpr.com

Western District Bar Association Adopts Mission Statement

At their December 15, 2000, meeting, the members of the Executive Board and Board of Governors of the Western District of Wisconsin Bar Association adopted a mission statement for the organization.

The mission statement, in its entirety, reads as follows:

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.

The process of drafting the Association's mission statement began in October at a strategic planning session that was facilitated by representatives of the State Bar of Wisconsin. President Paul Barnett then appointed a committee to recommend short- and long-term goals for the Association as well as to submit a draft mission statement for consideration. The draft as submitted, with one minor punctuation change, was unanimously adopted.

"The adoption of a mission statement for the Association is an important first step in the process of strategic planning," said Barnett. "Now, as we decide which direction the organization should move, and are called upon to consider specific initiatives, we can reflect back on the mission of the Association and ask whether the proposed project fits within our mission."

THE PRESIDENT'S CORNER

By
Paul L. Barnett
President

I hope this newsletter finds you and your family healthy and content after the holiday season. If you can, please take some extra time away from your practice for yourself.

In the last newsletter, I explained that one of my important initiatives this year is to engage the Association in strategic planning for our future. I am pleased to report that six Executive Board members joined me at the State Bar headquarters on October 5, 2000, and actively participated in a three-hour strategic planning session. I would like to thank Tom Bertz, Lynn Stathas, Jim Troupis, Peg Lautenschlager, Joel Aberg and Joe Skupniewitz for their commitment of time, ideas and energy to this effort. I would also like to express the Association's appreciation to Tina Nodolf, Kris Wenzel and Betty Braden of the State Bar staff who facilitated and reported the session and prodded us to think deeply about our mission and a vision for the future.

Four primary objectives emerged from the planning session. They include membership development, retention and participation; offering more and varied education and services to our members; reinforcing the Association's service to the District Court; and establishing a presence within the general public. Numerous ideas were proposed for each of these four areas. Everyone agreed, however, that these objectives are not mutually exclusive but instead overlap and complement each other.

The next step for the Association is to agree on mission and vision statements to serve as the foundation for establishing and prioritizing our short- and long-term goals. We must also decide on goals based on the objectives identified during the strategic planning session. These goals must be both measurable and attainable.

Your Executive Board will be working on this project during the next several months. We anticipate reporting draft mission and vision statements as well as a detailed list of goals in the next newsletter.

No statement and no goal are worthwhile, however, unless the membership itself gains ownership in them. An important part of the process of developing ownership is the opportunity for input. We solicit your input now and will again at the annual meeting. Please contact any of the Executive Board members (who are identified on the last page of this Newsletter) and express your views to them. Call me if you have any questions about the strategic planning process or would like to become actively involved.

We will submit a final report at the Annual Meeting and ask for your formal approval at that time.

This is an exciting period for our Association. We hope that you share our enthusiasm and, more importantly, will join us in this endeavor. Thank you for your consideration.

Peace.

WDBA Makes Contribution To Pro Bono Fund

At the annual meeting on June 8, 2000, Clerk of Court Joseph Skupniewitz reported that a pro bono fund shared by the Eastern and Western Districts had been exhausted. This fund was used to provide attorneys who were asked by the district courts to represent indigent litigants with funds to pay out-of-pocket expenses. Such funding enabled attorneys from some small law firms to accept pro bono assignments because a source of payment for at least their out-of-pocket expenses existed.

With the funding depleted, Mr. Skupniewitz turned to the Western District of Wisconsin Bar Association for assistance. At a meeting this fall, the Association voted to contribute \$3,000 to a pro bono fund established for use in cases arising in the Western District only.

The Court and the WDBA encourage additional contributions by law firms and individuals. If you wish to make a donation, please contact Joe Skupniewitz.

**Last Year's
Annual Program
June 8, 2000**

Earned 3 CLE Credits

An Interesting Case to Watch

A lawsuit challenging the conditions of confinement at Wisconsin's Supermax Prison in Boscobel was recently filed in the Western District by two inmates, Dennis Jonesel and Michael Johnson. Among other things, the plaintiffs allege that it is cruel and unusual punishment to be confined 23 hours a day in cells that are continuously monitored by video cameras. In October, the plaintiffs consented to Judge Crabb's appointment of Ed Garvey as their counsel. Garvey may seek to turn the inmates' suit into a class action. The defendants are represented by Assistant Attorney General Charles Hoornstra. The lawsuit is only in its early stages, but promises to be an interesting one to follow. The case number is 00-C-421-C.

Proposed Amendments To The Federal Rules of Civil Procedure

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has circulated proposed amendments to the Federal Rules of Civil Procedure for comment. The proposed amendments include changes to Rules 7.1, 54, 58 and 81 of the Federal Rules of Civil Procedure. Also under consideration are changes to the appellate, bankruptcy and criminal rules.

The proposed amendments are available on the Internet at <http://www.uscourts.gov/rules/>. Comments and suggestions concerning the proposed amendments may be submitted, no later than February 15, 2001, to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Comments may also be sent electronically to <http://www.uscourts.gov/rules/>.

The Federal Rules of Civil Procedure Have Been Amended Again

Pursuant to its authority under the Rules Enabling Act, 28 U.S.C. §2072, the Supreme Court has amended certain key discovery provisions of the Federal Rules of Civil Procedure effective December 1, 2000. The amendments affect rules 4, 5, 12, 14, 26, 30 and 37. Among other things, the amendments eliminate the district courts' ability to opt out of the Rule 26 disclosure requirements. The purpose of this amendment is to restore national uniformity to disclosure practice while at the same time allowing courts to issue case-specific discovery orders.

In addition, Rule 26(b)(1) has been amended to narrow the scope of permissible discovery. The new rule permits "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." The previous rule allowed discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." The disclosing party will need to make the initial determination of what materials are relevant to the claims or defenses.

An amendment to Rule 30 limits the length of a deposition to seven hours over the course of one day unless the parties stipulate to an extension or the Court orders otherwise.

Rule 30(d)(4) is a new addition to the existing rule. It will allow a party or a deponent to terminate a deposition if it is being conducted in bad faith or in such a way as to embarrass or op-

press the witness. Upon proper demand, the deposition must be suspended for the length of time necessary to move for an appropriate order under Rule 37.

Be aware that some of the evidence rules have been amended too. In particular, there have been amendments to Federal Rules of Evidence 103, 404, 701, 702, 703, 803(6) and 902.

The full text of the recent amendments is available at the State Bar's website, <http://www.wisbar.org/legalres/index.html>, using the links to Federal Rules of Evidence and Federal Rules of Civil Procedure.

**Mark Your
Calendars Now!**

**Western District
Bar Association
Annual Meeting
&
CLE Program**

April 27, 2001

Western District of Wisconsin Bar Association 2000-2001

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