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U. W. Law Professor David S. Schwartz Comments on Presidential Elections' Impact on United States Supreme Court

David S. Schwartz, professor at the University of Wisconsin Law School, was the keynote speaker at the Western District Bar Association's annual luncheon on June 8, 2000.

Prof. Schwartz's presentation, entitled "2001: A Supreme Court Odyssey," discussed the possible changes on the court and how they may be affected by the 2000 presidential election. Prof. Schwartz has tracked the ideological make-up of the court and the changes that have occurred over the last few decades.

In 1968, the Warren Court was comprised of 5 liberal justices, 2 moderates and 2 conservative leaning justices, according to Prof. Schwartz. Since 1984, the Burger and Rehnquist Courts have consisted of 4 liberal justices and 5 justices who are either conservative or conservative-leaning. (See Table 1- pg 4).

Because of age or health reasons, Professor Schwartz estimates that there are potentially 4 justices who could retire during the next presidential term. (See Table 2 - pg 5) Justices Stevens (liberal), Rehnquist (conservative), O'Connor (conservative-leaning) and Ginsburg (liberal) are the most likely to leave during the next term. Not surprisingly, indicates Prof. Schwartz, if Bush is elected the appointees for the Supreme Court are likely to be conservative or conservative-leaning, while Gore's appointees would be more liberal or moderate.

A president's power to appoint justices has always had an impact on shaping the law, with the effect often lasting far beyond the president's term in office. However, the potential duration of influence by a president appointing justices is likely to be greater now than it was 40 years ago, contends Prof. Schwartz.

In the 32 year period from 1936 until 1968, 20 U.S. Supreme Court Justices retired. The average years of service for the retiring justices was 14.5 years during that period. In the subsequent 32 year period, from 1968 through 2000, only 12 justices retired. Moreover, the average years of service for retiring justices increased to 23 years.

The trend, therefore, is that justices will be staying on the court for longer periods of time. Even so, the next president is likely to have an opportunity to appoint justices who can swing the court one way or another.

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Keynote Speaker . . .

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According to Prof. Schwartz, the practical changes on the court could go beyond the general ideology of the court as liberal or conservative. Prof. Schwartz believes that the court has displayed a considerable amount of instability which could change with new appointees.

Prof. Schwartz identified two indicators of instability on the court. First, the Supreme Court has been overruling significant cases at a greater rate than in the past. Many of the cases overruled, according to Schwartz, were cases decided within the past 32 years.

Another sign of instability, according to Prof. Schwartz, "is a high rate of confusing plurality opinions coming from the Supreme Court that leaves significant legal issues unsettled." Prof. Schwartz suggested that plurality opinions tend to be generated more often when there is no ideological majority.

When Prof. Schwartz took questions, one audience member asked Prof. Schwartz if he had any indication that any of the sitting justices were going to retire. Prof. Schwartz responded that he had no direct knowledge of any pending retirement nor had he heard rumors that one or more justices would retire.

Prof. Schwartz was careful to explain that he was merely speculating on possible retirements based on the ages and health of the justices. Justice Stevens is 80 and Chief Justice Rehnquist is 76. Furthermore, Rehnquist, O'Connor and Ginsburg all have reported health problems.

Professor Schwartz's remarks were well-received from the audience of approximately 60 attorneys and judges. If anyone would like a rough transcript of the presentation please contact Kevin Palmersheim at 836-6400.

From The Annual Meeting . .



UW Professor and keynote speaker David Schwartz addresses the Western District Bar Association at its annual luncheon on June 8, 2000



New officers were elected at the Western District Bar's annual meeting. From left to right Leslie Herje (Treasurer), Stephen Eisenberg (Secretary), Paul Barnett (President), Cathy Rottier (Past President) and Tom Bertz (Vice President/President Elect).



Clerk of Court/Magistrate Judge Joseph P. Skupniewicz, Judge Barbara Crabb and Chief Judge John Schabaz participate in the annual judges panel with members of the Association.

THE PRESIDENT'S CORNER

By
Paul L. Barnett
President

Western District of Wisconsin Bar Association

Greetings to all members of the Western District Bar Association. I hope that your summer has been an enjoyable one.

I am pleased and honored to serve you as President of the WDBA for the 2000-01 year. This will be an important year for the WDBA. I look forward to the challenge. I am fortunate that this year's Executive Board and Board of Governors consist of very talented and highly motivated lawyers. This group will accomplish great things in the coming years.

The reason that I believe this is an important year for the WDBA is because we are at a crossroads. Together, we must decide what the vision and mission of this organization will be for the next five or ten years. The success of the WDBA in the coming decade will depend in part on the decisions we make this year.

When the WDBA was first formed, its role within the Western District of Wisconsin was largely undefined. Of course, the leadership quickly recognized opportunities to assist the court in improving the practice of law in this District. Thus, we organized an annual continuing legal education and luncheon program, and included a Judges Panel so practitioners could interact with the judges of the court and hear first-hand the views of the Judges on a variety of subjects. Our Court Rules, Practice and Procedures Committee produced a "Practice Expectations" document that, based on the collective experiences of practitioners together with the input of the judges' clerks, contains the general practices of the Judges on routine procedural or trial technique matters. And, at various times throughout the past decade, WDBA members have been appointed to serve on court committees, such as the committee formed by Chief Judge Shabaz to consider the reappointment of Magistrate Judge Crocker.

Each of these events or tasks has undoubtedly helped the district court and enhanced the WDBA's reputation. However, besides the CLE and luncheon program, which has become an annual staple of the organization, we do not have any regular activities, programs or projects. Our membership services now consist of periodic newsletters and the annual CLE and luncheon program.

This is not to take anything away from the work of the WDBA or of its leaders in the years past. The work has been valuable and the leadership exemplary. It is to say that, whereas in its early years the WDBA had a clean slate to write on, it is now not as easy for us to identify projects worthy of our time and of value to the district court and our members.

For this reason, I believe it is time for us to take stock and determine what direction we wish to take. Accordingly, one of my key initiatives this year will be to organize a strategic planning session. The State Bar has individuals on staff who are trained and available to facilitate such an effort. In the short term, this process will require a commitment of several hours on the part of the WDBA's leadership. This investment of time, however, will be repaid several times over in the long term as we chart the course for this organization for many years to come.

I welcome your support for this important endeavor. I also invite your input. Your observations concerning the mission of the WDBA and your suggestions for projects and programs that will be of value to you, the members, and to the district court are important.

Please feel free to contact me or any of the other members of the Executive Board or the Board of Governors.

TABLES FROM PRESENTATION OF DAVID SCHWARTZ
AT ANNUAL MEETING OF WESTERN DISTRICT BAR
JUNE 8, 2000

Table 1: The Past

<i>June 1968</i>	<i>June 1984</i>	<i>June 2000</i>
Warren – L (1954)	Burger – C (6/23/69)	Scalia – C (9/26/86)
Black – M (1937)	Powell – CM (12/19/71)	Kennedy – CM (2/18/88)
Douglas – L (1939)	Stevens – L (12/19/75)	Stevens – L
Harlan – CM (1954)	Rehnquist – C (12/15/71)	Rehnquist – C
Brennan – L (1956)	Brennan – L	Souter – L (10/19/90)
Stewart – CM (1958)	O'Connor – CM (9/25/81)	O'Connor – CM
White – M (1962)	White – CM	Ginsburg – L (8/10/93)
Fortas – L (1965)	Blackmun – L (5/14/70)	Breyer – L (8/14/94)
Marshall – L (1967)	Marshall – L	Thomas – C (10/23/91)

Totals:

L	5	L	4	L	4
M	2	M	0	M	0
CM	2	CM	3	CM	2
C	0	C	2	C	3

L = (more or less) Liberal M = Moderate CM = Conservative/Moderate C = Conservative

Bold indicates change.

Table 1a: Longevity

	1936 - 1968	1968-2000
Number of retirements	20	12
Average years of service for retiring Justices	14.5	23.0

Table 2: Into the Future

<i>January 2000</i>	<i>Age</i>	<i>Bush-D</i>	<i>Bush-R</i>	<i>Gore-R</i>	<i>Gore-D</i>
Scalia – C	64				
Kennedy – CM	64				
Stevens – L	80	CM	C	L	L
Rehnquist – C	76*	C	C	M	L
Souter – L	61				
O’Connor – CM	70*	CM	C	M	M
Ginsburg – L	67*	M	C	L	L
Breyer – L	62				
Thomas – C	55				

Totals:

After Stevens’ retirement:

L 4	L 3	L 3	L 4	L 4
M 0	M 0	M 0	M 0	M 0
CM 2	CM 3	CM 2	CM 2	CM 2
C 3	C 3	C 4	C 3	C 3

By end of administration:

L 4	L 2	L 2	L 4	L 5
M 0	M 1	M 0	M 2	M 1
CM 2	CM 3	CM 1	CM 1	CM 1
C 3	C 3	C 6	C 2	C 2

L = (more or less) Liberal M = Moderate CM = Conservative/Moderate C = Conservative
 D = Democratic Senate majority R = Republican Senate majority
 * = reported health problem

Average retirement age of Justices since 1970: 79

Judge Barbara Crabb Favors Better Use of Technology in the Western District

Chief Judge John C. Shabaz, District Judge Barbara B. Crabb, and Magistrate Judge and Clerk of Court Joseph W. Skupniewitz participated in a judges panel at the annual meeting on June 8, 2000. Judge Crabb used this opportunity to highlight a few areas where technology could be better utilized in the Western District.

For several years, Judge Crabb's courtroom has been set up to use "Elmo," an automated evidence presentation system. Essentially, Elmo permits counsel to link up laptop computers with a sophisticated projection system, a VCR and television monitors for the parties, the court, the witnesses and the jurors.

Despite the potential of the Elmo System, Judge Crabb laments that the system is used mainly as a glorified overhead projector. Said Crabb, "I could count on one hand the number of trials where Elmo has been used creatively."

For attorneys who would like to know more about using the Elmo system or would like to practice with the system, court staff is available for assistance. More information is also available at www.wiw.uscourts.gov.

Judge Crabb and Magistrate Judge Crocker are also placing PDF copies of selected opinions on the Western District Website. Judge Crabb indicated that the screening factors for putting

decisions online would be similar to the factors considered for publication.

Judge Crabb noted she was more inclined to publish cases involving Wisconsin law because there is often a lack of Wisconsin case law on point. However, commented Crabb, she would probably lean toward making more cases available on the Website so the attorneys or reporting services can sift through the decisions and determine what may be of interest.

Despite the increased use of technology by the court, the Western District is reluctant to authorize widespread use of e-mail filings. Judge Shabaz's comment on the current court filing system was, "It's not broke."

Judge Crabb concurred with Judge Shabaz in declining to accept many e-mail filings, including briefs. However, Judge Crabb's court does accept e-mailed proposed findings of facts because it makes it easier for her staff to reproduce the facts in the court's decisions. Attorneys should not submit computer disks, however, because the disks merely take up valuable file space.

If attorneys have specific questions on whether an e-mail filing is appropriate, he or she should contact the Clerk of Courts for clarification.

Law Clerks Provide Behind The Scenes Look At Western District

Three law clerks participated in a panel at the Western District Bar Association's annual meeting on June 8, 2000, to address practice expectations in the Western District. Although the judges participate in a similar panel on an annual basis, the law clerks' panel presented a rare opportunity to get a behind the scenes perspective.

Peter Oppeneer, Law Clerk for Judge Shabaz; Mark Edwards, Law Clerk for Judge Crabb; and Kelly O'Driscoll, Law Clerk for Magistrate Judge Crocker, participated in the panel and answered questions from the bar.

Most of the law clerks' comments were practice tips on various procedural matters. For example, Mr. Edwards commented that one of the common failures on summary judgment motions is the failure to follow the basic summary judgment procedure. Even if an issue is appropriate for summary judgment, a motion will be denied if the procedure is not followed correctly.

One example cited by Edwards was an inadequate proposed finding of fact reading "the testimony was...." The fact that testimony was given does not support summary judgment. Rather, it is the fact that was testified to that is important.

Mr. Oppeneer commented that lack of preparation has doomed more than one attorney who has appeared before Judge Shabaz. Oppeneer indicated that Judge Shabaz enters judgment from the bench immediately after a jury verdict is returned, and counsel needs to be prepared for

what to ask for in the judgment. Oppeneer related one example of a defendant's attorney who allowed judgment of \$50,000 to be entered against his client when the comparative negligence laws did not permit recovery against the defendant.

Attorneys should also come to the initial pretrial fully prepared to schedule all aspects of the litigation, mentioned Oppeneer. Oppeneer reminded those present that there are very few extensions or continuances in Judge Shabaz's court, and that the initial pretrial was "the one opportunity to influence the trial date."

Ms. O'Driscoll discussed how Magistrate Judge Crocker's role differs somewhat from Judges Shabaz and Crabb. For example, Judge Crocker handles discovery disputes for Judge Crabb's cases. O'Driscoll commented that Judge Crocker is willing to get on the phone with parties to resolve discovery issues and keep discovery on track. However, attorneys should be aware that Judge Crocker does not have a background in the case. Consequently, his rulings could seem arbitrary to one party or the other, or the Magistrate Judge could end up playing Solomon in order to keep the process going. As a result, the parties may be better off trying to resolve discovery disputes themselves.

All three of the law clerks agreed that one of their primary roles is reading through the briefs filed in the respective courts. As a practical tip, the clerks noted that attorneys do not need to reproduce the facts in briefs for dispositive motions, because the fact section will merely repeat the proposed findings of fact submitted by the party. Moreover, although Judge Shabaz's Court prefers that citations to facts be to the record, Judge Crabb's Court prefers that the briefs cite the proposed facts rather than the record. All three law clerks agreed, though, that the most important consideration in citing facts is to not misstate or overstate the facts as that will merely hurt your credibility with the court.

Western District of Wisconsin Bar Association 1999-2000

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