Western District News

NEWSLETTER OF THE

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

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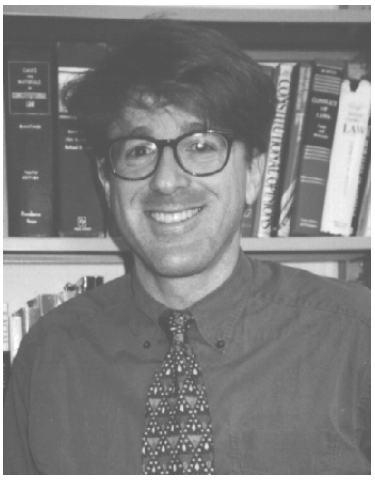
2001 - A Supreme Court Odyssey

UW LAW PROFESSOR DAVID SCHWARTZ TO SPEAK AT ANNUAL LUNCHEON



David S. Schwartz

David S. Schwartz, Professor at the University of Wisconsin Law School, will be the keynote speaker at the Western District Bar Association's Annual Luncheon on June 8, 2000.

Prof. Schwartz's presentation is entitled, "2001: A Supreme Court Odyssey." He will discuss how the present make-up of the United States Supreme Court has influenced its current jurisprudence and the impact November's presidential elections may have on the Court's future direction. Prof. Schwartz will also entertain questions from the audience on this and other topics, including the changing role that law schools play in training today's lawyers.

Prof. Schwartz is concluding his first year on the Law School staff, teaching employment discrimination and evidence. He is a 1986 graduate of Yale Law School who also received his M.A. degree in political science from Yale University in 1986.

Prior to joining the UW Law School faculty, Prof. Schwartz was employed as a senior staff attorney with the ACLU in Los Angeles. Since receiving his law degree, Prof. Schwartz has concentrated on civil litigation, particularly in the areas of employment discrimination and labor law, although he also accepted appointments as appellate counsel in state criminal appeals. Additionally, he clerked for Judge Betty B. Fletcher of the U.S. Court of Appeals for the Ninth Circuit.

In addition to being a litigator, Prof. Schwartz also served for three years as a panelist and mediator with the San Francisco Superior Court "Early Settlement Conference Program." He agrees that a lawyer mediated structured settlement opportunity is worthwhile, particularly given the cost of professional mediators. Although getting assigned a mediator who is capable and effective may be only by luck of the draw, Prof. Schwartz is adamant that the mediator must have personal experience in the type of case and

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issues involved. Otherwise, according to Prof. Schwartz, the mediator "has no credibility with the parties, and rightfully so."

Despite the heavy concentration in civil litigation in the ten years following graduation, Prof. Schwartz has had a long-standing interest in teaching the law. Only recently, however, did he pursue a full-time academic position. "I did not want to go full-time until I had gotten to the point in my career that I felt I had acquired solid litigation experience," he said. "This [experience] has helped me understand the legal system and to teach it."

Indeed, Prof. Schwartz believes that his litigation experience is important to his success in the classroom. "To teach evidence the way I want to, I need to keep fresh in trial work," he said, adding that he hopes to litigate cases as an adjunct to his teaching responsibilities.

One of the things that attracted him to the UW Law School was the litigation experience of its academic staff. Prof. Schwartz strongly believes that a law school faculty should be diversified in the experiences of its members. "Litigation experience is simply one aspect of that, but not the only kind," he observed. "People with different kinds of experience have something to add."

Next year, Prof. Schwartz will increase his teaching duties by adding courses in constitutional law and a general employment law course called "Protective Labor Legislation."

Prof. Schwartz has participated in a number of significant cases in his professional career. Asked to identify the most important, he immediately refers to a 1996 sexual harassment lawsuit as providing the most personal satisfaction. "It was a David and Goliath kind of case where the defendant was a national corporation that fought tooth and nail," he explained. "The case was tried in a small county. This was the first sexual harassment case tried there. The judge told me that I'd be lucky if [the defendant] offered $50,000 in settlement. The jury returned a verdict of $1.3 million. My client deserved every dollar."

From a national perspective, however, Prof. Schwartz points to *Saenz v. Roe*, 526 U.S. 489 (1999). In this case, the U.S. Supreme Court declared unconstitutional a California statute that limited welfare benefits for the recipient's first year of residency. Although he did not argue the case, Prof. Schwartz prepared the lower court briefs and observed the arguments.

"Once [this decision] sinks in," Prof. Schwartz predicts, "it will be the leading case on the "Privileges and Immunities" clause and the right to travel." He agrees that the full impact of the *Saenz* decision could be quite dramatic.

Prof. Schwartz describes being "completely enthralled" by the oral argument in *Saenz*. He could tell the Justices were very interested in the issue because all except Justice Thomas actively participated in the questioning. Following the arguments, Prof. Schwartz felt that five Justices were on his side, but he was quite uncertain as to the likely breadth of the outcome. He was "surprised," then, when seven Justices voted in support of a sweeping decision in his favor.

Indeed, Prof. Schwartz admits he did not expect Justice Scalia to vote with the majority. However, he offered a tongue-in-cheek explanation that other Supreme Court practitioners might consider.

"There was a lot of levity between the Justices and the attorneys, especially with Justice Scalia," he revealed." "If you give Scalia a chance to say some witty things, he's more likely to go your way."

Justice Scalia is not alone in his sense of humor, however. In 1992, while practicing law in California, Prof. Schwartz finished runner-up in the "Funniest Lawyer in San Francisco Stand-up Comedy Competition." And while attending as an undergraduate at Yale University, he authored a weekly humor column. It is possible that his funniest days are behind him, though, as he confesses that "[my] jokes in class don't go over very well."

Prof. Schwartz is married to BethAnne Yeager, who is also an attorney and who practices employment discrimination law in Madison on behalf of plaintiffs.

EXPERT TESTIMONY IN THE WESTERN DISTRICT UNDER DAUBERT

By
Catherine M. Rottier
Boardman Law Firm

To be admissible in federal court proceedings, expert testimony on scientific or medical matters must satisfy the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). First, the testimony must be reliable; that is, it must be supported by an appropriate scientific basis. Second, the testimony must be relevant to the case in which it is being offered. Where the proffered testimony does not satisfy those standards, the judges of the Western District have not hesitated to reject it. This article reviews written opinions they have issued within the last two years in which the admissibility of expert testimony has been considered against the backdrop of Daubert.

In Ramsden v. Agribank, FCB, 98-C-0221-C, Judge Crabb, citing a lack of admissible scientific evidence on the issue of causation, dismissed a civil action in which the plaintiffs alleged that they and their cattle had been poisoned by benzene contamination in the water of a farm they bought from the defendant. To satisfy their burden of proof on causation, plaintiffs offered the expert testimony of a veterinarian. The veterinarian was prepared to give opinion testimony about soil contamination and human health problems despite a stunning lack of credentials to support those opinions. Judge Crabb rejected the testimony, noting that it did not satisfy the Daubert standards. She observed that, as a veterinarian, the expert might have been qualified to render opinions about the cause of herd health problems, but his opinions on that subject nonetheless failed because he did not follow scientifically reliable methods in arriving at those opinions. The court characterized the opinions as nothing more than "unscientific speculation offered by a genuine scientist" rather than the "genuinely scientific evidence" expert testimony is supposed to be.

Chief Judge Shabaz has also dismissed cases after concluding that the expert testimony offered by the plaintiffs was insufficient to satisfy the burden of proof on causation. Two such cases involved claims of injury resulting from an allegedly defective orthopedic bone screw device attached to the plaintiff's spine during spinal fusion surgery. In Cali v. Danek Medical, Inc., 95-C-753-S, the expert testimony was insufficient to save the product liability claim from dismissal because the proposed experts had no personal knowledge, training or experience in medical instrument design or engineering and had never treated patients with orthopedic screw implants. One of the experts offered the opinion that, since there was instrumented fusion followed by neurological deficits, the former was "probably either a direct or indirect cause" of the latter. Noting that the conclusion lacked scientific support, the court held that the opinion was "not entitled to the dignity of evidence."

Similarly, in Smith v. Sofamor, S.N.C., 96-C-956-S, the court granted summary judgment to the defendant on the ground that the report and deposition testimony of plaintiff's only expert, Dr. A. Yale Gerol, was insufficient to create a genuine issue of fact on the question of causation. Gerol had concluded that, since the plaintiff's condition worsened after the instrumentation surgery, the bad result was caused by the defendant's orthopedic bone screw device. The court dismissed the opinion as having no scientific basis whatsoever. In response to plaintiff's suggestion that Gerol would

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have given a fuller explanation of his opinions had he been asked about them at deposition, the court responded that plaintiff's position evidenced a fundamental misapprehension of the summary judgment procedure. Rule 56(e) requires the plaintiff to come forth with evidence sufficient to support every essential element of its claim, including the element of causation.

After summary judgment was granted, the plaintiff in Smith moved to alter or amend the judgment arguing that he had been wrongfully deprived of a Daubert hearing on the admissibility of Gerol's expert testimony. The court denied the motion, noting that the admissibility of expert testimony under Daubert is routinely addressed on summary judgment. There is no need for a hearing or a trial if the plaintiff cannot make a prima facie showing that his expert's opinions have sufficient scientific validity to be received into evidence under the Daubert standard.

McKusick v. Hi-Tech Engineering, Inc., 97-C-0692-S, was a product liability case in which the plaintiff alleged he was injured by a chemical spill that occurred when equipment manufactured by the defendant failed. The defendant moved for summary judgment arguing, among other things, that plaintiff's expert testimony was inadmissible and insufficient as a matter of law to establish liability. The court disagreed. It held that plaintiff's liability expert, George Wandling, was qualified to testify about equipment design flaws because he was a design engineer with extensive training and experience in evaluating the hazards and risk analysis of machine design. Although Wandling's opinion was not arrived at by employing a scientific method that included verification and peer review, it was nonetheless admissible. According to Judge Shabaz, Daubert provides guideposts for the admissibility of scientific testimony, but the analysis under Daubert is flexible, particularly when the expert opinion relates to how a manufacturer should respond to a known problem with the use of its machine.

RECENT NOTEWORTHY DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS

By
Michael Modl
Axley Brynelson

This article will hopefully be the first of a regular feature in the newsletter summarizing recent Seventh Circuit decisions which may be of interest to all attorneys practicing before the United States District Court for the Western District of Wisconsin. The summaries will focus on those significant Seventh Circuit decisions relating to application of the Federal Rules of Civil Procedure or Federal Rules of Evidence and appellate issues.

APPELLATE BRIEF WORD LIMITS. In DeSilva v. DiLeonardi, 185 F.3d 815 (7th Cir. 1999), the Seventh Circuit considered whether appellants' counsel should be sanctioned for filing a brief that exceeded the 14,000 word limit. The appellants' FRAP 32(a)(7)(C) certificate had represented that the brief was under the 14,000 word limit. The problem arose as a result of appellants' brief being prepared with Microsoft Word 97, which did not count footnotes or endnotes unless specifically requested to do so. Under Rule 32(a)(7)(B)(iii), Federal Rules of Appellate Procedure, footnotes must be counted toward the allowable 14,000 word limit. Only the corporate disclosure statements, the table of contents, the table of citations, the statement with respect to oral argument, certificates of counsel and addendums to the brief containing statutes, rules or regulations, are not counted toward the 14,000 word limitation.

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WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

NOTICE OF ANNUAL MEETING AND CLE PROGRAM
THURSDAY, JUNE 8, 2000
U.S. COURTHOUSE
MADISON, WISCONSIN

11:00 a.m.	Annual Business Meeting – U.S. Courthouse, Room 250
12:00 p.m.	Luncheon – White Horse Inn Keynote Speaker: David S. Schwartz, Professor of Law UW-Madison Law School
1:30 p.m. - 3:00 p.m.	"HOT TOPICS" IN THE WESTERN DISTRICT OF WISCONSIN
1:30 p.m.	Employment Law (Jeff Scott Olson & Richard Briles Moriarty)
2:00 p.m.	Intellectual Property (Eugenia G. Carter & Adam L. Brookman)
2:30 p.m.	Expert Testimony and Reports. Proposed Changes to the Federal Rules of Evidence. The Impact of *Daubert*. (Robert M. Whitney)
3:00 p.m. – 3:15 p.m.	Break
3:15 p.m. – 4:00 p.m.	"Nuts And Bolts" of Federal Practice in the Western District of Wisconsin: • Proposed Changes to the Federal Rules of Civil Procedure; • Practice Expectations; The New ADR Local Rule; • Standard Orders; • Sanctions And Discovery Abuses (Todd Smith, Leslie Herje & the Clerks for the District and Magistrate Judges)
4:00 p.m. – 4:30 p.m.	Judges' Panel and Discussion (Chief Judge John C. Shabaz, District Judge Barbara B. Crabb, Chief Bankruptcy Judge Robert D. Martin and Magistrate Judge and Clerk of Court Joseph Skupniewitz)
4:30 p.m.	Reception (beverages and hors d'oeuvres)

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

Annual Meeting Reservation Form
Thursday, June 8, 2000

Name: _____ Phone: _____

Address: _____

_____

I will be attending (see box below for locations):

- ❒ 11:00 Business Meeting
- ❒ 12:00 Luncheon
- ❒ 1:30 CLE Program
- ❒ 4:30 Reception

Luncheon Menu Selection
($10.00 includes tax & gratuity)

- ❒ Beef Bourguignon
- ❒ Stuffed Chicken
- ❒ Vegetarian Pasta Salad

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

Lunch ($10.00) _____

Cost of CLE Program ($50 for non-members; Free for members) _____

Membership dues for 2000 - 2001 ($35) _____

TOTAL _____

Please return with your check by June 2, 2000 to:

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

The luncheon will be held at the White Horse Inn and all other portions of the day's events will be held at the Federal Courthouse.

Although the Seventh Circuit did not sanction appellants' counsel for violating the 14,000 word limit, the court did caution attorneys practicing before the Seventh Circuit to be familiar with the software programs they are using for preparing briefs and to make certain that footnotes are counted as words for purposes of the 14,000 word limit. The DeSilva court commented, "law firms should alert their staffs to the issue pending resolution at the software level." DeSilva, 185 F.3d at 817.

RULE 68 OFFERS OF JUDGMENT. In Poteete v. Capital Engineering, Inc., 185 F.3d 804 (7th Cir. 1999), the court considered application of Rule 68 Offers of Judgment in the context of the defendant prevailing on a motion for summary judgment. Plaintiff brought suit under ERISA claiming he was entitled to more than the vested balance in his account with the plan. Defendants denied that plaintiff was entitled to any more than the account balance and made a Rule 68 Offer of Judgment for the account balance, which the plaintiff rejected. Defendants then moved for summary judgment, which the court granted. The district court also, in granting the motion for summary judgment, ordered defendants to pay plaintiff his account balance. The district court judge then awarded the defendants approximately $26,000 in court costs and attorney's fees incurred after the Rule 68 Offer of Judgment had been made.

The Court of Appeals vacated the district court decision. The court observed that Rule 68 is applicable only to cases the defendant loses, but loses at a level that leaves him better off than if the plaintiff had accepted the offer. Finding that the defendants' offer was a genuine offer of judgment under Rule 68, the Seventh Circuit concluded that the defendants were entitled to the benefits that the Rule offers a defendant, and no more. The Seventh Circuit vacated the district court's judgment awarding defendants their post-offer attorney's fees, after concluding that Rule 68 does not entitle a defendant to recover his attorney's fees. Poteete, 185 F.3d at 807. The court observed that attorney's fees are awardable only to a prevailing party and any defendant who is entitled to invoke Rule 68 is by definition not a prevailing party.

SEALING CONFIDENTIAL INFORMATION. In Citizens First National Bank of Princeton v. Cincinnati Insurance Company, 178 F.3d 943 (7th Cir. 1999), the Seventh Circuit revisited the showing a party must make in order to be entitled to a protective order under Rule 26(c), to protect confidential information. The court noted that the trial court judge must make a determination of good cause to seal any part of the record of a case. The court may not grant a virtual carte blanche to seal whatever portions of the record that party wishes to seal. The court recognized the public interest in knowing what goes on at all stages of a judicial proceeding. The court observed:

> That [public] interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case.

Citizens First Nat. Bank, 178 F.3d at 945.

Specifically, the court noted that the language "other confidential ... information" and all "governmental information" in the protective order was overly broad. The court observed that

this language was so loose that it amounted to giving a party carte blanche to decide which portions of the record would be kept secret. The court found the protective order to be invalid for the additional reason that "it is not limited to pretrial discovery; it seals the documents covered by it even after they are introduced at trial." Id. at 945.

The court concluded that most cases endorse a presumption of public access to discovery materials and "therefore require the district court to make a determination of good cause before he may enter the order." Id. at 946. The Seventh Circuit observed that, although determinations of good cause need not be made on a document-by-document basis, the district court judge should be satisfied that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets. The district court should also make explicit that either party and any interested member of the public can challenge the secreting of particular documents. Id. at 946.

WILL UNPUBLISHED DECISIONS BE AVAILABLE ONLINE?

Efforts are afoot to make unpublished decisions of the United States District Court for the Western District available on the Court's website, located at *www.wiw.uscourts.gov/pub_district/forms.htm.* The Western District of Wisconsin Bar Association wholeheartedly supports these efforts and has offered to assist if the Court so desires.

Allowing access to the Court's opinions online would be beneficial to both the Court and the Bar. Attorneys and other interested individuals would be able to find and review decisions far more easily than they can do at present. Moreover, they would be able to do so at no cost, thereby enhancing equal access to the Court.

The Court's website already contains a lot of helpful information. Putting the unpublished decisions online would make the website even more valuable.

MY SERVICE AS APPOINTED COUNSEL: A LESSON IN WHAT IT MEANS TO BE A LAWYER

By
Todd Smith
LaFollette, Godfrey & Kahn

As we are all keenly aware, access to the judicial system is too often out of the reach of many Americans. In the Western District and elsewhere there are indigent individuals with legitimate claims or needs who deserve competent representation but cannot afford to pay for it. To help make justice accessible to all, our court maintains a panel of attorneys willing to take criminal, *habeas corpus* or civil rights appointments on either a *pro bono* or reduced fee basis. However, too few of our members are aware of the court's volunteer lawyer panel. As chair of the WBDA's pro bono/pro se committee, I would like to describe for you the very rewarding experience I had as appointed counsel and to encourage you to join the volunteer lawyer panel.

My appointment originated as many do — with a call from Judge Crabb's chambers. I was asked if I was willing to represent a Wisconsin inmate who had filed a civil rights action under 42 U.S.C. § 1983 alleging that he was injured at the hands of a prison guard. The caller suggested that a trial in this case was likely given the competing factual allegations. Always eager for a federal jury trial, I was happy to accept.

After receiving the file – six inches thick – I began to review my new client's scribbled allegations. After working through the irrelevant material, it became clear that the case had several flaws but at least one important strength. My client alleged that, while being escorted by the defendant prison guard to his cell, an argument began over whether certain items had been removed from the cell. My client, whose hands were restrained in handcuffs behind his back and his legs

in leg irons, conceded that he disobeyed the guard's instructions to kneel down so that the leg irons could be removed. What happened next was, of course, hotly disputed and would become the central issue of the case.

My client alleged that the guard, angry that my client had disobeyed his order, reached down and grabbed the short chain connecting my client's legs and pulled swiftly backwards. This action had the effect of throwing my client's head toward the floor. Because his hands were restrained behind his back, he had nothing with which to break his fall and his face hit the concrete prison floor. The guard denied he pulled on the leg irons, alleged that he used only so much force as was required to return my client to his cell, and claimed my client was not injured.

Here come the flaws in the case – there was no eyewitness to the incident – it would be my client's word against that of the prison guard. Furthermore, my client was hardly a model inmate. He was on virtually every extra-security measure imaginable (hence the handcuffs and leg irons) and had a history of violence against guards. This information was likely admissible because at trial we would be forced to concede that he had again disobeyed a direct order designed to enhance prison guard safety.

However, as I mentioned, the case did have one positive aspect. My client's injuries could not be disputed by the defendant. X-rays taken the very next morning confirmed that my client had suffered a broken cheek bone. Given the significant and unexplained nature of the injury, I thought it would be difficult for a jury to conclude that my client somehow inflicted it upon himself while confined in a small segregation cell.

Interviewing my client in the Columbia Correctional Institution was my first visit to a prison. I found him to be extremely eager to please and was struck with how young he appeared to be (he was 20 but appeared to be closer to 16). My client already had a trial theory in mind – he had all but prepared my closing statement for me. I advised him of the difficulties presented by his case and about my opinion that juries tend to view prisoner claims with much skepticism. He indicated he understood and pledged to stay positive, but it was clear to me he did not expect his voice to be heard.

At trial, my client's earnestness and sincerity were obvious. He told the jury his story and was honest about his past incidents with guards and about his failure to obey orders in this case. I believe his honesty enabled the jury to disregard the defendant's attempts to paint him as a constant troublemaker who would do or say anything to retaliate against the system. As I predicted, the defendant was unable to explain my client's injuries and once the evidence was in, I believed we could win. After only 35 minutes of jury deliberation, I was summoned back to the court for the verdict. Happily for me, the jury had believed my client's testimony and found the defendant liable. After the liability verdict but before the trial on damages, my client agreed to a substantial settlement.

In my conversations with my client after the trial, I learned that, despite his many run-ins with the law, he had never before faced a jury. The gratitude he felt toward those citizens was palpable. I thought this might be the first time in his life he felt he really had been heard. I hoped – and continue to hope – that he would use this experience to turn his life around. There are signs that he is doing so – he used a good portion of his settlement to pay his outstanding restitution orders and is working on obtaining his GED.

Many of us become attorneys thinking we can make a difference in people's lives. Some of us are lucky enough to accomplish this goal. Others, myself included, find too much of our time taken up by the demands of modern private practice such as searching for the next client or worrying about a billable hour goal. Cases like this one keep these pressures in perspective and remind us of the real value of our services to people whom we might not otherwise meet.

Application materials for the court's volunteer program are available on the court's website at *www.wiw.uscourts.gov/pub_district/forms.htm* or by calling the clerk's office at 264-5156.

Western District of Wisconsin Bar Association 1999-2000

WDBA

The ***Western District News*** is edited by Bob and Le Jordan, Communicators of Wisconsin, Inc., and is a publication of the Communications Committee of the Western District Bar Association.

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