



NEWSLETTER OF THE
WESTERN DISTRICT OF WISCONSIN
BAR ASSOCIATION

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None Of Us Are Isolated From Terrorist Attack

By Tom Bertz
President, Western District Bar Association

On Tuesday, September 11, 2001 at about 9:30 a.m. CDST, terrorists attacked the United States of America by destroying the World Trade Center in New York City, by severely damaging the Pentagon in Washington, D.C., and by hijacking another plane which was downed near Pittsburgh, Pennsylvania and was believed to be en route also to Washington, D.C. The destruction has not yet been totaled, but in terms of lives it is estimated that over 6,000 people have died and in terms of physical destruction it is estimated to be in the billions of dollars. Our hearts, prayers and thoughts go to those who have suffered from this enormous tragedy.

The Western District Bar Association of Wisconsin does not stand isolated from the events that have unfolded and it will not stand apart from the unfolding future. Because the attack was one on our country and its institutions, it is also an attack on the WDBA. WDBA members have direct or indirect ties to the calamity.

As WDBA members, we must show unstinting support for our beloved country, its leaders, its institutions and in particular, our federal court system. That system preserves the freedoms and liberties with which we have been so richly blessed for over 200 years.

This is my first address to the WDBA members. Little did I realize that when I assumed the office of the Presidency that my first article to the members would be at such a solemn, sobering and unsettling time. I actually had written my column earlier about Chief Judge Crabb appointing several WDBA members to court committees. I am still publishing that article in this newsletter because it is an example of how important the federal judiciary is to this country. Because the events of September 11, 2001 have seen front page coverage in our newspapers and rightfully dominates all our media, I hesitated to also write about it since I could not contribute anything which had not already been spoken. I did address the subject for these two reasons: 1) to mark the date as my first article so that I can compare this article to what the conditions will be like when I write my last one next year; and 2) to express my thoughts that we as WDBA members also have been attacked.

Despite the ugly distraction of the attack, we still must find the time and courage to continue our work as judges, magistrates and lawyers. We must also continue in our work for the WDBA so that this organization will continue to grow and serve as a beacon of freedom in the years ahead.

Western District Court Responds to Terrorist Attacks With Heightened Security

The Western District Courthouse closed on Tuesday, September 11, in response to the terrorist attacks. Chief Judge Barbara Crabb and Chief Deputy U.S. Marshall Terry Fred responded to a directive from the General Services Administration (GSA) for a shutdown of all federal installations nationwide. The courthouse was closed to incoming traffic at about noon and courthouse employees, other than security personnel, were authorized to go home at about 12:30 p.m.

There were no trials going on and no jurors in the building when the shutdown order came. A sentencing scheduled for that afternoon before Judge Crabb was rescheduled to a later date.

According to Marshall Fred, the courthouse security staff implemented enhanced security procedures soon after the tragedy occurred. A plan for graduated levels of security existed long before the terrible events of September 11. When the Marshall's office became aware of the terrorist attacks, the decision was quickly made to beef up existing security precautions.

“New” Limits on Depositions Under the FRCP

Recent amendments to the Federal Rules of Civil Procedure, effective since 12/1/00, include changes to the process of taking depositions which all practitioners should be aware of when developing a comprehensive litigation strategy.

There have been two principal amendments to Rule 30(d). Subdivision (1) has been amended to clarify that the general prohibition against instructions not to answer is not limited to a “party” but also extends to a “person.” This amendment codifies the way the rule had previously been understood and interpreted.

A singular change in deposition practice is reflected in Rule 30(d)(2), which now imposes a presumptive time limit on each deposition - “one day of seven hours,” unless otherwise authorized by the

court. There are several important features to this new rule. First, the *parties* may stipulate around the limit. In other words, it is not a right that can be asserted by the witness. Second, the text of the rule contemplates the completion of a deposition in a single calendar day. Third, the Advisory Committee's note provides each deposition of a person designated by an organizational defendant counts as a separate 7-hour deposition. Fourth, according to the Advisory Committee, “the only time to be counted is the time occupied by the actual deposition,” not time consumed by breaks. Oddly, however, the Committee further notes that “preoccupation with timing is to be avoided.”¹

Commenting on the 7-hour rule for the Western District Bar Association's April CLE program, Magistrate Judge Crocker wrote, “In most cases, either your depositions won't exceed seven hours or the attorneys will agree on which witnesses may go long. ... But if your opponent will not agree to extend any particular deposition, then you will have to show good cause before the court will add time.” Establishing good cause may end up being a difficult task. The bottom line is that, although courts will cut you some slack if you can show you deserve it, don't expect them to honor the new rule in the breach.²

While this approach to taking depositions is not quite like operating with a chess clock, attorneys will have to take these time constraints into account when it is anticipated a deposition will bump up against the time limit. For example, a deposition that necessarily involves a review of documents will take much longer than a straight Q & A session. Reviewing documents during the time scheduled for a witness' deposition counts against the 7-hour limit. Accordingly, absent stipulations between counsel, anything you can do to streamline the process should be considered. Hopefully those who practice law in the Western District will not become time-obsessed and will graciously allow accommodation as needed and required by each case.

¹ This material is summarized with permission from an article prepared by Attorney Gregory P. Joseph for *The Practical Litigator*, January, 2001, an ALI-ABA publication. See also, ali-aba.org.

² Excerpted with permission from Magistrate Judge Crocker's presentation at the WDBA's annual program on April 27, 2001.

This District's Input to the Bench/Bar Relations Committee of the Federal Bar Association

By: Cathy Rottier
Boardman Law Firm

Late last year, Judge Shabaz asked me to serve as an attorney liaison for this district to the Bench/Bar Relations Committee of the Federal Bar Association. The Committee had two initiatives. The first was to improve relations between the federal judiciary and members of Congress. The second was to improve relations between the federal courts and our citizenry.

In connection with the second initiative, each district was asked to identify efforts it made to interest and involve our citizens in the activities of the Court. In collaboration with Judge Shabaz, I prepared the following memorandum which was sent to the Federal Bar Association for incorporation in its report.

The United States District Court for the Western District of Wisconsin attempts to interest and involve the citizenry regarding the Court in the following ways:

- The Court maintains a website to provide easy access to forms and filing information. The website address is www.wiw.uscourts.gov.
- The Court conducts citizenship ceremonies on an as needed basis, currently at the rate of about once every two months. On the selected day, there may be two or three ceremonies involving about 50 people each. Several community organizations, including the League of Women Voters, the SERTOMA (Service to Mankind) Club, the Daughters of the American Revolution, and the Dane County Legal Auxiliary, assist in making the citizenship ceremony a meaningful occasion for all participants.

- The Court appointed four attorneys and two non-attorneys to a Citizens Panel to Consider the Reappointment of Magistrate Judge Stephen Crocker and made facilities available for the panel members to meet and interview the Magistrate Judge.
- The Court continues to host meetings of the James E. Doyle American Inn of Court, a group formed to advance civility and comradery among members of the legal profession in the district.
- The Court participates in the activities of the Western District of Wisconsin Bar Association, an association of lawyers whose mission is to assist the Court in the prompt and just administration of justice. Each year, the district judges participate in a panel program sponsored by the WDBA to answer questions about court procedures and address any areas of concern.
- The Court continues its primary focus on assuring prompt adjudication of cases, so that our citizens can be assured that a matter filed in this court will receive prompt attention and sure disposition.
- The Court treats potential jurors as VIPs. It seeks to minimize inconvenience to them by calling in only the number reasonably needed to serve for an upcoming trial. The Court monitors cases for last-minute settlements so that jurors need not appear at court unnecessarily. Out of respect for the jurors' time, trials in this district are required to start on time and continue without significant interruption until completed.

If you have suggestions on other ways our district court could advance the initiatives of Bench/Bar Relations Committee, please contact me by e-mail at crottier@boardmanlawfirm.com or by phone at 608-283-1749.

Multi-Disciplinary Practice

The State Bar of Wisconsin has formed a multi disciplinary practice commission to study issues relating to that subject. Those issues are as follows:

- a. Consider SCR 10.02(2) which provides that the purposes of the State Bar of Wisconsin include: "...to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; ...to safeguard the proper professional interests of the members of the bar;...to promote the innovation, development and improvement of means to deliver legal services to the people of Wisconsin..."
- b. Whether the legal profession can effectively prevent lawyer participation in MDPs by enforcement of the existing laws and Supreme Court Rules and whether it is appropriate to do so.
- c. Consider the importance of coordinating with other State Bars.
- d. Whether there is a desire by the public to have the option to seek legal services from lawyers practicing in an MDP setting.
- e. Whether it is in the public interest to have the option to seek legal services from lawyers practicing in an MDP setting.
- f. Whether the core values of the profession can be preserved in an MDP setting.
- g. Whether the Rules of Professional Conduct can be effectively enforced if SCR 20:5.4 is modified.
- h. Whether the definition of the practice of law should be changed, whether the bar should actively promote enforcement of the unauthorized practice of law statute and whether a civil statute should be proposed.

The Commission will submit an interim, preliminary report to the Board of Governors in time for publication in the February issue of the Wisconsin Lawyer. Public hearings will be held in several locations throughout the State. The final report and recommendations of the Commission will be placed on the action agenda of the State Board of Governors meeting after September 1, 2002.

WDBA members should be aware of the developments in the MDP Commission because it may affect the future of their practice in federal court. Those WDBA members who desire to express their opinions regarding the MDP are urged to contact the MDP Commission members. The subcommittees and members appear on the following page.

The subcommittees and members are as follows:

MDP - Other states

Thomas Drought
Charles Koehler
Earl Munson - C
Patricia Struck
Jim Brennan

Wisconsin public hearings

John Bermingham
Pamela Pepper
Chris Stawski - C
Dan Shneidman
Louise Trubek

European Experiences

Dean Ken Davis - C
Harry Ruffalo
Dean Howard Eisenberg
Marcia Mentkowski
Patricia Heim

UPL

Hon. Carl Ashley
Hon. Kathy Foster
Gerald O'Brien - C
Bill Mulligan
John Busch

Core Values

Andrew Chevrez - C
Diane Mader
Tom Shriner
John Hutchinson
Thomas Basting

Economic Forces

Lewis Posekany - C
Shawn Guse
Dan Eastman
Ben Strauss
Timothy Nettesheim

December 2000 Revision to the Scope of Discovery Under Federal Rule 26(b)(1)

By Michael J. Modl¹

The United States Supreme Court, effective December 1, 2000, amended Federal Rule of Civil Procedure 26(b)(1) to replace the “relevant to the subject matter” standard for the scope of discovery with the current “relevant to a claim or defense” standard. The amended Rule permits discovery under the prior “relevant to the subject matter” standard only where a party shows good cause. It is likely that a new body of case law will develop in the federal courts distinguishing between the “claim or defense” standard and the prior “subject matter” standard. This article will focus on several of the court decisions since the new scope of discovery rule became effective.

The scope of discovery in federal civil litigation has been fairly broad. A number of district courts, in response to complaints of overly broad discovery, enacted local rules to address this problem. Although the District Court for the Western District of Wisconsin did not impose limitations on discovery by local rule, both judges have taken a common sense approach to the scope of discovery, generally allowing for fairly broad discovery but, where appropriate, protecting a party through use of protective orders under Rule 26(c). In 1993, the Federal Rules were amended to provide some limitations on discovery. For example, parties were restricted to twenty-five (25) interrogatories and ten (10) depositions. The Western District, since 1993, has continued with its common sense approach, enforcing these limitations where justice requires.

The 2000 Amendments to Rule 26 indicate an intent to narrow the scope of discovery. This is clear from the very language of Rule 26(b)(1), which limits the scope of discovery to a claim or defense pled by a party. Only where a party makes a showing of good cause is broader discovery under

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Federal Rule 26(b)(1)

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the prior relevance standard permitted. The Advisory Committee notes similarly discuss the concern shared by both the bench and the bar with overbroad discovery and note the desire by attorneys practicing in federal court to have judicial intervention in controlling inappropriately broad discovery. The Advisory Committee notes state,

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. . . . The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.

Advisory Committee notes, 2000 Amendment subdiv. (b)(1).

In Thompson v. HUD, 199 F.R.D. 168 (D. MD. 2001), the court, noting it was dealing with an issue of first impression since amendment to the federal rules on December 1, discussed the scope of discovery under the “claim or defense” standard. The court observed that, although the rule does not explain the difference in scope between the former standard and the new standard, it is clear that the “claim or defense” standard was intended to be narrower than the “subject matter” standard. Thompson, 199 F.R.D. at 171. In determining whether requested discovery is relevant to a claim or defense, the court observed that the most valuable reference is to the pleadings on file with the court. Id. The court, however, cautioned against too narrow or rigid an interpretation of the reference to pleadings on file. The Thompson court suggested that the amendment to Rule 26(b)(1) was not intended to change the long existing rule of notice pleading. The Thompson court resolved the scope of the new Rule 26(b)(1) language by invoking the

factors in Rule 26(b)(2).

In Behler v. Hanlon, 199 F.R.D. 553 (D. MD. 2001), the court found that where the information requested related to the credibility of a witness whose testimony would be directed toward important issues in the case, information sought was discoverable under both the current and previous versions of Rule 26(b)(1). In Ellman v. Hentges, 2001 U.S. Dist. LEXIS 7724 (N.D. Ill. June 7, 2001), the court looked to the specific allegations in the complaint to determine whether information requested by the plaintiff in discovery was within the “claims and defenses” standard of Rule 26(b)(1).

A number of cases cited since the amendment to Rule 26(b)(1) became effective have simply granted or denied requested discovery under the new standard with very little analysis. Sanchez v. Turner, 2001 U.S. Dist. LEXIS 12475 (S.D.N.Y. July 23, 2001) (discovery denied); Salvatorie Studios Int’l v. Mako’s, Inc., 2001 U.S. Dist. LEXIS 11729 (S.D.N.Y. August 13, 2001) (discovery denied); Surles v. Air Fr., 2001 U.S. Dist. LEXIS 10048 (S.D.N.Y. July 17, 2001) (discovery denied); In re Oxford Health Plans, Inc. Secs. Litig., 2001 U.S. Dist. LEXIS 5817 (S.D.N.Y. Apr. 30, 2001) (discovery granted); Anderson v. Hale, 2001 U.S. Dist. LEXIS 7538 (N.D. Ill. May 31, 2001) (discovery granted); and Laurenzano v. Lehigh Valley Hospital, Inc., 2001 U.S. Dist. LEXIS 10534 (E.D. Pa. July 18, 2001) (discovery granted in part and denied in part).

The decisions to date do not suggest that the amendment to Rule 26(b)(1) will bring about a dramatic effect on the scope of discovery. In fact, in the run of the mill case, the rule change may have minimal impact. The rule change may have the most significant application in complex intellectual property or commercial litigation cases.

¹ *Appreciation to Attorney Sarah K. Frost for her research assistance.*

Judge Crabb Appoints Western District Bar Association Members to Court Committees

By: Tom Bertz, President

Chief Judge Barbara B. Crabb through U.S. District Clerk Joseph W. Skupniewitz has called upon the Western District of Wisconsin Bar Association (WDBA) to assist the Court in four areas:

- 1) ADR
- 2) Electronic Filing
- 3) Jury Selection
- 4) Magistrate Judge Skupniewitz Review

Chief Judge Crabb has appointed Court Committees to study those areas for the purpose of making recommendations to the Western District.

The following are the WDBA members on the Court Committees:

1) ADR—Jim Troupis, Michael, Best & Friedrich. Jim is the Chair of the WDBA ADR Committee and also serves as WDBA Treasurer.

2) Electronic Filing—Todd Smith, La Follette, Godfrey & Kahn. Todd also serves as WDBA Secretary. Ted Long of Lathrop & Clark is also on the committee. Ted is a patent attorney.

3) Jury Selection—Lynn Stathas, Reinhart, Boerner, Van Deuren, Norris & Rieselbach. Lynn is the Chair of the WDBA Rules, Practice & Procedure Committee. Tony Tomaselli of Quarles & Brady and Paul Barnett, Assistant Wisconsin Attorney General, are also on the committee. Tony concentrates his practice in intellectual property. Paul is WDBA Past President.

4) Magistrate Judge Skupniewitz Review—Tom Bertz, Anderson, Shannon, O'Brien, Rice & Bertz.

Chief Judge Crabb has already activated the Court Electronic Filing Committee to look into the means and methods of implementing electronic filing. Also on that Court Committee will be representatives from the United States Attorneys' office and the Wisconsin Department of Justice. The other Court Committees will begin work this fall.

On behalf of the WDBA, I thank Chief Judge Crabb and Magistrate Judge Skupniewitz for allowing the WDBA to participate in these areas. I also appreciate the willingness of WDBA members to serve on these Court Committees.

When the Court Committees make final recommendations to the Western District, I anticipate those recommendations will be published in this newsletter. In the meantime, if anyone has any thoughts on any one or more of those four areas, please contact the WDBA member who is on that particular Court Committee.

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.

Western District of Wisconsin Bar Association 2001-2002

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