

## Chief Judge Flaum Provides Association's Luncheon Keynote Address, CLE Program

By Alice H. Green



Judge Joel Flaum

On April 24, 2003, the Honorable Joel M. Flaum, Chief Judge of the United States Court of Appeals for the Seventh Circuit, was the keynote speaker at the Western District of Wisconsin Bar Association's annual luncheon. Judge Flaum underscored the

new challenges facing courts in the areas of security and technology, which he said have consumed a major portion of his time since assuming the position of Chief Judge in 2000. In particular, he stressed the need to improve security at the court in Chicago and expressed his opinion that within the next ten years all court pleadings will be filed exclusively in electronic format.

Further noting that the court's judges and staff are discussing the advantages and disadvantages of videoconferencing oral arguments, Judge Flaum voiced his personal opposition to the practice, which several circuits have now adopted. He observed that less personal interaction between the court and practitioners can have a negative impact on civility – which Judge Flaum hopes to see improve under his tenure. Judge Flaum also explained the process for addressing alleged judicial misconduct, mentioning that he personally reviews all judicial complaints and assuring practitioners that they are given due consideration. While he noted that complaints against judges have increased by 50% in recent years, he said that very few complaints necessitate court action.

Following his remarks at the luncheon, Judge Flaum

spoke to WDBA members about practicing before the Seventh Circuit and responded to members' questions. He stressed the importance of always addressing the question of jurisdiction and notifying the court at the earliest possible opportunity, through a pre-briefing motion, when there is an argument that the court lacks jurisdiction to consider a particular appeal. Judge Flaum also noted that a panel deciding the appeal may be unaware of some Seventh Circuit decisions that could be in tension with other decisions of the court. In such cases, counsel must inform the court about the potential for conflict. When made aware of this situation, the panel will then circulate its proposed decision in the appeal to the full court.

Judge Flaum mentioned that the selection of panels is a random, equalized process now performed by computer, where the only variable is a last-minute illness of an assigned panel member. He further remarked that although a judge may remove himself or herself from a case, no judge may request being assigned to a particular case. Referring to the Seventh Circuit as a very "hot" court, Judge Flaum underscored the importance of filing thorough, well-crafted briefs. He noted that the Seventh Circuit is now the only federal court of appeals not to announce its panels before argument and suggested that attorneys read available judges' profiles before arriving at argument. He also cautioned attorneys that because of electronic access to opinions, updating case law and other authority, even on the date of argument, and informing the court of new authority through Rule 28(j) letters, with a copy to opposing counsel, are absolutely essential.

*(Continued on Page 4)*

## Western District of Wisconsin Bar Association 2003-2004

### Executive Committee

**Todd Smith**, President

(608) 257-3911 Tsmith@gklaw.com

**James R. Troupis**, V.P./President Elect

(608) 257-3501 Jrtroupis@mbf.com

**Michael J. Modl**, Treasurer

(608) 257-5661 Mmodl@axley.com

**Jennifer Sloan Lattis**, Secretary

(608) 267-3519 lattisjs@doj.state.wi.us

**Leslie Herje**, Past President

(608) 264-5158 Leslie.herje@usdoj.gov

### Committee Chairs

**James Troupis**, Alternative Dispute Resolution

(608) 257-3501 Jrtroupis@mbf.com

**Thomas W. Bertz**, Co-Chair Communications

(715) 344-0890 Twb@andlaw.com

**Leslie Herje**, Co-Chair Communications

(608) 264-5158 Leslie.herje@usdoj.gov

**David Harth**, Pro Bono / Pro Se

(608) 663-7470 Dharth@hewm.com

**Mark Tilken**, Membership

(608) 257-5035 mtilkens@foleylaw.com

**Mark Neuser**, Courthouse Facilities

(608) 266-9338 mark.neuser@courts.state.wi.us

**Ted Long**, Rules, Practice & Procedure

(608) 257-1507 tj1@lathropclark.com

**Andrew Clarkowski**, Website

(608) 283-6705 aclarkowski@axley.com

### Board of Governors

**Lynn Stathas** 2001 - 2004

**Percy L. Julian, Jr.** 2001 - 2004

**Robert E. Shumaker** 2001 - 2004

**Kevin Palmersheim** 2002 - 2005

**Russ Golla** 2002 - 2005

**J.B. Van Hollen** 2002 - 2005

**Greg Everts** 2003 - 2006

**Sarah Zylstra** 2003 - 2006

**Margery Mebane Tibbetts** 2003 - 2006

**Joseph Skupniewitz** Permanent

### (Past Presidents on Board of Governors)

**Mark Cameli** (Ex Officio) 1999 - 2004

**Catherine M. Rottier** (Ex Officio) 2000 - 2005

**Paul Barnett** (Ex Officio) 2001 - 2006

**Thomas Bertz** (Ex Officio) 2002 - 2007

**Leslie Herje** (Ex Officio) 2003 - 2008

## Association Officers and Board In Place



*New WDBA President Todd Smith addresses the WDBA at its annual business meeting as out-going Secretary and Vice-President James Troupis looks on.*



*WDBA officers for 2003-2004 are, from left to right, Jennifer Sloan Lattis, Secretary; James Troupis, Vice President; Michael Modl, Treasurer; Todd Smith, President, and Leslie Herje, Immediate Past-President*

---

---

# THE PRESIDENT'S CORNER

By Todd Smith, President  
Western District of Wisconsin Bar Association

---

At the luncheon at this year's annual meeting and CLE seminar, the WDBA celebrated its ten year anniversary. Part of our program involved recognizing our past eleven presidents and creating a permanent plaque to be displayed in the courthouse honoring their service. All but two of the past presidents were in attendance, which I think is a testament to the continuing strength of our organization. I am very proud and honored to follow these lawyers as president of the WDBA.

At the luncheon, I mentioned that I believe that the WDBA is involved in more activities than ever before. Most of the credit for the WDBA's success lies with its past leadership, including Past President Leslie Herje, with whom it has been a privilege to work over the past year. Leslie's commitment to the WDBA and its mission has been an inspiration to me. In addition, the WDBA has an excellent board of directors who are dedicated to ensuring the quality of our programs and initiatives. In the coming year, I hope to build on the momentum they have created and develop new programs while ensuring the WDBA remains true to the activities that have made it a success.

To remain relevant and vital to its members, the WDBA must continue to provide quality services and resources to its members. I view the WDBA – all bar associations really – in part as a tool to help lawyers enhance their practice to allow them to better serve their clients. Toward that end, there are a number of goals I hope the WDBA can accomplish in the coming year.

First, the WDBA is committed to developing an early neutral evaluator program to assist litigants and counsel resolve their federal civil disputes at an early stage. Our program, which would be voluntary in nature, will identify experienced attorneys in areas of law unique to federal practice to serve as neutrals. Litigants in federal court can, with the consent of all parties, submit their case to such an evaluator. These volunteer evaluators will then advise each party about the likely resolution of the case, by identifying the strengths of the case, potential weaknesses and critical factual and legal issues that will drive the litigation. The hallmark of our neutral evaluator program will be flexibility, and the evaluator can either work with the parties sepa-

rately on a confidential basis or together, as a more collaborative effort. It is our hope that the early neutral evaluator program can become an asset to the WDBA membership and the court, assist in resolving cases, and encourage settlement and collegiality among litigants and counsel.

In addition, members will continue to see improvements to the WDBA's website, which can be found at [www.wisbar.org/bars/west](http://www.wisbar.org/bars/west). The website already includes information about WDBA activities, including a listing of officers, directors, committees and a calendar of events. However, the site also includes copies of our past newsletters and CLE seminar materials, which contain helpful articles and outlines on topics of interest to federal practitioners. The website was originally conceived of as a "one-stop" on-line destination where attorneys practicing in the district court could come to find information about the court, its judges and their respective practices and expectations of counsel. Thanks to the hard work of the Committee, I believe the website has accomplished this goal and has become a valuable asset for our membership. As always, we welcome input from our members on how we can make the website even better.

Finally, I hope to continue our recent collaborative efforts with the Seventh Circuit Bar Association and Eastern District of Wisconsin Bar Association. As you may recall, in the past year the WDBA co-sponsored a CLE seminar on intellectual property litigation with the Seventh Circuit Bar Association which was well-attended and well-received. I expect that there will be more opportunities for such cooperation with that organization, as well as with the newly-formed Eastern District of Wisconsin Bar Association, which will expose our organization to a larger audience.

Achieving the WDBA's goals will require the hard work of all involved. I encourage all members to get involved in the WDBA's committees, seminars and other activities. Board meetings will be posted on the website's calendar of events, and attending these meetings is the best way to have direct input on WDBA activities or to become involved in the WDBA in a leadership role. I look forward to working with you in the coming year!

---

## Judge Flaum

*Continued from Page 1*

According to Judge Flaum, the Seventh Circuit favors oral argument more than any other circuit, providing argument in every case that is fully counseled, and screening only cases involving *pro se* prisoners or appeals that are clearly frivolous. Seventy percent of the Seventh Circuit's appeals are argued, compared to forty percent or fewer in other circuits. Also, if the court screens a case but a party still wants it argued, the court will return it to the argument calendar.

Judge Flaum advised that flexibility in arguing a case is crucial and recommended coming to court with at least two or even three arguments, including one that shrinks, in case a judge wants to dialogue with the attorney. According to Judge Flaum, some judges believe that oral argument is their time to clarify issues, while other judges feel it is shared time with the attorneys. He stressed that lawyers should master the record, pointing out that some judges read the record before argument, while others do so afterwards, and that record citations are checked. Concerning courtroom protocol and etiquette, Judge Flaum stated that civility is critically important to him, cautioning that counsel should be respectful not only of the judges but of each other, and should refrain from any criticism of opposing counsel, including understated criticism. As for counsel's dress and demeanor, Judge Flaum suggested that attorneys be themselves and, noting that there is a volume-control button on the podium, present their arguments forcefully without being loud. He said counsel should make sure that the argument - and not their appearance - is the statement conveyed.

When asked if the Seventh Circuit has ever considered issuing a post-briefing order, identifying issues the judges specifically want addressed at argument, Judge Flaum responded that this practice is followed only in cases heard en banc. He pointed out that panel members, who hear six cases a day and receive the briefs approximately two weeks in advance of argument, all prepare individually and rarely confer before a case is heard — a practice that avoids driving a particular position. Judge Flaum mentioned that while he prepares by first reading the district court or agency opinion, other judges have different approaches. Following argument, the judges confer for approximately one hour and most cases are decided 3 - 0. Sometimes a judge will ask to author a particular opinion. The presiding judge, who may select a case that he or she wishes to author, ultimately assigns the opinions. When Judge Flaum assigns a case, he frequently considers which panel member seems to have a solid grasp of the matter.

Members posed additional questions concerning the use of visual aids, the method of allotting time for oral argument, the length of time between argument and decision, the publishing of opinions, the court's position on law students arguing cases, judges traveling to hear cases outside Chicago, and the United States Supreme Court's view of the Seventh Circuit. Among his responses, Judge Flaum said that visual aids, including photographs and contract provisions, may be helpful, but only if the exhibits accurately reflect the record, and only where advance notice is given as soon as possible to the court and opposing counsel. Judge Flaum explained that a panel has a total of three hours to hear six arguments; that except for death penalty cases, which are allotted a full hour, one person proposes the argument time for each case, after which the judges weigh in to finalize the assigned time; and that there is no significance to being assigned ten minutes as the last case of the day.

The Chief Judge's goal for issuing opinions is ninety days following argument and the status of cases pending more than ninety days is periodically checked; however, six months is the average interval. Compared to the statistics of other courts of appeals, this average time falls in the middle range, which Judge Flaum noted is extraordinary, given the significantly higher number of cases argued in the Seventh Circuit.

As of April 16, 2003, every decision, whether published or not, must go on-line, although unpublished opinions continue to be non-precedential. Judge Flaum mentioned there is a movement among some judges to eliminate the rule prohibiting citations to unpublished opinions, although it is too soon to predict the outcome of that effort. While law students may argue cases, a responsible attorney must be present in the courtroom and all parties must consent. If invited, the court will travel from Chicago once during a three-year cycle to convene in a Wisconsin, Indiana, or Illinois law school for a half-day of argument. At those times, cases are selected from the region near the designated law school to accommodate counsel and the parties.

As for the Supreme Court's view of the Seventh Circuit, Judge Flaum, noting that statistically the Supreme Court hears very few cases from the Seventh Circuit, indicated that it is one of two or three circuits in good standing.

*Alice Green is the Appellate Coordinator at the U.S. Attorney's Office for the Western District of Wisconsin.*

---

# Joseph Skupniewitz To Retire

---



*WDBA President Todd Smith presents the WDBA's Distinguished Service Award to Joseph W. Skupniewitz in recognition of his service to the Court, the Bar, and the Association as Clerk of Court, Magistrate Judge, and member of the Board of Governor's of the WDBA. The Distinguished Service Award is the WDBA's highest award. Previous recipients are Judge Thomas Fairchild, Judge James Doyle (awarded posthumously), and former Congressman Robert Kastenmeir.*

When Joseph Skupniewitz was appointed Clerk for the Western District Court in 1971, Judge James E. Doyle described him as "uniquely qualified for the position academically and temperamentally," citing his experience, aptitude and interest in the administration of the courts. Chief Judge Barbara B. Crabb could not agree more. She describes Mr. Skupniewitz's impact as both Clerk and United States Magistrate Judge as "far reaching." He has participated in evaluation teams for other courts throughout the country, and has served on special nationwide committees established to determine policy and to help to define special projects. He has been involved with the Administrative Office's use of the Western District as a pilot for a number of studies, and contributed to an educational video series for clerks' offices around the country about how criminal cases move through district courts. He was also instrumental in helping with a pilot computer program for financial management, and for working with others to bring computer technology to the Western District.

During his thirty plus years of service, Mr. Skupniewitz has worked hard to achieve the highly professional and cordial reputation the Clerk's office

enjoys today. He works with the members of the Bar on a daily basis, responding to questions about court procedures and local practices. He has also made responsiveness a top priority for the office. This includes addressing issues, concerns and needs of litigants, lawyers, jurors and the public. He has served on a variety of committees established to study and comment on the Court's workings, including the Civil Justice Reform Act Committee, and an earlier established committee to study local court rules. It is the computerization of the Court, and resulting changes and efficiencies, that Mr. Skupniewitz considers a particularly important advance.

Mr. Skupniewitz is also respected for his special skills in settling civil cases, helping to facilitate settlement in dozens of cases each year for both district court judges. In addition to his professional accomplishments, Mr. Skupniewitz is known for his personal generosity in the work environment, and for his service in the community with a variety of organizations, including the Boy Scouts.

Prior to his service as Clerk of Court and United States Magistrate Judge, Mr. Skupniewitz graduated from Wayland Academy in Beaver Dam, Wisconsin, and Harvard University. While a student at the University of Wisconsin Law School, he was the Managing Editor for the Wisconsin Law Review in 1965-66. He served as a Captain in the U.S. Air Force from 1967-71.

Mr. Skupniewitz recently received the Western District Bar Association's Distinguished Service Award in honor of, and appreciation for, his outstanding contributions and distinguished service as Clerk of Court and Magistrate Judge for the Western District. He will retire at the end of the year. He will be succeeded by Theresa M. Owens, who currently serves as the Chief Deputy Clerk for the Wisconsin Supreme Court and Court of Appeals.

---

## 2003 CLE Credits Approved

The Wisconsin State Bar approved the CLE Program held on April 24, 2003, for 3.0 Credits. The Minnesota State Bar approved the CLE Program for 2.75 Credits.

---

---

# PROFILES IN PRO BONO

By David Harth  
Chair, Pro Bono and Pro Se Committee

---



Naikang Tsao

When WDBA-member Naikang Tsao moved to Madison in 2000, he had little experience with prison litigation, having spent the previous five years at the U.S. Justice Department in Washington, D.C., representing federal agencies in environmental cases. Now in private practice in the Madison office of Foley & Lardner, Tsao has learned a great deal about litigating prisoner civil rights cases, largely as a result of the *two pro bono* prisoner cases he took on through the WDBA Volunteer Counsel Program.

In his first volunteer appointment, *Johnson v. Daley*, Tsao was instrumental in mounting a successful constitutional challenge to the Prison Litigation Reform Act's attorney's fees limitations. The appeal from Judge Crabb's decision striking down the PLRA limitations on equal protection grounds was recently heard by the Seventh Circuit, *en banc*, and a decision is expected later this summer.

More recently, an inmate, Christopher Scarver, filed a section 1983 action against the Department of Corrections, alleging that the conditions of confinement at the Wisconsin Secure Program Facility (WSPF) in Boscobel (formerly known as Supermax), were exacerbating his mental illness, and seeking as relief a transfer to another maximum security prison. The complaint was related to the class action consent decree in *Jones' El v. Berge*, which created a presumption that the WSPF was not a suitable placement for inmates with severe mental illness.

After initially screening the complaint, the Court determined that Scarver could not proceed on his own and sought volunteer counsel to take on the case. At the request of the WDBA Volunteer Counsel Program, Tsao and colleagues Allen Arntsen and Elizabeth Pevehouse agreed to represent Scarver *pro bono*, and that representation is ongoing.

When asked, "Why prison litigation?" Tsao responded: "There are a lot of reasons. No one likes prisoners, but even prisoners have basic constitutional rights. Unfortunately, prisoners can rarely afford to hire private lawyers when their rights are violated. Although many prisoners do file lawsuits on their own, they are very rarely successful. Volunteer lawyers can help make sure that some of the more meritorious claims will be heard."

"Prisoner litigation also is an opportunity to work on constitutional law issues, and to give our younger lawyers a taste of real litigation. I also believe that we are providing a service to the Court. And, more generally, *pro bono* work adds variety and balance to our professional lives."

Tsao is a partner at Foley & Lardner in Madison, and practices in the areas of intellectual property and general commercial litigation.

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 email to [dharth@hewm.com](mailto:dharth@hewm.com).

---

---

## Association Members Gather for Annual Meeting in Madison



*From left to right, WDBA Treasurer, Michael Modl; Past President, Leslie Herje; President, Todd Smith, and President-Elect, Jim Troupis.*



*Seventh Circuit Chief Judge Joel Flaum visits with WDBA members following his luncheon talk.*



*New WDBA President Todd Smith presents a plaque to Leslie Herje in recognition of her service as President of the WDBA in 2002-03.*



*Chief Judge Barbara Crabb makes additional comments regarding Joe Skupniewitz receiving the Distinguished Service Award.*



*Judge Shabaz and Judge Crabb respond to questions from members during WDBA's annual judges' panel discussion.*



*Seventh Circuit Chief Judge Joel Flaum presents a CLE program on practicing before the Seventh Circuit Court of Appeals.*



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

Pre-Sorted  
Standard  
U.S. Postage  
P A I D  
Permit #1  
Madison, WI

Address Service Requested

MISSION STATEMENT

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.

