Fall 2017 • Volume 3

# MBA Messenger


## Eviction Interdiction:

### Raphael Ramos of the Eviction Defense Project with MBA President Shannon Allen

# Regular Features



## Make Your Voice Heard

Send your articles, editorials, or stories to mflores@milwbar.org. We also have seats available on the *Messenger* Committee.


We look forward to hearing from you! The MBA *Messenger* is published quarterly by the Milwaukee Bar Association, Inc., 424 East Wells Street, Milwaukee, WI 53202.
Telephone: 414-274-6760
E-mail: mflores@milwbar.org




# Contents


**Fall 2017 • Volume 3**


## In This Issue:

## MBA Officers, Board of Directors, and Staff

### Executive Committee

**Shannon A. Allen,** *President*

**Matthew R. Falk,** *President-Elect*

**Aaron T. Olejniczak,** *Vice President*

**Patricia A. Hintz,** *Secretary/Treasurer*

### Directors

Steven P. Bogart
*Reinhart Boerner Van Deuren*

Honorable Ellen Brostrom
*Milwaukee County Circuit Court*

Erin (Maggie) M. Cook
*Godfrey & Kahn*

Nadelle Grossman
*Marquette University Law School*

Elizabeth A. N. Haas
*Foley & Lardner*

Timothy H. Posnanski
*Husch Blackwell*

Thomas H. Reed
*State Public Defender, Milwaukee Criminal Trial Office*

Timothy J. Saviano
*We Energies*

Kimberly Walker
*Boys and Girls Club of Greater Milwaukee*

### MBA Staff

John Allen, *Front Desk Coordinator*

Sarah Martis, *Executive Director*

Katy Borowski, *Director of Programs*

Morgan Flores, *Membership and Marketing Coordinator*

Avis Nichols, *LRIS Coordinator*

Kyla Motz, *Milwaukee Justice Center Legal Director*

Mark Vannucci, *Clinic Supervisor*

### Contact Information

Milwaukee Bar Association, Inc.
424 East Wells Street
Milwaukee, WI 53202
Phone: 414-274-6760
Fax: 414-274-6765
info@milwbar.org
www.milwbar.org

# Letter From the Editor

*Charlie Barr, Editor*

Let's talk about how people talk. Not what they say, but how they say it. I've picked up on two modern developments in spoken English that have my undies in a twist. The first is uttering a declarative sentence by raising one's voice at the end to make it sound, for all the world, like a question. "It was the best of times, it was the worst of times?" I perceive this as, like, a gen-X and millennial thing? I also suspect it's inversely (albeit loosely) correlated with socioeconomic status? But it's pervasive, that's for sure? And annoying, that's for double sure? At least to my ear?

Call me an old fuddy-duddy, but correct utterance of a declarative sentence requires that the voice *drop* at the end. It's a nice clue that the sentence has, in fact, ended. My father, who is a little hard of hearing in the way that Hurricane Harvey brought a little rain with it, says, "What? You dropped your voice at the end of the sentence." Well, duh. It's called "English."

I've thought hard about why the practice of making statements sound like questions has blossomed, and here's the best I can come up with. A question creates an expectancy: there is more to come—namely, an answer. But since the speaker isn't asking a question, the "more to come" is from the speaker, not the listener. In other words, the subtext is, "I'm not done talking." The speaker finds it necessary to convey this subtext because in the 21st Century, the listener is probably looking at his or her iPhone instead of the speaker. Or, if the conversation is happening on said phone, the listener is probably multi-tasking. Either of which, of course, is just as annoying as making statements sound like questions. It is the Age of Divided Attention.

The second conversational irritant concerns answers to real questions. This one may be even more pervasive, and seems to cut across age and socioeconomic strata. We hear it, almost uniformly, from Ph.D.s and assorted movers and shakers being interviewed on NPR. It's the use of the word "so" as the lead-in to the answer. "What was life like for you growing up? So, it was the best of times, it was the worst of times." In short, "so" has taken the place of "well."

This brontosaurus by far prefers "well." When not referring to a repository of underground water, it's a humble, endearing, *democratic* lead-in—meaningless of course, but a genuflect to the inability of even the most eloquent humans to express themselves with absolute precision in spontaneous conversation. One might say it levels the playing field. We don't bat an eyelash when a Supreme Court justice prefaces a statement with "well," just like the shopkeeper down the street.

"So" is fine in its traditional role as a workaday variant of "thus," but it sounds high-handed, even arrogant as the lead-in to an answer. The connotation I get is, "so let me get you back on track"; "so let me orient you to reality"; "so let's see if I can make any sense out of your inane question." So, our predominant conversational lead-in waste-word has gravitated from the democratic to the condescending. Isn't that just ducky?

Well, enough talk about talk. Let's talk about what's in the *Messenger.* We launch our "most memorable case" series, in which we ask an experienced member of the bench or bar to tell us about that case. Will Zick, always the gamer, kicks it off. You'll also find our first installment of "Top Five Suggestions" by *Messenger* editorial board member Matt Ackmann. The subject of his inaugural "top five" list is surviving your first year as a lawyer.

We profile a veteran Milwaukee County circuit judge (John DiMotto) and a brand new one (Kashoua Yang, the nation's first female Hmong-American judge). Brian Cuban takes a courageous and sobering look at the epidemic of suicide in our profession. Lauren Stuckert is back to address the question of whether a first-offense OWI in Wisconsin should be a crime or a traffic offense. Employment law guru Mark Goldstein, who co-chairs the MBA Courts Committee, updates us on trends in the labor market. We report on a constitutional challenge to Wisconsin's restrictions on sales of home-baked goods.

We offer another short story from Lawrence Savell. "The Bequest" is adapted from the author's winning entry in the 2016 *New York State Bar Association Journal* Short Story Contest. Our own celebrated film critic, Fran Deisinger, favors us with his review of *The Caine Mutiny.* We have photos from the MBA Foundation's Annual Golf Outing and the MBA's first-ever #membermashup networking event.

We hope you enjoy this issue of the *Messenger,* along with what's left of our resplendent but dwindling autumn. As we descend into inevitable winter, don't just talk the talk. Let your fingers do the walking over that keyboard, and send us an article.

*—C.B.*

# Member News


Brianna J. Meyer

Gimbel, Reilly, Guerin & Brown announced the addition of **Brianna J. Meyer** to its civil litigation and criminal law team. Meyer, a 2017 graduate of Marquette Law School, joined the firm after working as a law clerk there since the spring of 2016.


Jason D. Luczak

The firm also announced its promotion of **Jason D. Luczak** to the position of partner. Luczak has been with the firm since 2008, and focuses on criminal defense, civil litigation, licensing, and appeals.


Carolyn Garski

Mallery & Zimmerman announced the addition of **Carolyn E. Garski** as an associate. Garski focuses her practice on business, finance. and real estate transactions.


Andrew Robinson

The firm also made **Andrew H. Robinson** and **Aaron J. Graf** shareholders. Robinson's practice focuses on creditor's rights and representing clients in complex corporate and construction-related litigation matters. Graf represents clients in labor and employment litigation in both state and federal courts.


Aaron Graf


Nathan S. Fronk

von Briesen & Roper promoted **Nathan S. Fronk** and **Meghan C. O'Connor** to shareholder positions. Fronk focuses his practice on transactional matters, with emphasis on representing businesses and financial institutions in complex commercial lending transactions and conduit issuers in bond issuances and refundings. O'Connor counsels clients on a wide range of regulatory compliance, transactional, technology, and general corporate matters, with emphasis on health care issues.


Meghan C. O'Connor

The firm also announced that **Thomas A. Myers** has joined as a shareholder in the Business Practice Group. Myers represents clients in business sales and purchases, mergers and acquisitions, succession planning, finance, and taxation.


Thomas A. Meyers

# Volunteer Spotlight


Atty. Dennis J. Purtell

### Attorney Dennis Purtell

Dennis Purtell comes from a family of attorneys. He is a Wauwatosa native and Marquette High School graduate. He continued his education at the University of Minnesota, where he majored in forestry for one year, Russian language for one day, and ultimately settled on journalism. He went on to graduate from the University of Minnesota Law School. He began his legal career as a general practice attorney for a small Milwaukee law firm in 1965. During this time, he received many felony court appointments. His most memorable case involved a felony non-support conviction that he had to appeal. His client struggled with alcoholism, and Dennis argued alcoholism should be considered a disease in accordance with medical research. He made Wisconsin law, but lost the case. Eventually, Dennis found his niche in corporate healthcare. He has worked with more than 50% of the hospitals in Wisconsin.

Dennis has been involved in the Milwaukee legal community since graduating from law school. He served as MBA president, as president of the Milwaukee Young Lawyers Association, on the State Bar Board of Governors, and as the fifth president of the American Academy of Healthcare Attorneys, now the American Health Lawyers Association (AHLA). Dennis also served as a court commissioner, and on countless other vital nonprofit committees and boards.

Throughout his long career, Dennis has played the roles of counselor, mediator, and advocate, and has put those skills to work for the benefit of the legal community and the public interest.

## Attorneys Needed for Milwaukee Justice Center Mobile Legal Clinic

Is improving access to justice a priority for you? Are you looking for opportunities to provide *pro bono* services to those in need? The Mobile Legal Clinic is currently requesting attorney volunteers to staff the clinic for these shifts:

- **Second Tuesday of every month** from 9:30 to 11:30 a.m. at the Washington Park Senior Center
- **Third Wednesday of every month** from 3:00 to 5:00 p.m. at the Silver Spring Neighborhood Center
- **Saturdays** throughout the year

For more information or to sign up, contact Mark Vannucci, Attorney Supervisor, Milwaukee Justice Center, (414) 278-3988 or mark.vannucci@wicourts.gov.

## Mission Statement

*Established in 1858, the mission of the Milwaukee Bar Association is to serve the interests of the lawyers, judges and the people of Milwaukee County by working to:* promote the professional interests of the local bench and bar; encourage collegiality, public service and professionalism on the part of the lawyers of Southeastern Wisconsin; improve access to justice for those living and working in Milwaukee County; support the courts of Milwaukee County in the administration of justice; and increase public awareness of the crucial role that the law plays in the lives of the people of Milwaukee County.

# Message From the President

*Attorney Shannon A. Allen, DeWitt Ross & Stevens*

As lawyers, we often find ourselves juggling many facets of our lives, including, among other things, legal careers, personal lives, and *pro bono* and community activities. During my first few months as MBA president, I have been pleasantly surprised that despite MBA members being pulled in many different directions, they still find time to mentor the next generation of lawyers.

Mentoring is often defined as "training" or "advising" a "younger colleague." It can be accomplished in a formal program, as well as in an informal or casual setting. As my year as MBA president progresses, I continue to pursue the goal to which I committed at the Annual Meeting: working with younger MBA members, and Milwaukee-area young lawyers who are not yet MBA members, to discover their professional needs and how the MBA can assist them in becoming happier and more well-rounded young professionals.

Many years ago, I mentored a young associate as part of the MBA's mentor program. I have had the pleasure of observing my mentee go through many life changes, which include switching law firms, transitioning from associate to partner, marrying, and starting a family. It has been one of the greatest joys in my career and as an MBA member that my mentee and I have developed and maintained our professional friendship and informal mentoring relationship through those years.

Earlier this year, my law firm started a formal mentor program between partners and associates. It is a two-year commitment in which, after being matched, the mentor and mentee agree to meet once a quarter after formalizing a detailed action plan. What I have noticed most during my first quarter in the program is how much *I* am getting out of it. I thought I was supposed to be the mentor, but my mentee is teaching me many things—for example, that I should never get too comfortable with my role in private practice or my marketing plan, and that I should guard against letting either professional or personal connections go stale. Thus, I find myself assessing my own marketing goals and skills, as well as my professional relationships, including those with former opposing counsel I now consider friends, and former colleagues who stay in touch despite taking different paths as their careers progressed.

If you would like to be involved in discussions about a possible reboot of the MBA mentor program, please contact Sarah Martis at smartis@milwbar.org. We are currently assessing the viability of that program and welcome your input.

Please think about both small and large ways you can be a mentor to a college student considering law school, a law student weighing career choices, a recent law school graduate struggling to determine if private practice or the public sector is right for him or her, or a practicing attorney who needs professional guidance. As many of you can attest, we blink a couple times and find we have been practicing 20 or 30 years, or more. I continue to be extremely grateful that I chose the legal profession, and I feel a duty and commitment to assist younger lawyers as they make their way in that profession. I hope you will join me and become a mentor in whatever manner best suits you.

Over 300 attorneys and judges filled the Wisconsin Club for the 14th Annual State of the Court Luncheon.

Chief Judge Maxine White congratulates Timothy Saviano after administering his oath as a new MBA board member.

# 2017 FALL CLE CALENDAR

## OCTOBER

**October 17 — Patents: They're Not Just for Litigation Any More***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Joseph J. Berghammer and Binal J. Patel, *Banner & Witcoff*

**October 18 — An Update on Federal and Wisconsin Environmental Laws***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
David P. Ruetz, *GZA GeoEnvironmental, Inc.;* Christopher J. Jaeckels, *Davis & Kuelthau*

**October 24 — Medicaid Basics***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Megann Hendrix, *Walny Legal Group*

**October 27 — Ethics Nightmares: Tales From the Dark Side of the Law****
1:00 - 4:00 p.m., Milwaukee Bar Association ..... *$99*
Andrew L. Franklin

**October 30 — Family Law 101 (Part I): Basic Divorce Case From Inception to Conclusion***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Susan A. Hansen, *Hansen & Hildebrand*; David B. Karp, *Karp & Iancu;* Roberta Steiner, *Halling & Cayo;* Patricia L. Grove, *Halling & Cayo*

## NOVEMBER

**November 1 — Thomson Reuters Westlaw: Legal Ethics and Professional Responsibility***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Steven Silverstein, *Thomson Reuters*

**November 9 — Civil Litigation: Diversity Jurisdiction***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Thomas L. Shriner Jr., *Foley & Lardner*

**November 13 — Real Property: Design or Performance Specifications: Owner Warranted?***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Smitha Chintamaneni, *von Briesen & Roper*
Matthew R. McClean, *Davis & Kuelthau*

**November 14 — Labor & Employment: Cybersecurity Protection for Employers***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
John E. Murray, *Vice President of Human Resources, The Marcus Corporation*

**November 21 — Intellectual Property: IP Nuances in Video Games**
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Ross A. Hersemann, *founder of Leading Law*

**November 27 — Family Law 101 (Part II): Post-Judgment Basics***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Christy A. Brooks, *von Briesen & Roper;* Amy L. Shapiro, *Hawks Quindel;* Carlton D. Stansbury, *Burbach & Stansbury*

**November 28 — Elder Law: Capacity and Your Client***
Noon - 1:30 p.m., Milwaukee Bar Association ..... *$40/$52 w/lunch*
Heather B. Poster, *Becker, Hickey & Poster*

**1.0 CLE credit to be applied for*
***3.0 CLE ethics credits to be applied for*

***Register online and view more details at milwbar.org/calendar.php.***

*CLE free for newly licensed members (2012 or later)*

# Thank You to Our July, August, and September CLE Presenters!

### Effectively Managing Your Time
Thomas M. Olejniczak, Conway, Olejniczak & Jerry
Aaron T. Olejniczak, Andrus Intellectual Property Law

### Maximizing and Leveraging Your Online Presence
Steve Ryan, RyTech
Mark J. Goldstein, Goldstein Law Group

### Business Concepts for Lawyers
Nadelle Grossman, Marquette University Law School

### Intellectual Property: What Issues Worry the In-House Counsel?
Michael A. Baird, Uline
Ann E. Rabe, von Briesen & Roper
Alex D. Smyczek, Milwaukee Electric Tool Corp.

### Westlaw & Practical Law for New Associates
Steven Silverstein, Thomson Reuters

### Hot Topics From Experienced GALs
Lisa A. Bangert, Advocate, Attorney at Law
Kate A. Neugent, Burbach & Stansbury
Graham P. Wiemer, MacGillis Wiemer

# Meet Your MBA Board Member: Timothy Posnanski

*Sarah J. Martis, CAE, Milwaukee Bar Association Executive Director*

Timothy Posnanski is a member of the Financial Services & Capital Markets team at Husch Blackwell. He focuses his practice on representing financial institutions, corporations, governmental entities, and individuals in a broad range of commercial, real estate, bankruptcy, constitutional, and land use litigation matters in Wisconsin state and federal courts.

Timothy's grandfather, a trial attorney in St. Louis (where Timothy grew up), inspired him to become an attorney. "I grew up in a very large family, and my grandfather was a great story teller with a tremendous sense of humor. Typically, the only time anyone could be heard over the chaos during family gatherings was when my grandfather would tell stories of his latest cases. He loved what he did, and his enthusiasm for the law was infectious. I knew from an early age that I wanted to become an attorney."

Though his roots are in Missouri, Timothy fell in love with Milwaukee while completing his undergraduate degree at Marquette University. He had planned to practice law in St. Louis after obtaining his law degree from Washington University, but found he missed Milwaukee too much. "I chose to practice in Milwaukee because I love Milwaukee. I love how accessible Milwaukee is and how genuine its people are …. I missed Milwaukee (and Marquette home games) and decided that I wanted to return after graduation. I was fortunate to land a job as a summer associate with Whyte Hirschboeck Dudek, and have been here ever since.".

Timothy describes the Milwaukee Bar Association as essential, reliable, and educational. He hopes to work collaboratively as part of the MBA board to ensure the organization is providing valuable resources to its members and is committed to the development of its younger members.

When asked what his last meal would be, Timothy answers, "Just about anything from Lake Park Bistro. Because it's the best."

# Record Attendance for the 2017 State of the Court Luncheon

With over 300 in attendance, the MBA held its 14th Annual State of the Court Luncheon Tuesday, October 3 at the Wisconsin Club. Attendees heard directly from the judiciary concerning the work of the Milwaukee County Circuit Court. In addition, the MBA recognized two individual attorneys, a law student, and an organization for outstanding *pro bono* work with its annual *Pro Bono Publico* Awards.

Recipients of the 2017 *Pro Bono Publico* Awards are:

**Legal Action of Wisconsin's Eviction Defense Project (EDP).** The EDP, a valuable resource for low-income tenants in Milwaukee County, has done exceptional work in helping clients navigate eviction suits. Since December 2016, volunteer attorneys and law students have assisted hundreds of clients in and outside of the courtroom.

**David R. Cross,** an associate with Quarles & Brady, is an intellectual property litigator with extensive experience prosecuting and defending trademark and unfair competition cases. In addition, he volunteers with the EDP, and has helped 30 individuals avoid eviction in 2017. Most notably, he assisted a former tenant of Will Sherard, a notorious inner-city landlord. Cross had the case against his client dismissed and the CCAP records of the case sealed.

**Brenda Lewison,** an associate with the Law Office of Arthur Heitzer, represents individuals in employment discrimination cases and other employment-related matters. She regularly volunteers with the EDP. She has appeared in several court cases, including a lengthy eviction action that went to trial and involved significant briefing.

**Jason "J.J." Moore,** a student at Marquette University Law School, has completed over 700 hours of *pro bono* work, a record for the law school. Over 450 of his *pro bono* hours have been spent at the Milwaukee Justice Center Family Law Forms Assistance Clinic as a skilled client interviewer. He is a member of the Student Advisory Board for the Marquette Volunteer Legal Clinics, where he also volunteers.

# Q & A With Judge Kashoua Kristy Yang

Editor's Note: This interview was conducted prior to the tragic motor vehicle accident that took the life of Long Thao, Judge Yang's husband, on October 8. *The Messenger* joins the Milwaukee Bar Association and the legal community in offering our heartfelt condolences to the Yang family.

*Kashoua Kristy Yang, who won election as a Milwaukee County circuit court judge this year, is the nation's first female Hmong-American judge. The* Messenger's *Morgan Flores sat down with Judge Yang on the eve of her first day on the bench for an informal interview about her experiences and expectations as she embarks on a new chapter in her life.*

**Q: Tell me a little about your childhood. Where did you receive your undergraduate degree?**

**A:** I was born in a refugee camp in Thailand. I spent the first six years of my life there. Then we immigrated to the U.S. I pretty much grew up in Sheboygan. I went from Thailand to Sheboygan, Wisconsin. That's where I went to elementary school, middle school, and high school. I went to college in Sheboygan, too—Lakeland College. I received my J.D. from the University of Wisconsin Law School.

**Q: How did you like living in Sheboygan?**

**A:** Growing up, I thought it was a very boring town. There wasn't much for a young adult to do. Looking back in retrospect, especially as a parent now, I think it was a great place to raise a family. The community of Sheboygan is small enough that societal issues aren't as pronounced as in a larger city like Milwaukee.

**Q: Why did you choose to run for Milwaukee County Circuit Court judge?**

**A:** Generally, it was thinking that I could do better in terms of my contribution to the legal community. I learned what it means to practice law and kept thinking that I could perhaps contribute in a different way. I think that a big part of that is due to my experience in the courtroom as an advocate. Could I have done something different to champion my client's position? All of this kind of pushed me in the direction of thinking I could and should run [for judge].

**Q: In which division will you begin working?**

**A:** I will be starting in criminal misdemeanor. It's a new challenge. I'm looking forward to it.

**Q: When did you first know you wanted to be a judge, and what gave rise to that aspiration?**

**A:** For me, at least, I never knew. I didn't grow up with this dream of being a judge. I did have an incident in Spanish class where I felt the drive to become an attorney. My younger sister, who went to the same law school at the same time as I, mentioned I should run for judge. My response to her was, "Why would I do that? I'm having a great time practicing law and really enjoy this." In court, I did question whether things could be done differently. The law provides for so much discretion for the judge. I thought about my life experiences and that they would allow me to exercise discretion in a fair way. Those experiences kind of nudged me. I didn't go to law school with my mind and heart set on becoming a judge. I'm not saying that I don't appreciate the opportunity now, but the idea wasn't fully there at the time.

**Q:** What type(s) of cases interests you the most?

**A:** I don't know yet. I'm sure I'll develop and grow, and that my philosophy will change over time, but I think it's fascinating—the varied legal system and the law, when we think about the big picture and how society chooses to govern.

**Q: Describe in a nutshell the legal experience you bring to the bench.**

**A:** The bulk of my work has been family, worker's comp, and social security disability. When we talk about the legal system and when we talk about the law, sometimes it's someone's last resort to resolve an issue or first opportunity to resolve an issue. They are looking for trust in the legal system. They are looking for confidence in the legal system. And that this is the place where they resolve their issues. First and foremost, it's the perception brought to the legal system and the perception the judge brings to the legal system. Once again it's the goal to bring the idea of fairness and justice. It's not based on the law alone. It's not this cold, callous legal scholar with this black robe looking down on these parties. That's not what we perceive as justice and fairness. When we look at a judge or think of someone who is impartial or who's going to be able to make a fair decision, we are looking for someone to listen to us and try to understand. To simply understand and listen. My experience in family, worker's comp, and social security had me always dealing with the person, the individual. I'm interested in specific details or information, how the law will perform or not perform, and where the missing pieces are. This type of listening has allowed me to understand the application of the law and to listen. The point is to have the ability to listen and be sympathetic to a person in court. Then secondly, my critical thinking in different areas of the law will help guide me. These different areas have afforded me the opportunity to switch my thinking and understand things from different angles and to determine what's important. The issues a judge would likely face are just across the board. Being able to one, listen, and two, through all of the listening do critical thinking and figure out what is really important and relevant so as to move a case forward and bring it to closure.

**Q: Which U.S. Supreme Court justice do you most identify with, and why?**

**A:** As a minority woman, not that my experiences as a minority woman are the only experiences I have, and being one of very few Hmong-speaking attorneys in Wisconsin, I think for the last couple of years being the only Hmong GAL, I've had different opportunities and challenges. So, maybe Justice Sotomayor is who I most identify with in her experience growing up as a Latina, some of the challenges she faced. When I listened to her experience, it resonated with me. While I did pull myself up from my own bootstraps, I kind of didn't. I relied on my family; we partially survived on welfare growing up in Sheboygan. My dad was a teacher in Laos, but it's not like he could transfer his credentials here and start teaching, much less speak the English language fluently. He was left with very few resources to assist and support our family. If it weren't for welfare and other community resources, would we have made it? No, I don't think so. Thus, we didn't pull ourselves up from our own bootstraps, but once we were able to, we did. So, my experience is similar to that of Justice Sotomayor's experience of not entirely pulling herself up from her bootstraps. We both came to the table with certain foundations that were lacking. Life experiences really shape the way we [as people] see the world, the way we define fairness and justice, and the laws we create.

**Q: What adjective do you think lawyers will use to describe you as a judge?**

**A:** Oh, that's a tough one, a tricky one, too! I don't know, but I hope that it is fair and yet firm, when it comes to my schedule. The reason I say this is from my experience. I worked for a big company before and was tasked with finding inefficiencies and bottlenecks. When I left Hawks Quindel and went on my own for four years, my office went

*continued page 23*

# Top Five Suggestions for Surviving the First Year as an Attorney

*Attorney Matt Ackmann, Hawks Quindel*

With the May 2017 graduates settling into their first year of practicing law, I offer my top five suggestions on tackling year one, while that experience is still fresh in my mind:

**1** Be mindful of your life outside work. You've probably cut back on social and family life because of law school demands. Be mindful of how your work life is impacting those areas—they are important!

**2** If you're provided a deadline that affords more time than you expect the project to take, don't cut it short. There will be times when work gets the best of you and the extra time is needed.

**3** Schedule time for yourself. Get up and out of the office, even if it's just for 15 minutes. I know, there is no time. You must make time; try improving time management.

**4** Take advantage of the State Bar discounts applicable in your first year only.

**5** Give back to your community. Volunteering your legal services with community organizations, such as the Marquette legal clinics, is a great way to advance your skill set and improve your community.

## Upcoming Events 2017

**Thursday, October 26**
***Pro Bono* Cocktail Reception**
6:00 - 7:30 p.m.
Milwaukee Bar Association

**Thursday, November 2**
**#membermashup**
5:00-7:00 p.m.
Bugsy's Back Alley Speakeasy

**Thursday, November 16**
**Law & Technology Conference**
8:00 a.m. - 5:00 p.m.
Italian Conference Center
631 East Chicago Street
Milwaukee, WI 53202

# Welcome
## New MBA Members!

Kelsey A. Anderson
Joshua Baldwin, *Foley & Lardner*
Kathleen Dreyfus Bardunias, *Foley & Lardner*
Adam Barraza, *Marquette University Law School*
Michaela Bear, *Marquette University Law School*
Andrew Belter, *Machulak, Robertson & Sodos*
Griffin Bliler, *Marquette University Law School*
Amanda A. Bowen, *DeWitt Ross & Stevens*
Charlie Bowen, *Marquette University Law School*
Courtney Brenk, *Marquette University Law School*
Cory Brewer, *Milwaukee County Circuit Court*
Jennifer Budzien
Justin Carter, *Marquette University Law School*
Lisamarie Collins, *Foley & Lardner*
Bennett Conard, *von Briesen & Roper*
Kirsten H. Cooper, *Falk Legal Group*
Trevor Currie, *Foley & Lardner*
Cate Cusack, *Marquette University Law School*
Stephen Deguire, *Marquette University Law School*
Brayton Deprey, *Marquette University Law School*
Van Donkersgoed, *Marquette University Law School*
Sonam Dorsi, *Marquette University Law School*
Zachary Eastburn, *Quarles & Brady*
Michael Edwards, *Zacherl, O'Malley & Endejan*
Jon Finch, *von Briesen & Roper*
Lauren Fletcher, *Quarles & Brady*
Jamie Ford
Graham Garland
Michael Gentry, *Reinhart Boerner Van Deuren*
Keegan Girodo, *Marquette University Law School*
Danielle Gorsuch, *Marquette University Law School*
Jeffrey Guerard, *Ahmad & Guerard*
Jade Hall, *Marquette University Law School*
Michael D. Halloin, *Halloin & Murdock*
Patrick Hankins, *Marquette University Law School*
Mario Harmon, *Marquette University Law School*
Candace Hays
Morgan Henson, *Marquette University Law School*
Joseph Herriges, *Marquette University Law School*
Caroline Hogan, *Foley & Lardner*
Brooke Houston, *Marquette University Law School*
Joshua Hufford, *Quarles & Brady*
William Hughes, *Foley & Lardner*
Alexander Huppertz
Gregory Jacobs, *Stafford Rosenbaum*
Andrea Jahimiak, *Marquette University Law School*
Jaren Johnson, *Marquette University Law School*
Ryan Jordan, *Marquette University Law School*
Brandon Jubelirer
Michael Kennedy, *Marquette University Law School*
Steven S. Kimball
Nick Kitzman, *Foley & Lardner*
John Kreuser
Bryan T. Kroes, *Hurtado Zimmerman*
Elizabeth Kulinski
Dana Lach, *Foley & Lardner*
Michael Laing
May Lee, *Lee Law Firm*
Joseph Long, *Marquette University Law School*
Julia F. Mader, *Michael Best & Friedrich*
Abbey Magnuson, *Foley & Lardner*
Omar Malcolm, *Marquette University Law School*
Marnae Mawdsley, *Marquette University Law School*
Alan Mazzulla, *Rose & deJong*
Paul McKenna, *McKenna Law Office*
Sara McNamara, *Reinhart Boerner Van Deuren*
Trevor Medina, *Marquette University Law School*
Michelle Mersberger, *Marquette University Law School*
Brianna Meyer, *Gimbel, Reilly, Guerin & Brown*
Ryan Michaels, *University of Wisconsin Law School*
Anne-Louise Mittal, *Foley & Lardner*
Jerome C. Mohsen, *Quarles & Brady*
Jason C. Moore, *Marquette University Law School*
Sarah Mueller, *Marquette University Law School*
Jonathan C. Noble
Tolani Odutayo, *Foley & Lardner*
Anne O'Meara, *Marquette University Law School*
Emmanuel Onochie, *Marquette University Law School*
William P. Patacsil, *Valparaiso University School of Law*
Raj Patel, *Foley & Lardner*
Matthew Peters, *Foley & Lardner*
Olya Petukhova, *Foley & Lardner*
Joseph Poehmann, *Quarles & Brady*
David A. Prado, *The Luening Law Practice*
Sarah Ratayczak, *Marquette University Law School*
Michael Reyes, *Michael Reyes & Associates*
Amanda Risch, *Sorrentino Burkert Risch*
Mikal Roberson, *Marquette University Law School*
Jordan Robinson-Delaney, *Marquette University Law School*
Ana Rodriguez, *Marquette University Law School*
Mark Ropella, *Marquette University Law School*
Raymond Rutz III
Christian Saint Pierre, *Marquette University Law School*
Brittani Schanstiri, *Marquette University Law School*
Brittany Schoenick, *Legal Action of Wisconsin*
Andrew Schumacher, *Foley & Lardner*
Brandon Schweber, *Marquette University Law School*
James Scoptur, *Aiken & Scoptur*
Daniel Sevcik
Terreea Shropshire, *Marquette University Law School*
Ashley A. Smith, *Marquette University Law School*
Andrew F. Spillane, *Godfrey & Kahn*
Bailey Steffes, *Quarles & Brady*
Amanda M. Sullivan
Corey Swinick
Koh Tanimoto, *Foley & Lardner*
Brandie Tartza, *Marquette University Law School*
Emily A. Tercilla
Jon M. Tyus
Jennifer Van Wie, *Foley & Lardner*
Ryan Vargas, *Marquette University Law School*
Chrissy Wabiszewski
Jonathan Walsh, *Marquette University Law School*
Nicole Wanlass, *Foley & Lardner*
Maura Woods, *Marquette University Law School*
Chue Xiong, *Marquette University Law School*

# *Messenger* Launches "Most Memorable Case" Series

*This is the first in a series (we hope) of vignettes in answer to the question: "Tell us about your most memorable case." We'll pose that question to some of the most experienced members of the bar and bench in our community. The most memorable case can come from service as an advocate, judge, mediator, or in any other professional role. For our leadoff hitter, we tapped Will Zick, who has served as an advocate, judge, and mediator.*

*But, hey, you don't have to wait for us to ask. If you have a worthy entry in this category, jot it down and send it our way.*

### A Courtroom Epiphany in Waukesha

*Honorable Willis J. Zick*

A couple in their twenties got divorced in Waukesha. Primary placement of their young children went to the mother, who remained in Waukesha, with substantial summer visitation to the father, who had moved to Pennsylvania. Each party remarried within a few years. Five or six years after the divorce, the father brought a motion in Waukesha to have primary placement transferred to him and his wife, claiming that they could do a better job of parenting than the mother and her new husband were doing.

Each side hired an excellent lawyer. The first day of trial was emotional and contentious, as each side tried to show they were better parents.

All four parents and stepparents testified with fervor. Each side presented expert witnesses. The trial lasted into the evening, by which time all were exhausted. Everyone agreed that the second day of trial would have to be conducted efficiently if we were to avoid a third day.

The courtroom was charged as trial resumed on the second day. Counsel for the father immediately advised that his client wanted to make a statement. The father rose and, with sincerity and humility, stated that he had decided to withdraw his motion. He explained that he was so impressed by the other side's first day testimony that, after much soul searching, he had decided that the children were receiving excellent care and that they would be better off staying where they were.

I was touched by his selfless decision, giving up his personal hopes in deference to the best interests of the children as he, in an epiphany of objectivity, had come to see them. I expressed my heartfelt admiration of his decision and told him this was the most impressive example of genuine concern for children that I had seen in my many years on the family bench.

This dramatic denouement of what had started as deadly forensic combat led to an eruption of joy and good will, with much smiling on each side. I like to imagine the four of them, perhaps accompanied by their lawyers, going out for a friendly lunch, with the mother picking up the check, before the trek back to Pennsylvania.

I left the courtroom at the end of the day inspired and encouraged by the capacity of human beings to make selfless personal decisions. It doesn't always or even usually happen, but when it does, it is breathtaking.

# Packing Heat on Milwaukee Public Transportation

*Attorney Steven C. McGaver and James D. Lewis, Law Clerk, Gimbel, Reilly, Guerin & Brown*

As construction of Milwaukee's newest form of public transportation, the downtown street car, nears completion, the Wisconsin Supreme Court has issued a controversial decision impacting the safety of public transportation statewide. The court, overriding a Dane County Circuit Court judge and a unanimous Court of Appeals panel, ruled that the lawful right to carry firearms extends to users of public transportation.

The court's recent ruling in *Wisconsin Carry, Inc. v. City of Madison*[1] clarifies the rights of concealed carry permit holders to bring their weapons onto public transportation vehicles. The 74-page opinion focuses on a City of Madison Transit and Parking Commission rule that prohibited bringing any dangerous item onto city Metro Transit buses, including concealed weapons and firearms. The Supreme Court determined that the rule created a more restrictive prohibition on firearms than the state concealed carry statute.[2] In the opinion, Justice Kelly relied on the local regulation statute[3] in holding that the commission's rule wrongly prohibited a licensed citizen from carrying his or her concealed weapon. The local regulation statute forbids municipalities from enacting firearm regulations more restrictive than state firearm statutes.

The city argued that its commission had the authority to ban carrying weapons because operation of public buses is akin to a private individual's ownership of a vehicle. The court rejoined that while a private citizen can exclude passengers for any reason or no reason at all, public transportation is held to a different standard. The public nature of Metro Transit requires the government to have a legal basis for excluding passengers. The court, construing the concealed carry statute as a broad authorization to carry weapons subject only to limited exceptions, concluded that a local government cannot prohibit passengers from carrying weapons on public transportation vehicles because that statute does not provide a legal basis to do so. The court found that the state statute preempted the Metro Transit rule and that a local government is unable to forbid something the Legislature has expressly authorized.

Justice Bradley, joined by Justice Abrahamson, dissented. They reasoned that the concealed carry statute does not preempt the commission's rule because the statute clearly limits preemption to municipal ordinances and resolutions adopted by a city, village, town, or county. The commission's rule is neither an ordinance nor a resolution, and the City of Madison did not enact it.

[1]2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233.
[2]Wis. Stat. § 175.60.
[3]Wis. Stat. § 66.0409(2).


# #membermashup Networking Series Kicks Off

Thanks to all who attended our first MBA #membermashup, a four-part networking series to engage new attorneys and connect them with the Milwaukee legal community. Join us for the next event on Thursday, November 2 at Bugsy's Back Alley Speakeasy. Gather for a unique experience of bourbon and beer flights. (Other cocktails are also available.) Network with fellow members and gain new professional contacts as you enjoy cocktails, delectable appetizers, and the speakeasy atmosphere.


Kristin Leaf and Frank Schiro


Carrie Booher,Heather Witt, Christopher August, and Jessica Haskell

Shannon Allen and Bud Bobber

# 29th Annual MBA Foundation

Thank you to our many generous sponsors and guests who attended the 29th Annual Milwaukee Bar Association Foundation Golf Outing, which raises money to support the Milwaukee Justice Center. The center, located in the Milwaukee County Courthouse, provides civil legal services to unrepresented litigants who cannot afford private counsel, coordinates *pro bono* legal services, and trains attorneys willing to serve as counsel on *pro bono* cases.

Be sure to save the date for our next MBA Foundation Golf Outing: **Wednesday, August 1, 2018 at Fire Ridge Golf Club in Grafton, WI.**

Judge Jeffrey Wagner


# Golf Outing

▲ Andrew P. Beilfuss tees off.


▶ Golf Outing Winners Joe Kuborn, Aaron Olejniczak, Peter Holsen, and Kevin Spexarth

▲ Anne Brannon, Gaylene Stingl, Emily Constantine, and Cathy La Fleur

Andy Skwierawski ▶

# The Reel Law

*Attorney Fran Deisinger, Reinhart Boerner Van Deuren*

### *The Caine Mutiny*

Directed by Edward Dmytryk
124 minutes, 1954

A film I discussed earlier in this series, *Breaker Morant,* presents a trial in the unique context of the court martial. There, several Australian officers serving the British in the fierce Boer war were themselves served up as a sacrifice in a trial rigged to reach that result. *The Caine Mutiny,* a film adaptation of the Herman Wouk novel set during World War II, features a court martial that is on the level, against an executive officer who takes command of an American vessel from a hesitant captain at a critical moment. (There has never been an actual mutiny aboard a U.S. Navy ship, by the way. At least none has ever been prosecuted.)

Although this film is over 60 years old and unseen by most living Americans, it nevertheless contributed what we would now call a "meme" to our popular culture: "Oh, but the *strawberries*." I'll explain that later.

The fictional USS Caine is not a glamorous ship. It's a minesweeper that is little more than a guppy accompanying the bigger fish of the U.S. Pacific fleet. We meet the Caine when freshly minted ensign Willie Keith (Robert Francis) joins it, and we see, as he does, that its men are slovenly and its decks rusted. Keith, a Princeton man, is repelled by what he views as lax discipline by the ship's captain, but he is also surprised by the loyalty and affection the other officers and crewmen have for that captain. Still, Ensign Keith is pleased when the ship gets a new captain: Lieutenant Commander Philip Francis Queeg, brilliantly played by Humphrey Bogart.

The honeymoon is short. Queeg is a tightly wound martinet who dresses down his subordinates, including Keith, for every infraction—and is not above lying to cover his own mistakes. While lambasting an ordinary seaman for having his shirt untucked during a firing exercise, he allows his ship to steam over and cut the line to the target it is towing. Queeg claims the tow line must have been defective.

Worse, when the ship is assigned to lead a group of marine landing craft to within 1,000 yards of a defended beach—a combat landing under fire—Queeg insists at three times that distance that the Caine is within 1,000 yards, and orders the ship to drop a yellow dye marker and turn around, leaving the landing craft unprotected. His officers react to this cowardice with dumb horror. Later that day, Queeg joins them in the officers' dining room and awkwardly and ambiguously seems to ask for their help. But no man speaks up to offer it. And in private conversations they start referring to Queeg as "Old Yellowstain."

As the Caine's mission at sea continues, Queeg's anxieties worsen, until after dinner one night he becomes convinced that someone has stolen strawberries from the mess. He orders his officers to collect every key from every member of the crew—after a strip search of each—because he is certain that one of them has made a duplicate for the mess locker. The officers carry out his instructions but begin to discuss what it would take to remove a captain under Navy regulations. They receive encouragement from Lieutenant Tom Keefer (Fred MacMurray), an intellectual would-be novelist who obviously resents his life aboard the Caine and in the Navy. Keefer insists—especially to the executive officer, Lieutenant Steve Maryk (Van Johnson)—that Queeg has psychological problems, and cites a Navy regulation that allows a commanding officer's removal in extreme circumstances.

Maryk resists the officers' intrigue, but his own doubts about the captain's fitness grow significantly when Ensign Barney Harding confides that he told Queeg what happened to the strawberries. Harding had allowed some mess boys to eat them, but the captain ordered him not to repeat this explanation to anyone else because, inexplicably, he was still convinced a duplicate key existed.

The command crisis aboard ship reaches its climax when the Caine is caught in a roiling typhoon. On the bridge, Captain Queeg, panic in his eyes, insists the ship is in no danger and must follow fleet directional orders, despite Lieutenant Maryk's and Ensign Keith's warning that the ship will founder if not steered into the gale. (Years ago, I practiced admiralty law and learned, in a case involving an ocean freighter damaged in a fierce Great Lakes nor'easter, that sailing into the wind is often the safest approach to a storm.)

When the helmsman begins to lose control of the Caine and the ship lists violently, Queeg falls silent, seemingly paralyzed by fear or indecision. Maryk, repeatedly unable to get Queeg to respond, finally countermands the captain's order and relieves him, an action Keith accepts. Maryk then calls all the other officers to the bridge to announce his decision. As the ship regains its balance, Queeg regains his composure and objects, warning that Maryk has refused a lawful order and will be considered a mutineer. But the officers side with the executive officer against the captain.

This stirring sea adventure (plus some time unfortunately wasted on a banal stateside romance between Ensign Keith and a nightclub singer) takes up the first three-fourths of the movie, but most of the last quarter plays on legal turf. Maryk is brought to a court martial in San Francisco, charged with mutiny. His assigned Navy counsel, Lieutenant Barney Greenwald (the great character actor José Ferrer) makes it plain to him and to Keefer (a key defense witness) that their actions disgust him and that he would rather prosecute. But Greenwald has studied the facts well, and when the trial begins he is ready.

Still, the Navy prosecutor (E.G. Marshall, another great character actor) gets the better of the trial at first, skewering Keith and Maryk on cross for how little they know about psychology, and presenting an eminent psychologist who testifies that Queeg's abrasive command style is not proof of impairment. When Lieutenant Keefer is called to back up Maryk's observations about Queeg's mental state with his own, he loses his nerve—and his memory—protecting himself at Maryk's peril. And during Maryk's testimony, the prosecutor skillfully leads him to agree that it's "possible" that it was the executive officer himself who didn't understand the soundness of the captain's orders under the duress of the moment.

But one witness can make or break a case, and in this trial, that witness is Lieutenant Commander Philip Francis Queeg. Bogart won a Best Actor Oscar for *The African Queen,* but a good argument can be made that the finest acting in his long career occurs in the few minutes he sits in the witness chair in *The Caine Mutiny.* The prosecutor calls him to the stand, and on direct examination he shows a veneer of confidence and even charity, finishing his testimony by saying that he bears the accused officers no malice and is extremely sorry for them. But he also pointedly remarks that those officers were "disloyal."

Lieutenant Greenwald wastes no time on cross bringing up Queeg's misadventures, including the tow line and beach landing incidents. The prosecutor objects, but Greenwald successfully argues that the line naval officers sitting as judges need to measure Queeg's fitness by how he performed in command. Queeg's confidence and calm visibly erode as Greenwald presses the cross. When the defense lawyer archly remarks that Queeg's answers suggest he is "constantly the victim of

*continued page 22*

# Bakin' and Shakin' in Lafayette County

Three home bakers have shaken things up in Lafayette County with a constitutional challenge to Wisconsin law that requires a license, either as a food processing plant or a retail food establishment, or both, for sale of baked goods such as cookies, breads, and muffins to the public. The case is *Kivirist, et al. v. Wisconsin Department of Agriculture, et al.,* No. 2016CV000006 (Lafayette County Circuit Court).

The plaintiffs are Lisa Kivirist, Marion Kriss, and Dela Ends, farmers who bake at home and wanted to sell their baked goods directly to the public in their respective communities to supplement their family incomes. Representing them is Institute for Justice, a public interest law firm headquartered in Arlington, Virginia. One of the firm's focuses is economic liberty—the right to earn a living free from unreasonable government regulation. In 2013, the firm launched its Food Freedom Initiative as an industry-specific outgrowth of its economic liberty practice.

The upshot of Wisconsin's licensing scheme—codified in Wis. Stat. §§ 97.29 and 97.30, along with implementing regulations—is that anyone wishing to sell baked goods directly to consumers for profit must use a commercial-grade kitchen, submit to state inspections, and pay license and inspection fees. The resulting expense, which involves either renting or building a commercial-grade kitchen in a room or building separate from the licensee's home kitchen, typically runs into tens of thousands of dollars—frequently too high an entry bar for the low-volume home baker looking to supplement his or her income. Wisconsin and New Jersey are the only states that prohibit sales of home-baked goods if not produced in a licensed facility with a commercial-grade kitchen.

Institute for Justice mounted a two-pronged constitutional challenge via an action for declaratory and injunctive relief. The lawsuit claimed that the licensing law, as applied to home bakers selling bakery-type items directly to consumers, exceeded the state's police power because they have no rational relationship to a legitimate state objective, and therefore constitute a violation of substantive due process rights. The suit also attacked the licensing laws as a violation of the equal protection clause, due to the alleged lack of rational basis for distinguishing between baked goods and other foods, such as honey, raw apple cider, maple syrup, and popcorn, which are exempt from those laws. The state contended that the regulatory scheme is necessary, or at least rationally related, to the objective of protecting the public from the health risks of improperly prepared or preserved food. Section 97.27(1)(dm) defines "potentially hazardous food" as "any food that can support rapid and progressive growth of infectious or toxicogenic microorganisms."

The home bakers won Round One. Lafayette County Circuit Judge Duane Jorgenson, in a May 31, 2017 oral ruling on cross-motions for summary judgment, found the licensing law unconstitutional as applied to the plaintiffs' sale of their home-baked goods directly to consumers. We were all taught in law school that the level of judicial review in a due process or equal protection challenge to government regulation—rational relationship or strict scrutiny—almost always portends the outcome, with the government winning the rational relationship cases and losing the strict scrutiny cases. In this case, however, the state tripped over the low "rational relationship" hurdle.

The plaintiffs characterized the licensing law as economic protectionism at the behest of powerful trade groups—most prominently, the Wisconsin Bakers Association—to avoid competition from home bakers. Judge Jorgenson didn't shy away from comment on this theme. He found the record "replete with special interests at play," which, while "not determinative," caused him to "view the stated purpose of the legislation and its application towards these [Plaintiffs] and others like Plaintiffs with some skepticism." He noted exemptions for non-profit sales (such as bake sales) and, in particular, an exemption that allowed a nonprofit arm of a "special interest" to sell 400,000 cream puffs at the State Fair without a license, and then use the proceeds to oppose efforts to change the licensing law. The Legislature has repeatedly failed to pass a "Cookie Bill" that would allow the unlicensed, face-to-face sale of home-baked goods up to $10,000 annually.

Judge Jorgenson then reviewed the expert testimony offered by the plaintiffs, the bottom line of which was that "'baked goods are not a microbiological hazard.'" With 48 other states permitting the sale of home-baked goods from unlicensed and noncommercial-grade kitchens, the court found a "there is a clear evidentiary absence regarding any public health" problem. On that basis, he found that "the statutory scheme does not have a rational connection with the stated objective of the statute."

As for the equal protection challenge, Judge Jorgenson observed the anomaly that home-baked goods from the same unlicensed kitchen can be served to bed-and-breakfast patrons (two of the plaintiffs operate such establishments) but not sold directly to consumers. He also noted that home-based purveyors of canned goods, apple cider, popcorn, maple syrup, sorghum, honey, eggs, and produce are situated similarly to would-be purveyors of home-baked goods, yet are exempt from the food processing regulations. Finding no rational basis for the disparate treatment of these groups, the judge sustained the equal protection challenge along with the due process challenge.

Accordingly, the circuit court enjoined "any enforcement of a licensing requirement or the requirement of a licensed commercial kitchen for the processing by these Plaintiffs of baked goods for the sale to consumers directly," provided that the goods are nonhazardous, shelf-stable, and not in need of refrigeration from the time of baking to the time of sale.

Round Two began immediately. The state promised an appeal and a motion for stay pending that appeal. Neither has occurred. Instead, the state took the position that because the ruling held the regulatory scheme unconstitutional "as applied" rather than "on its face," it applies only to the three plaintiffs. The Department of Agriculture stated that it would continue to enforce the licensing requirements against all other home bakers in Wisconsin, with fines and even the potential of jail terms for noncompliance.

The plaintiffs moved for clarification or reconsideration of the ruling on the issue of whether it applies only to the three plaintiffs or to all similarly situated home bakers in Wisconsin. At a July 26 hearing on that motion, Judge Jorgenson did not definitively rule, but indicated that he leaned strongly toward the more limited scope. He suggested that only First Amendment "as applied" cases are appropriate for injunctive relief broader than necessary to protect the interests of the named plaintiffs. The plaintiffs requested leave to amend the complaint to add more plaintiffs, but that hasn't happened, either. Instead, the parties submitted further briefs on the scope issue. The plaintiffs cited numerous cases, including *Gabler v. Crime Victims Rights Board,* 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384, as examples of cases outside First Amendment jurisprudence in which courts have struck down statutes or regulations and granted injunctive relief for the benefit of plaintiffs and those situated similarly to them. The state countered that while a court can enjoin enforcement of unconstitutional statutes and

*continued page 18*

# Judge John DiMotto Combines Passion for Justice With Knowledge of the Law

*Attorney Susan A. Hansen, Hansen & Hildebrand and Family Mediation Center*

Judge John DiMotto levitates in his chair when speaking about the law. Though he is in his 43rd year as a lawyer and 28th year as a circuit court judge in Milwaukee County, his passion for the law and doing justice has not diminished over time.

DiMotto is one of the only two judges (John Foley was the other) who has served in all six divisions of the court system. He volunteered for assignments that would let him experience each one (misdemeanor, felony, family, civil, probate, and juvenile) for a three to four-year period.

DiMotto is widely respected throughout the state for his legal knowledge and expertise. He still briefs every published Wisconsin appellate case. He has developed outlines and checklists for every issue and type of case, which are prized by many judges who have learned from and relied upon them. He is committed to life-long learning and sharing his knowledge and skills. He has taught for the Office of Judicial Education, has served as associate dean of the Wisconsin Judicial College, and has attended a seminar at a Chinese judicial conference.

Public service defines DiMotto's view from the bench. His goal is to give every case the time, attention, and careful thought it needs and deserves. He speaks in plain language that all can understand, recognizing that his work is to communicate with the parties and members of the jury, not only the lawyers. As a judge, he treats everyone in his courtroom with calm and measured respect. In turn, he quietly commands respect. He believes the judge sets the tone and must treat each person as the judge wishes to be treated.

While he is in charge of his courtroom, DiMotto does not see himself as the center of attention. He is open to constructive criticism and self-reflection. Notwithstanding his long and distinguished career, he continues to work on his goal of being the best judge he can be.

DiMotto believes a judge must follow the law, not public or political opinions, to do justice. The role of the courts is to serve as a check on other branches of government, to assure compliance with the law, and to administer justice to the public on a case-by-case basis. There is no place in the courtroom for a judge's personal or political agenda. As he puts it, a judge must practice what he or she tells a jury before it begins its deliberations: "Let your verdict speak the truth, whatever the truth may be."

As for those who have most influenced DiMotto's legal career, it is evident that his wife, Jean DiMotto, a retired circuit court judge, is part of everything he does. She has been his support and a source of grounding and love in their family life and throughout his career. She is also his companion as they travel the globe together, including his favorites, China and Australia. The couple also enjoys many local restaurants, including his personal favorite, Sanford's. DiMotto shares many of his experiences through photography and social media, is an avid moviegoer, and enjoys reading anything by John Grisham.

Additional influences include his family of origin, which supported his caring, honest, and fair-minded work ethic; former District Attorney E. Michael McCann, who advised him to always do what he thought was right; and Judge Victor Manian, whose even-tempered demeanor, fairness, and dignified treatment of all who appeared in his courtroom has been a model for DiMotto throughout his career.

DiMotto has clear advice to lawyers: be prepared, be reasonable and realistic, and be dignified in the courtroom. Leave arrogance and disrespect at the door. Lawyers can be effective advocates without being abrasive or abusive. In a recent case, DiMotto opened a hearing, after several contentious prior hearings, by reading the Supreme Court and

*continued page 18*

# Seventh Circuit Finds ERISA Plan's Venue Selection Provision Enforceable

*Attorneys Michael Graham and Paulette M. Mara, Michael Best*

On August 10, 2017, in the United States Court of Appeals for the Seventh Circuit held that a venue section provision in an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA) was enforceable and was not inconsistent with the venue provision in ERISA § 502(e)(2). *In re Mathias,* 867 F.3d 727 (7th Cir. 2017). This was a case of first impression for the Seventh Circuit, and follows a decision of the U. S. Court of Appeals for the Sixth Circuit in *Smith v. Aegon Cos. Pension Plan,* 769 F.3d 922 (6th Cir. 2014), *cert. denied,* 136 S.Ct. 91 (2016).

### Case Background

George Mathias was employed by Caterpillar at its plant in Pennsylvania. In May 1997, Mathias experienced serious health issues, and the Social Security Administration declared him to be disabled. The company covered his health insurance as an employee on long-term disability. Mathias decided to retire in 2012, retroactive to 2009, but his employment status was not changed, so he paid less than the full premium due for coverage of retirees, which was higher than for disabled employees. In 2013, the company discovered the error and notified him that he owed the difference in premiums between the rate for retirees and disabled employees.

Mathias sued the company and its ERISA-governed health plan in the United States District Court for the Eastern District of Pennsylvania—the district of his residence. However, Caterpillar's benefit plan included a provision that required participants and beneficiaries to file suit related to the plan benefits in the United States District Court for the Central District of Illinois—the district in which the benefit plan is administered. Citing the plan's venue selection clause, Caterpillar moved to transfer the case to the Central District of Illinois. Mathias opposed the venue transfer motion, arguing that the plan's venue selection clause is invalid because ERISA contains an explicit venue selection provision. The district court rejected Mathias' arguments, relying primarily on the Sixth Circuit's decision in *Smith* that venue selection provisions in ERISA plans are enforceable and not inconsistent with ERISA's venue provision specifically or ERISA's purposes generally.

### The Decision Upholding Venue Clauses

The Seventh Circuit panel, in a 2-1 decision, upheld the plan's venue selection clause, finding that it was enforceable even though it limited the venues that are available to plan participants and beneficiaries under ERISA. Under ERISA's venue provision, an action may be brought in the district court where:

- The plan is administered;
- The breach or violation took place; or
- A defendant resides or may be found.

The Seventh Circuit noted that no language in ERISA's venue section expressly invalidates a venue selection provision in an ERISA plan.

The court reasoned that while ERISA plans are a "special kind of contract" and ERISA has a statutory goal of protecting participants and beneficiaries, an ERISA plan "nonetheless is a contract." The court then observed that the Supreme Court has held in other circumstances that contractual forum-selection clauses are presumptively valid even in the absence of arm's-length bargaining, as long as ERISA does not forbid them. The court followed the Sixth Circuit's reasoning in *Smith* and found that the "may be brought" phrasing in ERISA is entirely permissive, and no other ERISA language prohibits parties from contractually narrowing the options to one of the venues listed in ERISA. Since the plan's venue selection clause limited the forum to one of those available under ERISA—the district where the plan is administered—the Seventh Circuit concluded that allowing a plan venue selection provision to stand reflects the significant leeway that ERISA affords employers in designing their benefit plans.

### Practical Impact

This decision gives employers in the Seventh Circuit (which covers Illinois, Indiana, and Wisconsin) some confidence that their plan venue selection clauses will be upheld against future participant challenges. These venue selection clauses are now enforceable in at least two Circuits, including the Sixth Circuit (which covers Michigan, Ohio, Kentucky, and Tennessee). Note, however, that both *Mathias* and *Smith* were split decisions, and that the Department of Labor in its amicus brief sided with the participant's interpretation of ERISA. Therefore, other federal appellate circuits might reach a different conclusion, which would cause a circuit split. Moreover, some circuits that have yet to weigh in on this issue may generally be more participant-friendly. Therefore, while the trend appears to favor upholding ERISA plan venue clauses, employers in jurisdictions outside the Sixth and Seventh Circuits should understand that there is less certainty that such venue provisions will be enforced if challenged.

*The authors can be reached at mtgraham@michaelbest.com or 312-596-5884, and at pmmara@michaelbest.com or 202-747-9584.*

## Pro Bono Corner

*The* Pro Bono *Corner is a regular feature spotlighting organizations throughout the Milwaukee area that need* pro bono *attorneys. More organizations looking for attorney volunteers are listed in the MBA's* Pro Bono *Opportunities Guide, at www.milwbar.org.*

The Wisconsin EMS Association is looking for an attorney who would like to provide *pro bono* services. The Wisconsin EMS Association, a trade association with over 7,000 members, is the largest state emergency medical services association in the country.

The opportunity consists of approximately 4 to 6 hours per month of vendor contract and employment document review. The commitment of time is sporadic and fluctuates depending on the season.

Please contact Executive Director Marc Cohen at 414-431-8193 or marc@wisconsinems.com.

# Milwaukee Justice Center Welcomes New Faces

Dawn Belmontes-Luevano, a former Milwaukee Justice Center family forms volunteer, began in the spring of 2017 as the information desk and appointment line coordinator. Dawn, a fluent Spanish speaker, is from Milwaukee and has a son in high school and a daughter in middle school.

Jon Allen, also a former MJC family forms volunteer, began in the summer of 2017 as the new front desk coordinator, overseeing intake and student volunteer scheduling for MJC family forms services. He graduated from University of Wisconsin-Platteville with a bachelor's degree in biology, and worked in healthcare for 12 years before going back to school at Milwaukee Area Technical College for his paralegal degree in 2015. Jon is married to Susan Allen, partner with Stafford Rosenbaum and a volunteer at the MJC.

Mark Vannucci brings a wealth of experience to his new role as the part-time clinic supervisor. Mark, a long-time volunteer with the Marquette Volunteer Legal Clinic at the MJC, began in the clinic supervisor position September 2017. Mark received his law degree from the University of San Diego and is a sole practitioner (Vannucci Law Offices). He has a son in Chicago, a daughter in Denver, and a son who is a senior at the University of Wisconsin.

J.J. Moore, a committed MJC law student volunteer, joined the team as the Mobile Legal Clinic coordinator, a part-time role. J.J. has a bachelor's degree and a master's degree from Texas Christian University. He is originally from Massachusetts and is an ardent Patriots and Red Sox fan.

Jack Ceschin is the new Public Ally at the MJC, working with the Mobile Legal Clinic. Jack was an MJC forms volunteer for several semesters after completing an internship. He graduated from UW-Milwaukee in May 2017. Jack is an avid reader and enjoys trying new foods.

### Attorney Volunteers Needed for Mobile Legal Clinic!

As the Mobile Legal Clinic continues to expand services, it needs new volunteer attorneys to offer brief civil legal advice. Most commonly, volunteer attorneys assist with small claims questions, insurance and accident-related questions, landlord-tenant concerns, and family law. As a part of the Marquette Volunteer Legal Clinics, the Mobile Legal Clinic provides training and resources for volunteers.

*Front row, left to right:* Jack Ceschin, Public Ally; Kyla Motz, MJC Legal Director; J.J. Moore, Mobile Legal Clinic Coordinator *Back row, left to right:* Jon Allen, MJC Front Desk Coordinator; Dawn Belmontes-Luevano, MJC Information Desk Staff; Mary Ferwerda, MJC Executive Director; Mark Vannucci, MJC Clinic Supervisor

Please consider signing up for one of the following two-hour shifts by emailing J.J. Moore, MLC Coordinator, at jason.moore@wicourts.gov.

**October**

**Tuesday, October 17,** 2:00 – 4:00 p.m., Milwaukee Rescue Mission, 1530 W. Center St.,
**Wednesday, October 25,** 3:00 – 5:00 p.m., Silver Spring Neighborhood Center, 5460 N. 64th St.

**November**

**Saturday, November 4,** 10:00 a.m. – noon, Despense de la Paz, 1615 S. 22nd St.
**Tuesday, November 7,** 9:30 - 11:30 a.m., Washington Park Senior Center, 4420 W. Vliet St.

**Spring 2018 dates to be released soon!**

### *Bakin'* continued from p. 15

regulations on a statewide basis in appropriate cases, this case is inappropriate for such relief because the plaintiffs "have not offered any workable way to ascertain who is in that constitutionally mandated class and who is not."

Just before the *Messenger's* press time, Judge Jorgenson issued a supplemental decision siding with the plaintiffs with respect to the scope of his May 31 decision. In conjunction with that supplemental decision, the court entered a final order and judgment. The case is now ripe for appeal.

### *DiMotto* continued from p. 16

local rules of civility. He said he assumed the lawyers knew the rules, but thought it important to have the rules in the case record as a reminder. He suggested that each lawyer reflect on those and the rules of ethics before proceeding. Competent, respectful, and legally grounded advocacy has more impact in DiMotto's courtroom than volume or hostility.

DiMotto sees an important and positive role for alternative dispute resolution processes, such as mediation, which allow the parties to control the outcome. Participating directly in resolving issues improves satisfaction for the parties, even if it entails not getting everything they wanted in a win-lose approach.

DiMotto's family means everything to him. He sees his family members as supporting and defining one another as good people who want to do good things for others. He also knows those family relationships have kept egos in check and have supported the respectful treatment of others as a touchstone in life for each of them.

We can all learn from DiMotto's legal philosophy, courtroom demeanor, and work ethic. The justice system is better for all he has given and continues to give.

# Wisconsin's Drunk Driving Dilemma: "Worst for the First?"

*Attorney Lauren Stuckert, Mishlove & Stuckert*

Wisconsin has a reputation for being far too lax in its treatment of drunk drivers. It is the only state to classify a first-offense operating while intoxicated violation ("first OWI")[1] as a non-criminal traffic offense. The four exceptions to this rule are OWI with a minor in the vehicle, OWI causing injury, OWI causing great bodily harm, and homicide by OWI. A violation involving any of these aggravating elements results in a criminal charge that exposes the offender to mandatory or potential incarceration.[2]

Despite a constant push from many media outlets, concerned citizens, and state representatives to criminalize all first OWI offenses, the Wisconsin Legislature repeatedly opts to continue treating an unembellished first OWI as a traffic offense that does not carry any potential for time behind bars.

## Current Penalties for First OWI in Wisconsin

In Wisconsin, a person convicted of a first OWI suffers the following penalties: six to nine-month revocation of his or her driving privileges,[3] a forfeiture of $150 to $300 plus a $435 OWI surcharge,[4] a requirement to complete an alcohol and other drug assessment (AODA) and the recommended follow-up driver safety plan,[5] and six demerit points against his or her driver's license.[6]

The offender can apply for an occupational license (OL), which permits him or her to drive for work purposes up to 60 hours a week.[7] With proof of liability insurance (the SR22 form), the Wisconsin Department of Transportation (DOT) routinely grants these limited licenses. A first offender whose breath or blood test result was .15 or higher is also required to install an ignition interlock device (IID) in all vehicles registered or titled in his or her name for a period of one year.[8] The offender is prohibited from driving any vehicle that does not have an IID installed for the entire length of the one-year order, which will not commence until he or she secures a valid license or OL, and the DOT receives verification from the IID installation company that the device has been installed.

An arrested person who refuses to submit to a chemical test of his or her breath or blood in violation of Wisconsin's implied consent law faces a longer driver's license revocation (one year), plus the one-year IID requirement, with no eligibility for an OL for the first 30 days of the revocation period.[9]

## The Case for Criminalization

Proponents of criminalizing a first OWI believe that harsher penalties will lead to lower recidivism rates, and that the threat of facing jail time and a criminal record will discourage those who might be inclined to drink and drive from doing so. These advocates, who push Wisconsin to get in line with the rest of the country, foster outrage among the public by characterizing a first OWI citation as a mere traffic ticket. A first OWI offender is not required to appear in court. He or she can hire a lawyer to appear, or in the alternative, simply not show up and accept a default judgment. Some believe this convenience undermines the serious of drunk driving in this state.

Senator Alberta Darling (R-River Hills) and Representative Jim Ott (R-Mequon) have repeatedly attempted to bring this issue to the Republican-controlled legislative floor, only to see it fizzle every time before even getting to a vote. Influential special interest groups and lobbyists representing the tavern and alcohol industries are the consistent scapegoats for continued resistance to criminalizing first OWIs.

## The Argument to Keep First OWIs Civil

At the other end of the spectrum are those who believe that criminalizing first OWIs will not lead to any reduction in drunk driving, and that instead it would overburden an already overburdened criminal justice system.

The major concern about the costs associated with criminalizing first OWIs is that the change would require imprisonment of thousands of additional people each year. A December 31, 2015 snapshot of the Wisconsin DOT Driver Record File shows that 448,624 Wisconsin drivers had one OWI conviction on their records.[10] A 2017 Wisconsin Department of Health Services Study found that in 2014 there were 17,134 arrests for first OWI—58% of the total OWI arrests that year.[11] Additional jail space and criminal justice expenses, including district attorneys and public defenders to handle this dramatic increase in cases, would be a significant cost for Wisconsin taxpayers.

Others against criminalization emphasize that the focus ought to be on the rehabilitative needs of individuals at risk for alcohol and drug abuse. They advocate for the expansion of the judicial system's use of treatment and diversion programs instead of increasing the penalties.

## A Closer Comparative Look at State First OWI Penalties

The perception that Wisconsin has the least severe first OWI penalties in the country is not entirely accurate. Although other states categorize the offense as criminal, many of those states allow convicted drivers to have their records completely expunged if certain conditions, such as completion of a diversion program, are satisfied. Illinois is one state that employs this type of deferred prosecution program, known as "court supervision," which if completed successfully does not result in a conviction or criminal record.

Vehicle administration offices in many states also purge driving records of OWI convictions after a certain number of years have passed. Not so in Wisconsin. 2009 Wisconsin Act 100, a major overhaul in OWI laws, abolished expunction of any OWI offense.[12] Thus, an OWI conviction in Wisconsin remains on a driver's record for life.

Additionally, many states allow a criminal OWI charge to be reduced to a lesser, non-alcohol related offense, such as a reckless driving violation (often referred to as a "wet reckless") via a plea bargain. Wisconsin law strictly prohibits this type of plea negotiation unless a prosecutor can persuade a judge that the government's evidence is insufficient to result in a conviction.[13]

## Conclusion

Opinions differ on whether criminalization of a first OWI in Wisconsin will fix the drunk driving crisis in the state. It is unlikely that the advocates pushing for this penalty increase will rest until a first OWI is a crime in Wisconsin. Ironically, however, many states that are supposedly tougher on drunk drivers have legal loopholes that alleviate the penalties for first time offenders, challenging the common perception that Wisconsin is the most lenient state when it comes to punishing drunk drivers.

[1]In Wisconsin, the acronym OWI is commonly used. In other states, different acronyms are preferred: DUI, DWI, OUI, etc. In this article, OWI is used to refer generally to all alcohol-related driving offenses.
[2]Wis. Stat. §§ 346.65(2)(f)1, 346.65(3m), 939.50(3)(f), and 939.50(3)(c).
[3]Wis. Stat. § 343.30(1q)(b)2.
[4]Wis. Stat. §§ 346.65(2)(am)1 and 346.655.
[5]Wis. Stat. § 343.30(1q)(c).
[6]Wis. Stat. § 343.32(2)(bj).

*continued page 20*

# The Legal Profession Has a Suicide Problem and Silence Is Deadly

*Attorney Brian Cuban*

Not long ago, I keynoted the Cuban American Bar Association Annual Judicial Luncheon in Miami. My hosts said it was the first time they had brought in a speaker such as myself, and that the event is usually about election-cycle stump speeches. They wanted this event to be different for very personal reasons.

The Cuban and Miami legal community had recently lost a well-known and respected colleague with the suicide of lawyer Ervin Gonzalez. Not long after that, the death of Miami federal prosecutor Beranton J. Whisenant was ruled a suicide. Two tragedies among a profession with a suicide rate in the top five of all professions. I was almost one of those grim statistics.

July 2005. A dark room. Table, desk, chairs. I'm with a staff psychiatrist at the Green Oaks Psychiatric Facility in Dallas, Texas. My brothers, Mark and Jeff, are sitting at the table across from me. I have a vague recollection of my younger brother rousing me from my bed. My .45 automatic lying on my nightstand.

The residuals of cocaine, Xanax, and Jack Daniels are still coursing through my veins. Questions from the attending psychiatrist pierce my fog and anger like tracer rounds. "What drugs have you taken? How are you feeling? Do you want to hurt yourself?"

In the back of my mind, what's left of the lawyer takes over. I know that my family can't commit me, but he can. Proceed with caution. I don't mention that I had been "practicing" sticking the barrel of the gun in my mouth and dry-firing the gun.

Ripped back to reality. Voices in the room. The doctor is talking to me again. When was the last time I used cocaine? I'm pretty sure it has been recently, since it was all over the room when my brothers showed up. I had become the consummate liar in hiding the obvious cocaine habit and drinking problem from my family.

More questions. Do I think I need help? Will I go to rehab? Sure, whatever will get me out of here! I lash out again. They have no right to do this. I yell across the table. "You have no right to control my life! I am an adult! Mind your own business!" They quietly let me rant.

Blaming them for the darkness is so much easier than seeing the light. The doctor is asking calm, focused questions, to ascertain whether I'm a danger to myself. At times, I'm calm in my answers. At times I'm crying, angry at him, then at my brothers. Quit asking the same questions! I know your game! Quit treating me like an idiot!

An hour has passed. The room is getting brighter. The love and calm of my brothers soothes me. Quiets me, softens my edges. It's always been there, but I wasn't present enough to sense it. I was thinking only of myself. My next high. My next drink. Without the drugs, what am I going to see in the mirror each morning? The thought terrifies me. My brothers calm me, and I begin to focus on my love for my family. Arms are around me. Holding me. I begin to feel the love penetrating my shell. They are not the enemy. Should I go to rehab? What about twelve-step? I'm still on the defensive, but at least for the moment I can listen. Have to grab those moments. They don't come often.

Sitting in that room during my first of two trips to a psychiatric facility seems so long ago. Today I am approaching 11 years in long-term recovery. I still deal with clinical depression and take medication daily. I see a psychiatrist weekly.

I'm also a lawyer. I'm part of profession with alarmingly high depression rates. As I often write about, there is also the serious issue of problem drinking in the profession. Both have a strong correlation with suicide. I've been there. I get it. I talk to many in the profession weekly who are struggling. Some have contemplated suicide. I ask them what they are afraid of in seeking help. What's holding them back from taking that first step forward toward the light. It's almost always about loss. Loss of license. Loss of job. Loss of family. Interestingly, however, the fear of loss is generally attached to disclosure of the problem and not the possible consequences of the problem itself. That is what we know as "stigma." A problem that cuts across demographics but is particularly powerful in the legal profession. We are strong. We are hard chargers. We are "thinkers" who can problem-solve our way out of any situation without disclosure. We are not vulnerable.

I'm here to tell you that that emotional vulnerability is a good thing in taking that first step to get help. Reaching out is not weakness, it's courage. Asking questions as a friend or family member is not intrusive, it's compassionate.

September was Suicide Prevention and Awareness Month, but this message is equally urgent in any month. Be vulnerable. Be compassionate. Ask questions. Provide resources. Learn what your state lawyer assistance program has to offer. Learn what your local bar association has to offer. Does your law firm have an employee assistance program? What is your firm doing to empower talking, compassion, and empathy without stigma? If you are a sole practitioner, don't isolate. People want to listen. Talking is healing. Silence can be deadly.

*Brian Cuban (@bcuban) is The Addicted Lawyer. Brian is the author of the Amazon best-selling book,* The Addicted Lawyer: Tales of the Bar, Booze, Blow & Redemption. *A graduate of the University of Pittsburgh School of Law, he somehow made it through as an alcoholic, then added cocaine to his résumé as a practicing attorney. He went into recovery April 8, 2007. He left the practice of law and now writes and speaks on recovery topics, not only for the legal profession, but on recovery in general. He can be reached at brian@addictedlawyer.com. This article was reprinted by permission from his blog, www.briancuban.com/blog.*

**_OWI_ continued from p. 19**

[7]Wis. Stat.§§ 343.30(1q)(b)2 and 343.10.
[8]Wis. Stat. § 343.301(1g)(a)2.a.
[9]Wis. Stat. §§ 343.305(10)(b)2 and 343.301(1g)(a)1.
[10]Wisconsin Department of Transportation (DOT) website (http://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx) (last viewed September 19, 2017).
[11]Moberg, D. and Kuo, D., "Five Year Recidivism after Arrest for Operating While Intoxicated: A Large-Scale Cohort Study," https://uwphi.pophealth.wisc.edu/publications/other/index.htm (last viewed September 19, 2017).
[12]Wis. Stat. § 343.23 (2)(b).
[13]Wis. Stat. § 967.055.

# The Bequest

*Attorney Lawrence Savell, Herbert Smith Freehills*

The boxes arrived in Nick's office on a Friday morning. Inside the one designated "#1" on the outside was a short letter from the executor.

"Dear Mr. Adams: With this letter please find four boxes which Mr. Robert Maxwell instructed in his will be sent to you. Best regards."

Nick sighed. Bob Maxwell was a friend of his father's, from when they were undergrad roommates at the University of Wisconsin. Bob had stayed on to attend the law school there, while Nick's father moved back to New York after graduation to start working in the Adams family business.

Nick had met Bob with Nick's dad a few times over the years when Bob's law practice required trips to New York. It was Bob, a soft-spoken and polite Midwesterner who had never married and who took a liking to Nick, who had first encouraged the inquisitive Nick to consider a legal career. And when Nick had said he was thinking of putting law school off for a couple of years after he got his B.A., it was Bob who persuaded him not to delay but to seize the moment, as things had a habit of slipping away. Three years later, Nick became the first lawyer in the family.

Nick had not seen Bob since Nick's father passed five years before, and he was surprised and touched that Bob had remembered him in his will.

Under the letter, the box, like its three traveling companions, was full of books. There were several treatises, nearly all a bit long in the tooth. Nick presumed that Bob had remembered Nick was a history major in college, and might appreciate them more than other lawyers.

But they also contained two other things—a large folder of copies of filed briefs, and various weathered volumes of the *Wisconsin Reports*. Sending the volumes of old Wisconsin decisions was strange, Nick thought, as they would be of little use to a New York lawyer.

Nick took out all the *Reports* volumes and arranged them sequentially. There were 32 in all—a small fraction of the volumes published. There were thus many gaps in the number sequence. Nick was intrigued.

He poured himself a tall black coffee from the office kitchen. He returned to his chair, put his feet on his desk, and opened the lowest-numbered volume. It had been a while since Nick had opened a book of case decisions, since he was part of the generation that conducted nearly all of its case research via online databases like Lexis and Westlaw. Indeed, Nick's firm, like many others, had in recent years donated or tossed all its case report volumes, as anachronistic relics of the pre-digital world taking up valuable office space that could be put to more profitable use.

He turned through the pages, and saw the spectrum of subject matters that one would expect to be addressed in the reported cases: contracts, torts, matrimony, wills, etc. There was nothing out of the ordinary.

He was about to put the book down when he saw something. About a third of the way into the volume, at the right margin of a page, was a pair of handwritten pencil marks. The first, at the beginning of a long paragraph, consisted of a horizontal line about a quarter of an inch long, joined at a right angle by another line of about the same length going down. At the end of the paragraph, again at the right margin, was another mark, this time with the vertical line meeting the horizontal at the bottom, like a backwards "L".

The marks surprised Nick. He would never—even in pencil—think of defacing a book owned by his firm. The case —which dealt with authorship of a courthouse cafeteria cook's memoir, predictably titled "Justice Is Served"—was not one he recalled hearing about in law school. The marked paragraph contained merely a statement of the law in Wisconsin on a particular obscure point. It was the only notation in the case. Why had someone broken the unwritten rules of law office decorum to single out that paragraph in that case?

Nick continued paging through the volume, and toward the end, in a contract case, he saw another set of the handwritten brackets. This set was different in two ways: the first mark occurred midway through the paragraph, and next to it was written, "Rider 1."

Nick sat back in his chair. Riders to him were passages he wanted to quote in briefs or other documents. When, as was usually the case, he drafted directly into Word, he would just cut and paste from the online text to his document. For materials that were not available online, he would photocopy the respective printed page and circle his selection for his assistant to input. But this rider was likely created before photocopiers were available in the office—the marking lawyer probably gave his or her secretary the volume with some kind of bookmark in the page, and the secretary would have typed the marked passage into whatever document was being prepared.

Nick smiled – Bob had indeed sent him a history lesson—on ancient law office procedure.

Nick flipped through the rest of the volume, but saw no more notations.

Nick next turned to the volume with the next highest number on its spine. It too had a few marginal notations. A quick flip through the rest of the volumes indicated they all did.

Why, Nick asked himself, had Bob sent him so many volumes, when just one would have illustrated the practice? Maybe it was to show how prevalent the practice was; indeed, Nick had noticed slight variations in the marking styles, and in the handwriting of notations.

Each volume had inside the back cover the firm library sign-out card in a white pocket, with columns for name and date borrowed. Nick knew from his own experience that most lawyers would not bother to sign out a case report volume he or she borrowed. Nevertheless, each volume's card had a number of conscientious entries, over the course of several decades.

Nick wondered whether any of the notations were Bob's. He looked at the card in the volume he had open, and saw that it had been signed out by "R. Maxwell" on "1/21/63." He pulled the card from another volume, and saw another "R. Maxwell" entry. Every one of the cards in the volumes Bob had sent him had an "R. Maxwell" sign-out entry. Some had more than one.

"OK," Nick thought, "so what?" Bob was now beyond the jurisdiction of any court seeking to prosecute him for serial publication defacement. And Nick had no idea whether any, or if any which, of the notations had been Bob's.

Nick started putting the books back in the boxes when he saw again the large folder of briefs. He removed the contents, and flipped through them. They had carefully been arranged in ascending date order, spanning several years in the 1960s, which Nick realized was probably at the beginning of Bob's legal career. Each brief had been signed by Bob.

The first brief dealt with an automobile case. It contained two block quotations. Nick looked at the first citation, which was to a Texas case.

*continued page 22*

***The Bequest* continued from p. 21**

But the second was to the *Wisconsin Reports*. The volume number was one of the volumes Bob had sent him. Nick went through each brief, and located in each at least one block quote citing to the *Reports*.
By now night had fallen, and Nick was the only one left in the office.

With the pile of briefs to his left, and the *Reports* volumes standing at the ready in a large arc further away on his hastily cleared desk, Nick started turning to the pinpoint-cited pages identified in Bob's briefs.

The bracketed passage in the first one bore, after the first marking, the handwritten notation, "Sunny day." Those words appeared to have no relation to the case or the quoted material.

The next brief, dated a couple of weeks later, had a *Reports* citation pointing to another bracketed passage, this time accompanied by the notation, "Windy." Again, no connection was apparent.

"So Bob was not just a lawyer, but also an amateur meteorologist," Nick mused to himself. "Who knew?"

Similar notations were made, until one that said after the opening bracket, "Chilly." But this one was different, in that to the right of the closing bracket was the word, "Indeed," in a different handwriting.

The next several instances contained similar paired notations, basically limited to single-word weather observations and single-word affirmative responses.

Finally, the forecast changed.

This particular opening notation read, "Park 12.5."

Nick determined that "Park" was not the name of the case, nor of any of the parties, nor the judge, nor counsel. On a hunch, he pulled up on Google Maps the location of Bob's firm as indicated at the end of the brief. Two blocks away was a park.

But "12.5" made no sense. Unless it was a time. Twelve-thirty?

Photographs of the park showed that, at least when they were taken, the park had many benches, and information indicated it was a popular place for nearby workers to eat lunch.

The ending bracket in the case reporter passage bore the notation, "Okay."

Such "Park" references reoccurred frequently, virtually every time accompanied by an affirmative response. This went on for nearly two years.

But then, although the opening bracket references thereafter continued, the closing bracket responses did not. Not long after that, alongside the final cited passage, there was no notation accompanying the opening bracket.

"Why had they stopped?" Nick wondered to himself.

Nick reviewed all the materials again, but they provided no guidance. On a hunch, he confirmed online that the park remained a park through the present, and had not been paved over to put up a parking lot or for any other form of "progress."

Nick ran all kinds of searches on the web, trying to find some clue. Eventually, in response to a search including the name of Bob's firm and the word "secretary," among the results was one that caught his eye.

It was an engagement announcement in a local newspaper. Dated shortly after the last brief, it proudly reported that one Abigail Mills had become engaged to one Benjamin Nelson, accountant. Ms. Mills was identified as a secretary at Bob's firm.

Bob had let his chance slip away.

Nick leaned back in his chair and exhaled audibly. He now understood that when Bob had advised him to seize the moment, he had been speaking from personal, and painful, experience.

Bob had apparently never fully recovered from that disappointment, Nick realized. But he had wanted to make sure that Nick did not make the same mistake.

Nick cleared space on his shelves for the books and the folder of briefs, so that they would always be in his view and so he would not forget their lesson. He thought about the many ways he could implement the guidance he received, in his career, in his personal life, and in his plan someday to do the writing he kept putting off for that time all lawyers envision, when life would somehow become less hectic.

Before leaving, he sent a quick email to the executor, acknowledging his receipt of the boxes, thanking him for his efforts, and requesting a copy of Bob's will.

And a few days later, Nick would read in that will that, except for four boxes of legal material, Bob had left everything to one Abigail Mills Nelson.

*Lawrence Savell is a lawyer with Herbert Smith Freehills in New York City. He can be reached at lawrence.savell@hsf.com.*

***The Reel Law* continued from p. 14**

disloyal officers," Queeg, becoming more agitated, rejoins that "only some of them were disloyal." Unconsciously, he reaches into his pocket for some ball bearings, which he begins to roll noisily in his hand.

Finally, Greenwald moves to the subject of the key, and when he parries Queeg's emphatic assertion that there "definitely was a duplicate key" by offering to produce Ensign Harding to testify, the captain cracks. His face in close-up, his watery eyes evincing the terror of a trapped animal, Queeg launches into an excruciating unbidden explanation of how he was the victim of the other officers, including the memorable claim: "Ah, but the *strawberries,* that's where I had them!" This shocking monologue only lasts a minute, but seems much longer. At the end, Queeg catches himself, looks around the room, softens his voice and then shrinks back, offering to answer any questions "one by one." The judges, the prosecutor, and Maryk all stare silently. Greenwald does the smartest thing a lawyer could do in that moment. "No further questions," he says, and sits down.

In the next scene, the Caine's officers are celebrating Maryk's acquittal around a dining table when Greenwald stumbles in, drunk, and darkens the mood. He reminds them of Queeg's wartime command service before the Caine assignment, and searingly accuses them of not recognizing or responding to Queeg's plea for help after the beach landing. Queeg was disturbed, no doubt, and Maryk's actions may have been necessary, but in the dramatic events on the Caine, no one has covered himself in glory.

*The Caine Mutiny* is a great naval and legal drama with sure-handed direction and an exceptional cast. Its compelling narrative aside, two other characteristics deserve mention. As I was re-watching the film, my wife mentioned that she had seen it as a child and remembered the storm scene as terrifying. She's right, yet the shots of the ship being buffeted in the waves are clearly nothing more than shots of a model in a tank. Good writing and acting allow film viewers to suspend their disbelief.

Finally, it occurs to me that I have rarely, if ever, mentioned the music in the films I have discussed. That would be a mistake here. The great Max Steiner composed the music for this film. His "Caine Mutiny March" is a rousing military march. Steiner borrows and amends its themes superbly to accompany the rest of the film.

***Yang* continued from p. 8**

paperless. I really like things to be efficient and effective, and to use technology to make my life and everyone's life easier. So, I hope once I figure out the dashboard and technology available to judges that I can help make everyone's life easier.

**Q: Do you have any established goals you'd like to accomplish during your six-year term?**

**A:** You know, I don't know. It's early yet. Tomorrow is my first day, August 1. Once I learn, I'm sure the wheels will start turning. I love challenges and process improvement. Once I get in there and get my hands dirty, I will figure out what we can do better. Not just the processes but how to educate the community about the judiciary. We can always do better in that department. What do judges do? The community needs to know that and understand that. Perhaps starting in those areas.

**Q: Who are some of your mentors?**

**A:** As an attorney, I was very fortunate to have good mentors in the areas in which I practiced: family law, workers comp, and social security disability. For family law, I had Amy Shapiro at Hawks Quindel, then Dan Schoshinski and Israel Ramon for worker's comp and social security disability. They were very generous with their time and their knowledge. I'm very thankful for their mentoring, as I wouldn't be where I am today without them.

**Q: What surprised you most about the campaign?**

**A:** When you go into it not knowing, everything is a surprise and nothing is a surprise. I anticipated the money, because I had heard that it would be expensive. I think just politics, in general, is what I expected the least. As a neophyte candidate, everything was new to me. When we started the campaign, I thought that I had to go to specific gatekeepers within the community. When I say gatekeepers, I mean people who are well connected with a particular community or particular base. Maybe someone who was well known in the Hmong community or LBGTQ community. I thought that I had to go through these people to network. That, in my experience, wasn't entirely true. Not that these gatekeepers weren't important or didn't have influence, but my experiences taught me it was just about connecting with as many individuals as possible. It's always been about the individual. It's not like I could send one message out to a group and they would feel it and get it. It wasn't like that. I had to do that [connect with individuals] day in and day out, seven days a week. It wasn't a nine-to-five effort. I had to figure out how to make things work between work, family, and the campaign trail. That is something I was most surprised about. It took a lot of talking to people and touching their hands and listening to them.

**Q: Do you think that is what really set you apart?**

**A:** I think so. I think so. I think the ability to connect with people time and time again was instrumental. The experience reinforced the importance of connecting with people.

**Q: What does being the first female Hmong-American judge in the U.S. mean to you?**

**A:** It doesn't mean a whole lot right now, because I haven't done anything. Now that I'm voted in as a judge, it still doesn't mean anything yet. I don't mean to take that lightly. It's an honor and a privilege to serve as a judge. What I mean is that the value of what I bring hasn't been defined yet, but over time it will be. Over time, it will have a meaning. Although the expectations are great, it's not a burden. One of the things that my parents taught me over the years whenever they gifted me something is that it's not a gift of materials, it's a gift of love, but I learned to understand that it's really a gift of expectations. And when people give you something they expect something. It's not a *quid pro quo,* per se. They give you something because they expect you to do something and to do it well. The voters have given me this job, they have gifted me this. It comes with a great expectation that I will fulfill my duties and responsibilities. It's a very serious yet honorable job. To me, what it means is that I have to be one of the hardest working judges out there and do a really good job in fulfilling my duties and responsibilities. Time will tell.

**Q: What do your daughters think about your new position?**

**A:** My 17-year-old could probably care less. She's the typical teenager: disinterested. My 7-year-old is super excited. The 2-year-old doesn't know what's going on. I'm very glad that the campaign provided me with an opportunity to teach civic engagement to the 17-year-old and 7-year-old. They now understand and appreciate civic engagement. I always take them with me to vote, but this time around they saw my name on the ballot and experienced how voting can affect someone's life, because it has changed ours. And so now, they know what that means, and to appreciate it. Especially my 7-year-old, who has learned so much from this experience and was my biggest cheerleader from day one.

**Q: What is the best advice you would give someone who is considering a career in law?**

**A:** You know, it would have been a different answer if you had asked me that a year out of law school versus today. I have so much respect for lawyers and the American judicial system, because I know the hard work that goes into it and I think that having a J.D. is so valuable. What law school really teaches you is critical thinking. When you understand the judicial system and the big picture, you see the world differently. How do you quantify that in determining the value of a J.D.? I would absolutely encourage anyone who is interested in the law to go to law school. Like most everything, there are other things to consider: a J.D. may pave the way but you still must take that first step. You can obtain your J.D. and do nothing and not really reap the benefits of it. If you do something with your law degree, the opportunities are limitless.

**Q: Where do you see yourself in 15 years?**

**A:** I don't know. I haven't thought that far in advance, but I hope something along the lines of a judgeship. That's a tough question.

**Q: What do you like to read in your down time?**

**A:** Do I even have down time? I was up until 2:00 a.m. cleaning last night. Right now, I've started this audio book on Benjamin Franklin. My first time doing an audio book. I'm giving that a try. I read a lot of magazines. Nothing too deep. I can't remember the last time I read a novel. Must have been years ago.

**Q: Do you subscribe to any specific blogs or podcasts?**

**A:** No, although I should and I will. I will be doing that.

**Q: Tell me something most people don't know about you.**

**A:** Kristy is my legal middle name, with no quotes around Kristy, because it's not a nickname. I hate to speculate why people do that. When I was young I wasn't given the name Kristy by my parents. I was of course given the name Kashoua. Growing up in Sheboygan, as young kids we had nowhere to go [to play]. We also walked everywhere. Thankfully, we walked to the library and read all of the time. It was our form of entertainment. I used to read *The Babysitter's Club* series often and one of my favorite characters was Kristy. When I had to register for elementary school, my aunt asked if we wanted different names. I ecstatically said yes, and went to retrieve the book, and pointed to the character's name Kristy. Since fourth grade and through college I've gone by Kristy. When I was naturalized I took Kristy as my middle name. While in law school with my sister, we discussed using our given name in our practice to show honor to the family, so in practice I go by Kashoua. During the campaign, I wanted to simplify information and figured it would be a good time to transition back to Kristy. It's Kashoua Kristy Yang, without the quotes.

# Brave New World

*Attorney Mark J. Goldstein, Goldstein Law Group*

"May you live in interesting times." Although the origins of this quote (and whether it was intended as a blessing or curse) are disputed, there can be no dispute that we are, indeed, living in interesting times.

On the business front, business owners seem to be in a much better place than in quite some time. But growth has been hampered by the unexpected difficulty of finding workers. The unemployment rate is at an historic low.[1] By some measures, as many as six million job openings exist across the United States.[2]

At the same time, employee disengagement, mobility, and "underemployment" are as prevalent as ever. And while there is continued clamoring for an increase of the minimum wage to $15 per hour, can it be that employees are simply sitting on the sidelines, waiting for a better deal? Unlikely.

Putting aside the merits of more than doubling the minimum wage, a core economic principle of business is that increased demand (for workers) leads to increased prices (wages)—an economic "reset" of sorts. But it doesn't look like that is happening. Consider a few other factors at play:

- A marked shift from manufacturing to service, including a wide range of jobs that never existed before (e.g., YouTube content creator, drone operator, cloud computing specialist).
- Increased reliance on technology, in some instances changing jobs drastically (as a theater lighting director recently relayed to me, "I went from deck hand to IT professional") and in other instances replacing workers entirely (e.g., toll road tellers, parking lot attendants).
- More women working, and more historically female jobs—although increased wages have not necessarily followed (for a variety of reasons), and men appear reluctant to seek out these jobs.[3]
- More and more unmarried and non-traditional households, including as many as 23 million children living in households with one or no parent.[4] This means that employees may have more and different commitments (e.g., after-school pick-up) or, conversely, almost unlimited flexibility (e.g., no family obligations).
- The replacement of baby boomers with millennials, both in terms of work style and raw numbers (projected growth rate of working age population 91% less than 1950-2000).[5]
- A real question about the best route to workforce readiness (i.e., higher education or skills-based training).

All this has been called an "employment mismatch." It is bigger than a "skills gap," as it involves not just the disconnect between existing jobs and employee skills but also disconnects in the mindsets of employers and employees.

It is against this backdrop that some workplace laws look downright old-timey. Talk to business owners about how they have defined the workweek, or how they guard against off-hours work-related texting or messaging. By and large, they haven't. Talk to employees about whether they are classified as exempt or non-exempt, and what that means in practical terms. By and large, they don't know. Talk to entrepreneurs about the risks of flex or comp time, or whether their independent contractors are, in fact, independent contractors (involving state worker's compensation law, state unemployment compensation law, the federal tax code, and even the Affordable Care Act). These are tertiary considerations, if considerations at all.

At present, it seems there are three approaches to such issues:

1. Aggressive: Uber and others have flaunted the law, ignoring it when they can and settling up when they must. Make no mistake, Uber's strategy appears to be built more on practical realities than traditional legal defenses. It is an approach in line with the current zeitgeist, but the jury is still out on whether it can be successful in the long term (for Uber, for Uber drivers, and as transferrable to other industries).[6]
2. Cautious: staking out a defensible position with respect to the existing laws.
3. "Who, me?": ignorance of legal requirements.

It is time for a fourth approach: federal and state legislation that recognizes the changes in how we work, both in terms of the new jobs out there and how employers and employees are defining and approaching work in general.

Interesting times indeed.

*Mark J. Goldstein is president of Goldstein Law Group. He is also a member of the Council of Small Business Executive's Talent Now Committee, and a frequent writer and speaker on labor and employment law and other topics.*

[1]http://www.jsonline.com/story/money/2017/05/18/wisconsins-unemployment-rate-drops-17-year-low/330992001/ (last viewed September 27, 2017).
[2]https://www.bls.gov/news.release/jolts.nr0.htm (last viewed September 27, 2017).
[3]US Census Bureau, comparison of 1975 and 2016 (young adults aged 25 to 34) (last viewed September 27, 2017).
[4]https://www.census.gov/newsroom/press-releases/2017/cb17-tps36-young-adulthood.html (last viewed September 27, 2017).
[5]MMAC report, June 2016: "Recommendations for Improving K-12 Education in Milwaukee"
[6]https://www.nytimes.com/2017/09/22/business/uber-london.html (last viewed September 27, 2017).

*Pro Bono Publico* Award winner Brenda Lewison poses with MBA President Shannon Allen.

A Member Benefit of

STATE BAR OF WISCONSIN

STATE BAR OF WISCONSIN

# Group Term Life Insurance Plan

## Affordable Group Term Life Insurance, approved by the State Bar of Wisconsin as a benefit of your membership.

### Help give your loved ones the future they deserve.

Your family depends on you for a lot. Plan for the unexpected, and you can help keep their dreams for the future on track no matter what life throws your way.

The State Bar of Wisconsin Group Term Life Insurance Plan, with coverage issued by **The Prudential Insurance Company of America**, is money to help pay the mortgage, so they can continue to live in the family home; or to help with college expenses, so your children can get the education they deserve. It's money to help ensure your family's financial future is protected.

### Coverage designed with you in mind

All State Bar of Wisconsin members under the age of 65 are eligible to apply for the Group Term Life Insurance Plan. Rates for the State Bar of Wisconsin Group Term Life Insurance Plan are competitive, helping to make the decision to apply an easier one. And, as your needs increase, you can simply apply for more coverage.

### Optional Dependent/Spouse Coverage

Covered members may also apply to insure their spouses under age 65 and eligible dependent children.

### Features at a glance:

- Up to $1,000,000 of term life insurance that can help keep your family's future on track
- Coverage you can keep, even if you change employers
- Optional Accidental Death Coverage*
- Insurance approved by the State Bar of Wisconsin

### Apply Online

Visit **wisbar.org/grouptermlife**. Applying for coverage online is quick and easy. You can also apply online for dependent/spouse coverage.

**Questions?**

Call Bultman Financial at **(800) 344-7040** to speak to a representative.

Providing this coverage to your loved ones could be one of the most important things you ever do for them.

*This policy provides ACCIDENT insurance only. It does NOT provide basic hospital, basic medical, or major medical insurance as defined by the New York State Department of Financial Services.

IMPORTANT NOTICE—THIS POLICY DOES NOT PROVIDE COVERAGE FOR SICKNESS.

Group Insurance coverage is issued by The Prudential Insurance Company of America, a Prudential Financial company, Newark, NJ. The Booklet-Certificate contains all details, including any policy exclusions, limitations, and restrictions, which may apply. Contract Series: 83500. The Plan Administrator is Pearl Insurance, 120 East Glen Avenue, Peoria Heights, IL 61614-5348, 800-447-4982.

0303629-00001-00

SBW 1315888