Western District News

NEWSLETTER OF THE

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

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J.B. Van Hollen Becomes New U.S. Attorney for the Western District

On August 6, 2002, President George W. Bush appointed J.B. Van Hollen from Washburn, WI, to be the new United States Attorney for the Western District. President Bush had nominated him months earlier and on August 1, 2002, the United States Senate confirmed the appointment. His nomination had previously been approved by the Senate Judiciary Committee. Wisconsin Senators Herb Kohl and Russell Feingold serve on that Senate Committee.

Prior to accepting the appointment as United States Attorney, Mr. Van Hollen was the Bayfield County District Attorney, Washburn, WI, a post he had served since 1999.

Mr. Van Hollen is a 1988 graduate of St. Olaf College, Northfield, MN, and a 1990 graduate of the University of Wisconsin Law School. From 1990 to 1991 he was an Assistant State Public Defender in Spooner, WI. In 1991, Mr. Van Hollen was appointed an Assistant U.S. Attorney for the Western District, serving in that capacity until 1993.

Born in Rice Lake, WI, and raised in Chetek and Mason, WI, he graduated from Ondossagon High School in 1984. He is married to the former Lynne Pliner of Green Bay, and they have two children. Mrs. Van Hollen is a former Assistant District Attorney for Ashland County. She now works as a part-time Assistant District Attorney for Marquette County.

As the new United States Attorney, Mr. Van Hollen will emphasize that his office have close cooperation with local law enforcement. He believes that this cooperative effort will bring efficiency and effectiveness to law enforcement in the Western District.

Outside of his duties as the United States Attorney, Mr. Van Hollen is a member of the Masonic Lodge and is in state and local bar associations. He is an active sportsmen, biker, swimmer and golfer. He is looking forward to also serving on the Board of Governors of the Western District Bar Association.

J.B. VAN HOLLEN
UNITED STATES ATTORNEY
WESTERN DISTRICT OF WISCONSIN

BORN:
February 19, 1966

FAMILY:
Married
Two Children

EDUCATION:

1988	B.A., St. Olaf College
1990	J.D., UW Law School

EXPERIENCE:

1990-1991	Assistant State Public Defender Spooner, Wisconsin
1991-1993	Assistant United States Attorney United States Attorney's Office Western District of Wisconsin
1993-1999	Ashland County District Attorney, Ashland, Wisconsin
1999-3/02	Bayfield County District Attorney, Washburn, Wisconsin
8/6/02	Presidentially-Appointed United States Attorney for the Western District of Wisconsin, Madison, Wisconsin

Report on Private and Public Access to Electronic Case Files

By Tom Bertz

The Judicial Conference Subcommittee on Privacy and Public Access to Electronic Case Files has recently issued its report:

Background

Federal court case files, unless sealed or otherwise subject to restricted access by statute, federal rule, or Judicial Conference policy, are presumed to be available for public inspection and copying. Nixon v. Warner Communications, Inc., 435 US 589 (1978) (holding that there is a common law right "to inspect and copy public records and documents, including judicial records and documents"). The tradition of public access to federal court case files is also rooted in constitutional principles. Richmond Newspapers, Inc. v. Virginia, 448 US 555, 575-78 (1980). However, public access rights are not absolute, and courts balance access and privacy interests in making decisions about the public disclosure and dissemination of case files. The authority to protect personal privacy and other legitimate interests in nondisclosure is based, like public access rights, in common law and constitutional principles. See Nixon, 435 US at 596 ("[E]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes").

Certain types of cases, categories of information, and specific documents may require special protection from unlimited public access. The Subcommittee excluded Social Security cases and personal identifiers such as Social Security numbers, dates of birth, financial account numbers and names of minor children from electronic access. All criminal cases are excluded from electronic access but this policy is to be re-evaluated in two years.

In Bankruptcy cases personal identifiers are not to be disclosed. Appellate cases are to be treated the same as they are treated at the lower level. United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 US 749 (1989) (noting that technology may affect the balance between access rights and privacy and security interests).

It is also important to note that the federal courts are not required to provide electronic access to case files (assuming

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The President's Corner

By
Leslie K. Herje
President

For most Americans, September 11th is a day that will trigger many different memories and moments for reflection. In addition to recalling the horrifying and senseless loss of life and destruction that occurred a year ago, I am also reminded of the impact that day has had on our communities and legal system. We encounter these effects daily and are compelled to reassess constantly how far a free nation should go to safeguard our collective safety.

In that regard, I want to pay special tribute to a man who benefitted us all through his thoughtful insights into these issues, the late Dean Howard Eisenberg of Marquette Law School. As you know, the Western District Bar Association was privileged to have Dean Eisenberg as its key-note speaker at our most recent annual meeting luncheon in April. Howard addressed nearly ninety members of the WDBA and Federal and State judiciary, eloquently and passionately urging members of the bench to ensure that the civil liberties of all citizens are protected in this post-September 11th climate. As always, his comments struck a balanced tone and raised thought-provoking questions regarding issues that the bench and bar will be facing in the future.

Not surprisingly, Howard Eisenberg did not ask for an honorarium or expenses for speaking to our organization. Rather, he expressed his gratitude for being asked speak to our organization and was pleased to have a captive audience. Along with many members of the legal profession and community, I was shocked by his sudden death, yet encouraged by the kind words and affection universally expressed by those people who admired Howard. He dedicated much of his career to helping those most under served by our profession.

It is lawyers like Howard Eisenberg who inspire members of the profession to strive to become better lawyers, better citizens, and give back to the community. An outpouring of community assistance and volunteerism after September 11th afforded us the privilege of experiencing first-hand the best of our fellow citizens.

To honor Howard Eisenberg's memory, the WDBA Board of Governors unanimously voted to make a donation to the Phyllis and Howard Eisenberg Fund at Marquette Law School. The Eisenberg family established the fund to support the under-privileged by providing financial assistance to students who provide pro bono legal services.

CLE CREDITS APPROVED

The Wisconsin Supreme Court Board of Bar Examiners approved 3 regular hours for Wisconsin mandatory continuing legal education requirements for the April 25, 2002 Western District Bar Association CLE program. Individual attorneys must report their hours of actual attendance on a timely filed CLE Form 1 (or an amendment thereto) in order to satisfy part or all of the Wisconsin mandatory continuing legal education requirements.

Report on Private and Public Access To Electronic Case Files

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that a paper file is maintained), and these recommendations do not create any entitlement to such access. As a practical matter, during this time of transition when courts are implementing new practices, there may be disparity in access among courts because of varying technology, including more efficient access to court case files.

These recommendations propose privacy policy options that the Judicial Conference Committee on Court Administration and Case Management believes can provide solutions to issues of privacy and access as those issues are now presented. To the extent that courts are currently experimenting with procedures which differ from those articulated in this document, those courts should re-examine those procedures in light of the policies outlined herein. The Committee recognizes that technology is ever changing and these recommendations may require frequent re-examination and revision.

Recommendations

The general policy principles recommended for adoption by the Judicial Conference are as follows:

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.

2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could be available on the Internet.

3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

4. Except where otherwise noted, the policies apply to both paper and electronic files.

5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.

6. The availability of case files at the courthouse will not be affected or limited by these policies.

7. Nothing in these recommendations is intended to create a right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Take Two: Court Tries Another Approach To Electronic Filing

By: Todd G. Smith, President-Elect
Western District Bar Association

In September 2001, the U.S. District Court for the Western District of Wisconsin initiated electronic filing procedures. Those procedures, limited to cases before Chief Judge Barbara Crabb and Magistrate Judge Stephen Crocker, utilized a third-party commercial vendor to receive, convert and file pleadings and papers with the court. While the court would accept electronically-filed documents from any vendor, in practice, only one vendor stepped to the plate to offer such services. That vendor has ceased operating and, accordingly, the court's electronic filing experiment stalled.

In an order dated June 17, 2002, the court adopted a new procedure allowing litigants to file their pleadings electronically via email. The court accepts electronically filed pleadings in any case except those assigned to Judge Shabaz. Like the old system, under the new system all new case filings may be done electronically. If a case is subsequently assigned to Judge Shabaz, all subsequent filings must be by paper.

The new system is much simpler and less expensive than the previous one. The new filing system simply requires counsel to convert their documents to .pdf format using their existing word processing software or Adobe Acrobat software widely available from Adobe Software. Counsel can also scan documents they have not created themselves (such as attachments and exhibits) and then convert them to .pdf format for filing using the Adobe Acrobat software. There is no fee for filing documents in this system.

The converted documents are then simply attached to an email message to the court and sent. Counsel should put the case number and short caption in the subject line of the email message. Counsel should also save the converted documents with a descriptive filename (e.g. Summons, Motion to Dismiss, Brief in Support of Summary Judgment, etc.), so that the court's docket clerks can easily distinguish the documents they receive.

The email addresses used by the court are as follows:

ecf.crabb@wiwd.uscourts.gov (Judge Crabb)
ecf.crocker@wiwd.uscourts.gov (Judge Crocker)
ecf.new@wiwd.uscourts.gov (New case filings)

This system promises to be much simpler and cost effective than the previous system.

Like the old system, sealed documents may not be filed by electronic means. The court will treat every document as if it is signed by counsel. For documents requiring a signature for its validity (such as an affidavit), counsel shall retain the signed original document for at least two years after the resolution of the action. Finally,unless otherwise stated, documents may be received by the court up to 11:59 p.m. on the date due and be considered timely. The court will immediately send you a return email indicating the time your filing was received.

The court has stated that in the future it may start sending notices, briefing schedules and other orders to counsel via email. For more information, counsel can consult instructions on the court's website, located at www.wiwd.uscourts.gov.

WDBA WEBSITE IN THE WORKS

By: Brian P. Hodgkiss, Chair
WDBA Website Committee

With the help of Jeff Hershberger, the State Bar of Wisconsin's Web Producer, the Western District Bar Association will soon have its own website to assist its members.

Our Website Committee has teamed up with Hershberger to design and maintain the Western District Bar Association Website. The site's design concept will be based on the wisbar.org website, but all content will be original and supplied by the WDBA. Maintenance of the site will be handle by the State Bar of Wisconsin at no cost to the WDBA.

The content will be gathered by the WDBA Website Committee with the help of committee chairs, and submitted to the State Bar for posting on the page. It is expected that updates will occur on a monthly basis with fresh content dealing with WDBA activities, projects, and notices.

The mock-up website is expected to be completed by October 2002. It will include WDBA bylaws, contact lists for all executive committee, board of governors and committee chairs and minutes for upcoming meetings. A calendar of upcoming events and membership appeal should aid in increasing the associations membership numbers and participation. The site will also contain a synopsis of the organization's history and archival sections, including materials from annual meetings and newsletters.

It is hoped that once completed, the mock-up site will act as a catalyst for member ideas on maximizing the internet as a tool the WDBA can use for ease of communication and new member recruitment. The website should act as a quick and easy resource for information on the WDBA's activities, inner workings, and history.

If a WDBA member has any questions or would like input on the website, he or she should feel free to contact Brian P. Hodgkiss at bph@andlaw.com

Removal Traps For the Unwary

By Michael J. Modl

The removal of cases from state court to federal court has been likened to a minefield of traps for the unwary. In Auchinleck v. Town of LaGrange, 167 F. Supp.2d 66 (E.D. Wis. 2001), the court ruled that the thirty-day time period for removal of an action involving multiple defendants commences to run when the first defendant is served with the summons and complaint. In Auchinleck, plaintiff brought a civil rights action against the Town of LaGrange and a number of individual defendants. Some of the defendants were served on April 8, others on April 12 and the remainder on May 14. Defendants all consented to removal and removed the case to federal court on May 15.

Plaintiff moved to remand the case claiming that it had not been timely removed in that, under 28 U.S.C. § 1446(b), the time for removal was thirty days from service of the complaint on the first-served defendant. Defendants contended that the statutory thirty-day removal period ran from the date the last defendant was served. The Auchinleck Court acknowledged that the Seventh Circuit has not answered the question as to what triggers the beginning of the thirty-day period for removal where there are multiple defendants. The Court observed that the Western District of Wisconsin had adopted a first-served rule in Higgins v. Kentucky Fried Chicken, 953 F. Supp. 266 (W.D. Wis. 1997). The Auchinleck Court adopted the first-served rule. The Court premised its ruling on the requirement that all defendants must consent to removal and if the first-served defendant does not remove within the statutory thirty-day period, she has waived her right of consent to remove.

The Court acknowledged the potential unfairness of the first-served rule. With the ninety-day service period following the filing of a complaint in Wisconsin state court, a plaintiff can serve one defendant promptly and then wait more than thirty days before serving other defendants who plaintiff suspects may prefer a federal forum. If the first-served defendant does not remove the action to federal court within the statutory thirty-day period, the later-served defendant will have lost her right to opt for a federal forum. The Auchinleck Court deemed adherence to the statutory language in § 1446(b) to be more important than the potential for unfairness to defendants. The court also observed that a plaintiff's right to choose her forum trumps defendant's right of removal. The court concluded that the language of § 1446(b) and policy justifications support adopting a first-served rule for determining when removal is timely in an action involving multiple defendants who are served at different times.

In Eichmann v. Hunter Automated Machinery, Inc., 167 F. Supp. 2d 1070 (E.D. Wis. 2001), the court ruled that the burden is on defendants to determine, at the start of litigation, whether a party defendant is a nominal defendant for purposes of determining whether diversity jurisdiction exists. If a party defendant is simply a nominal defendant, the time for removal is thirty days from the date of service on the first defendant.

In Eichmann, Jerry Eichmann died from injuries which he sustained while operating a mold-making machine in his employment. Eichmann's wife sued Eichmann's employer and the manufacturer of the machine which caused Eichmann's injuries and subsequent death. Plaintiff made claims against her husband's employer, W.A.F., based upon possible entitlements to certain worker's compensation benefits. Plaintiff and W.A.F. were non-diverse. After plaintiff dismissed W.A.F. from the lawsuit, defendants' removed the case to federal court.

Plaintiff moved to remand, contending that the time for removal had passed. The court agreed and remanded the case to state court. In determining whether diversity jurisdiction exists, courts look only to the citizenship of those parties who are "real and substantial parties to the controversy." A "real party" defendant is one who, under applicable substantive law, "has a duty sought to be enforced or enjoined." Under Wisconsin law, an employee's exclusive remedy against an employer for

torts in the workplace is generally the Wisconsin Worker's Compensation Act.

Because the defendant employer was only a nominal party rather than a real party in interest, its citizenship was not part of the calculus in determining whether diversity jurisdiction existed. The court concluded that, when the citizenship of the employer defendant is disregarded, diversity jurisdiction existed from the time the lawsuit was originally filed. Because more than thirty days had passed from the time the action was commenced, removal was untimely and the court granted the motion to remand.

The United States Supreme Court in Murphy Bros. v. Michetti Pipe, 526 U.S. 344 (1999), resolved another removal trap for the unwary. Prior to the Murphy decision, the federal courts of appeals were split as to what action triggered the time for removal. The removal statute provided that the removal notice shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the complaint. The issue in the Murphy case was whether a named defendant must be actually served with a copy of the summons and complaint to trigger the thirty-day removal period or whether receipt by means other than service (e.g. receipt of a fax or mailed courtesy copy of the complaint) could trigger the start of the removal period. The Supreme Court concluded that:

> an individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process. Accordingly, we hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, "through service or otherwise"after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.

Murphy Bros., 526 U.S. at 348.

The United States Supreme Court in the most recent term, ruled that where a state consents to removal of an action to federal court, the state has waived its Eleventh Amendment immunity. Lapides v. Board of Regents of the University System of Georgia, Case #01298, U.S. Supreme Court (May 13, 2002). In Lapides, plaintiffs brought in state court federal civil rights claims and state law claims against the Board of Regents of the University System of Georgia and against a number of state officials in their individual capacity. Defendants consented to removal and the individual state officials successfully moved for summary judgment on the federal civil rights claims based on qualified immunity. The state then sought dismissal of the state law claims based upon Eleventh Amendment immunity.

The United States Supreme Court ruled that the State of Georgia, by consenting to removal, had waived its Eleventh Amendment immunity. Accordingly, the federal court could properly exercise jurisdiction over the state law claims against the State of Georgia.

CONCLUSION

The above cases illustrate some of the traps for an unwary defendant who may wish to remove a case from state to federal court. Counsel for defendants must determine when the first defendant was served with process and remove within thirty days of service on the first-served defendant. Counsel for defendants must also determine if any of the named defendants are nominal defendants for purposes of determining whether diversity jurisdiction exists. If the real parties in interest are diverse, removal must occur within thirty days of service on the first defendant.

Determination of when a case is removable is based upon service and not receipt of a copy of a complaint by means other than service, such as a fax or mailed courtesy copy of the complaint. Finally, a state defendant must recognize that consenting to removal for strategic reasons (e.g., a federal court determination of issues such as qualified immunity) will constitute a waiver of Eleventh Amendment immunity otherwise available to the state defendant.

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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.