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MILWAUKEE BAR ASSOCIATION, INC.
1858
MBA

Messenger

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Advising the Multi-State Employer: *Far-Reaching Sexual Harassment Regulation from California*

BY ATTY. KEITH KOPPLIN
DAVIS & KUELTHAU

Effective January 1, 2005, Section 12950.1 of the California Government Code required employers with 50 or more employees to provide at least two hours of interactive sexual harassment training to all supervisory employees by January 1, 2006. This training must be refreshed every other year thereafter. While the purpose of this statute is to reduce the incidence of sexual harassment in California workplaces, the recently proposed regulations interpreting Section 12950.1 suggest that its impact will be felt beyond The Golden State.

According to the proposed regulations, “[t]here is no requirement that the 50 employees . . . reside in California.” In other words, Section 12950.1 covers all employers with 50 employees, provided at least some work in California. Thus, for example, a Milwaukee-based employer with even a single employee stationed in California arguably falls within the purview of Section 12950.1.

That begs the question: Who must such covered employers train? Section 12950.1 mandates training for all of a covered employer’s “supervisory” employees. The proposed regulations elaborate on this requirement by incorporating the definition of “supervisor” contained in Section

12926(r) of the California Government Code, which declares that supervisory status does not depend on an individual’s formal title; rather, it depends on the individual’s authority to use independent judgment in the resolution of employment issues on behalf of his or her employer. The proposed regulations require training for all such employees with a California connection. In other words, a Milwaukee-based employer falling within the purview of Section 12950.1 must train all of its supervisory employees either stationed in California or supervising employees stationed in California.

So what constitutes “training”? Section 12950.1 prescribes “two hours of . . . effective interactive training.” According to the proposed regulations, this entails training that is conducive to the asking and answering of questions, provides feedback, and measures educational progress and knowledge acquisition. Such training must include, among other things, the legal definitions of sexual harassment, the types of conduct that constitute harassment, and strategies for preventing harassment in the workplace. The proposed regulations even enumerate the desirable and undesirable qualities of effective trainers.

With these training requirements in mind, what incentive does a Milwaukee-based employer have to comply with Section 12950.1? According to Section 12950.1, an employer’s compliance does not insulate it from a sexual harassment claim, nor does noncompliance establish guilt.

Additionally, and perhaps surprisingly, employers failing to train their supervisors will simply be ordered to do so without monetary penalty.

Notwithstanding the seemingly inconsequential nature of Section 12950.1, the training it mandates serves a distinct purpose in the judicial analysis of sexual harassment claims in California. In *State Department of Health Services v. Superior Court (McGinnis)*, 79 P3d 556 (Cal. 2003), the California Supreme Court held that employers are strictly liable for any sexual harassment perpetrated in the workplace by their supervisors. See *id.* at 558. However, the *McGinnis* Court introduced an affirmative common law defense to damages called the “avoidable consequences” doctrine. See *id.* According to this defense, “a person injured by another’s wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.” *Id.* at 564. Thus, if an employer can establish that it has adequate policies and procedures in place to address sexual harassment, and that the complaining employee failed to take advantage of such mechanisms, it can eliminate its financial liability for any consequences of the harassment that could have been avoided.

While compliance with Section 12950.1 does not relieve an employer of liability for sexual harassment perpetrated by its supervisors, it is a necessary prerequisite to invoking the avoidable consequences doctrine. As the *McGinnis* Court

makes clear, “to take advantage of the avoidable consequences defense, the employer ordinarily should be prepared to show that it has adopted appropriate antiharassment policies and has communicated essential information about the policies and the implementing procedures to its employees.” *Id.* at 565.

Given the broad applicability of Section 12950.1, and the potentially significant monetary ramifications of noncompliance, Milwaukee-based and other employers falling within its purview should be encouraged to comply. Although the original deadline for compliance was January 1, 2006, the proposed regulations create a safe harbor for every employer making a substantial, good faith effort to comply before the regulations become effective. Practically speaking, this will be no earlier than February 10, 2006, which marks the end of the period for public comments on the proposed regulations. Finally, it is important to note that other states, including Connecticut and Maine, have similar training requirements, suggesting that still others will eventually follow suit. Thus, it is prudent to keep abreast of antiharassment legislation on a state-by-state basis.

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Greetings from the MBA's Newest Arrival – *Executive Director James Temmer*



Established in 1858, the Milwaukee Bar Association aids in the administration of justice, promotes high standards of learning and professional conduct, provides opportunities for law-related community service and fosters collegiality within the legal community.

This is the rather impressive mission statement of my new employer, the MBA. My job is to discover and implement opportunities to fulfill this mission. All of these ideals began with providing excellent member services and I am dedicated to doing just that.

I am a Milwaukee native and a product of Milwaukee Public Schools. I hold degrees from both the University of Wisconsin-Madison and Marquette University so I promise no favoritism to either the Badgers or Warriors. I mean Golden Eagles. I also spent two years at Penn State working on a Ph.D. in American History but returned to Wisconsin and started working for a museum in Fort Atkinson. My wife, two sons and I now live in Cedarburg. I have more than ten years experience leading nonprofit, member-based organizations and I'm thrilled to be working for the MBA. Whether

most people accept it or not, almost every aspect of our lives is affected by laws, contracts and negotiations. Part of the reason I took this job is that I believe the goals and mission of the MBA are vital to improving the entire community.

I have been impressed with the level of thoughtfulness and dedication displayed by the Board of Directors, section and committee members, and staff. Everyone associated with the Milwaukee Bar Association should be proud of their accomplishments. As a historian, I was amazed to learn that this is the fifth oldest bar in the United States; it was the genesis of both the Marquette Law School and the Legal Aid Society. There will be a great deal of reflection on the past as the Bar gets ready to celebrate its 150th anniversary in 2008. We should all be able to pronounce sesquicentennial by then.

My predecessor, Jim Paetsch, did a wonderful job and the MBA prospered during his tenure. I hope to continue and grow many of the partnerships he instituted. We are always searching for new ways to deliver services our members need, create opportunities to refer new clients, and improve the image of the legal community. Associate Director Tia Thorst, did an admirable job of stepping in and running the MBA in the period between directors. The entire staff should be credited for a nearly flawless transition. I learn new things from them every day.

It's been said that in today's society it isn't what have you done for me lately it's what are you going to do for me next. We can never rest on our laurels and assume that members are pleased with the Milwaukee Bar. I am answerable to every member who asks, what do you do for me. We will continue to be a strong voice on behalf of the legal community and advocate on your behalf on issues such as the recent Milwaukee County court funding crisis. We will strive to provide the highest quality CLEs at reasonable rates. We will continue to utilize technology such as on-line CLEs and free WestLaw access, to serve our members. We will improve the Lawyer Referral & Information Service to help both members and the general public. We will continue to offer the finest networking and social opportunities for the legal community such as Judges Night, the Annual Meeting, the Tech Show, the State of the Court Luncheon and the MBA Foundation golf outing. We will maintain a state-of-the-art meeting facility for member use. We will assure that our staff has the tools to provide high quality service. And, finally, we will ask you what you want from your MBA.

Mission statements are worthwhile only if they are implemented. The MBA's mission is both lofty and practical. It promises to better the community by bettering the legal profession. I look forward to working with, and for, all of you to realize these goals.

From Jim to Jim, MBA Remains Strong



President's COLUMN

BY PAMELA PEPPER
US BANKRUPTCY COURT

What better way to start a brand-new year than by welcoming the MBA's brand-new executive director, Jim Temmer? The MBA board is tremendously excited that Jim has joined us. As you may recall, our previous executive director (Jim Paetsch) left in mid-September to pursue another promising career opportunity. During the next three months, a hiring committee of volunteer lawyers took in resumes, combed through them, selected candidates to be interviewed, interviewed the candidates and checked references. The hiring committee was ably and efficiently chaired by president-elect Mike Skwierawski and board member Fran Deisinger—the process could not have been completed as well and as quickly as it was without their leadership.

The hiring committee agreed on a group of finalists for the position, and the executive committee of the MBA conducted interviews of those candidates. As you can tell from the fact that Jim now holds the position of executive director, the hiring committee and the executive committee were very impressed with him. Jim comes to us from the Charles Allis/Villa Terrace Museums, where he served as the executive director. He has past non-profit experience, and has experience working with lawyers. Perhaps what impressed us the most was that Jim knew right away what the MBA was about — service to its members. He is here to serve you.

You should, by now have received a letter from Jim asking you to save the evening of February 21 for Judges' Night. In the coming weeks, I hope you'll take the opportunity to meet and talk with Jim. You'll recognize him — he's the very tall, dark-haired, bearded fellow with the twinkly eyes. He's eager to meet members and to learn more about what lawyers need. He can best serve MBA members if he hears from them about what

works and doesn't work, so don't hesitate to introduce yourself and have a chat.

As thrilled as the board is to have Jim join us, we are also grateful to the other staff members of the MBA. You may be aware that during the three months before Jim started, the board did not appoint an interim executive director. Rather, we called upon every member of the staff to shoulder a bit more of the load than usual. Every single one of them rose to the task. They are an excellent group of people who pitched in and did what it took to keep the MBA afloat. It wasn't easy at times, but they pulled it off. I wanted to take this opportunity to introduce them to you if you don't know them already and to thank them again for their willingness to help.

Stephanie Kershek is our office manager. You'll see her at the front desk phones, or at CLE functions. She also acts as a "jane-of-all-trades," filling in here and there where needed. Britt Bellinger directs our Lawyer Referral and Information Service (LRIS), and is ably assisted by Andrew Clinin. Together, Britt and Andrew have really put some excitement back into LRIS. Pamela Hill is our accountant. You probably don't see her much—she spends a lot of time working on keeping the MBA's books. It may be a solitary job, but it is much appreciated! Amy Westrup is our marketing director. She works on making sure that the MBA is well-represented in the world of non-lawyers. Sabrina Nunley — our longest-serving staff member — is the queen of CLE programs. She also administers the Fairchild Inns of Court. Finally, many of you know Tia Torhorst from the Technology Show or the Eastern District of Wisconsin Bar Association. Tia continued to handle those duties (putting on, with the Technology Committee, a terrific and profitable tech show in early November), but also took on many other administrative duties.

The MBA made the successful transition from Jim Paetsch to Jim Temmer because of the efforts of these talented, dedicated people. They continue to contribute their time in assisting Jim in learning the details of the myriad services the MBA provides. The board thanks each and every one of them for chipping in in the absence of an executive director. We have a great staff team, which will only improve under Jim's leadership. As I asked before, what better way to start a new year than with this kind of leadership, and this kind of staff? Okay maybe throwing in some chocolate would improve the mix slightly — but I doubt it. *Here's to a wonderful 2006 for the MBA, and for each of you!*

Hurricane Katrina, Supreme Court Named Top Legal Events of 2005

There was sweeping change across the United States in 2005 from the Supreme Court to the Gulf Coast. Hurricane Katrina, the shuffling of the U.S. Supreme Court and the battle over the new bankruptcy law topped the charts as the key legal issues of the year, according to a survey of Thomson West authors, all top lawyers and legal scholars in their fields. The survey was conducted by Thomson West, the foremost provider of integrated information solutions to the U.S. legal market and a business within The Thomson Corporation.

HURRICANE KATRINA

While the events surrounding Hurricane Katrina are just beginning to make their way into the courts, the disaster and its lasting effect on the Gulf Coast made headlines this year, and the expected legal fallout makes Katrina one of the top legal issues for 2005.

THE UNITED STATES SUPREME COURT

The legal shift of the U.S. Supreme Court will have an impact for decades to come. Although the court's shuffling with a new chief justice and the retirement announcement of Sandra Day O'Connor made the headlines in 2005, experts cited the *Kelo v. City of New London* decision, which ruled that municipalities can use eminent domain to seize private property in order to turn it over to a private developer, as the most important Supreme Court case of 2005.

BANKRUPTCY ABUSE PREVENTION & CONSUMER PROTECTION

Experts both for and against the new law say it is one of the most important pieces of legislation enacted in 2005. "The Bankruptcy Abuse Prevention and Consumer Protection Act, which took effect Oct. 17, 2005, works a sea of change in bankruptcy law by restricting access of individual debtors to Chapter 7 bankruptcy relief. The law heavily favors secured creditors and taxing entities to the detriment of unsecured creditors," said Judge Joe Lee, author of *Bankruptcy: A Practice Systems Library Manual*.

Those polled are Thomson West authors who are leading experts in areas ranging from constitutional law and litigation to employment law and civil rights. For the full survey results or to interview one of Thomson West's authors, contact Angelique Schaffer at (651) 848-8860 or angelique.schaffer@thomson.com. Visit the Thomson West Expert Directory at <http://west.thomson.com/news/experts/> for knowledgeable sources on today's legal issues.

CLE Calendar

January 2006



January 12
CIVIL LITIGATION

Wisconsin Case Law Update - Civil Procedures
Presenter: TBA
12:00 noon - 12:30 p.m. (Registration/Lunch)
12:30 p.m. - 1:30 p.m. (Presentation)
CLE Credit(s): 1.0 CLE Credit



January 16
REAL PROPERTY

Top 5 Ways to Avoid Troublesome Closings
Presenter: David Turicciano - Cook & Frank
12:00 noon - 12:30 p.m. (Registration/Lunch)
12:30 p.m. - 1:30 p.m. (Presentation)
CLE Credit(s): 1.0 CLE Credit



January 19
INTELLECTUAL PROPERTY

Trademark Counterfeiting - Problems and Solutions
Presenter: Kenneth L. Ng, Sr. Attorney - Kohler Co.
12:00 noon - 12:30 p.m. (Registration/Lunch)
12:30 p.m. - 1:30 p.m. (Presentation)
CLE Credit(s): 1.0 CLE Credit



January 24
ELDER LAW

The Use of Community Special Needs Trusts
Presenter: Heather Poster - Becker & Hickey
12:00 noon - 12:30 p.m. (Registration/Lunch)
12:30 p.m. - 1:30 p.m. (Presentation)
CLE Credit(s): 1.0 CLE Credit



January 31
HEALTH

Top Ten Things to Know About Constructing and Leasing Medical Office Buildings
Presenter: Don Schoenfeld - von Briesen & Roper
12:00 noon - 12:30 p.m. (Registration/Lunch)
12:30 p.m. - 1:30 p.m. (Presentation)
CLE Credit(s): 1.0 CLE Credit

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Location:

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View Programs Online:

Programs with this symbol can be viewed live online at www.westlegaleducation.com

Watch your mail for upcoming CLE information or check out www.milwbar.org for the latest CLE programming information.

NAMES IN THE NEWS



LRIS Closes Out Another Successful Year

The Lawyer Referral and Information Service (LRIS) has closed out yet another successful year. 2005 brought with it a new director, Britt Bellinger, and on September 1, the LRIS call center took on the administration of the Waukesha County Bar Association (WCBA) Lawyer Referral and Information Service.

The MBA LRIS and the WCBA LRIS are two completely separate services, that run through different phone lines, databases and serve different markets.

The MBA LRIS had a steady increase in calls received over the past three years. The MBA LRIS

ended the year with a total of 7,895 referrals to panel member attorneys.

Since September, the WCBA LRIS garnered a panel of 85 attorneys and averaged almost 40 referrals per month.

It was great year for both services and 2006 is on track to be a great year of growth, and increased quality and quantity of referrals.

If you have questions regarding either referral service, or would like to become a panel member, please contact us; MBA LRIS - 414.274.6768 and WCBA LRIS at 262.544.4016.

Tune in to Seminar on Music Downloads

Greater Milwaukee Association of Legal Professionals will host its monthly meeting on January 17th. Details below:

WHAT: Music Downloads — How Does it Work and Why is the Music Industry is Concerned

WHO: Michael T. Hopkins, Esq.

WHEN: January 17th, 6:00 p.m. (dinner), 6:45 p.m. (speaker)

WHERE: Albanese's, 2301 North Bluemound Road, Waukesha

RSVPs: Tami Michalak, 414-978-5472

DeWitt Ross & Stevens is pleased to announce the addition of associate attorney **Timothy M. Van de Kamp** at Brookfield. His law practice is focused on business matters, real estate issues and litigation with a particular emphasis on municipal government land use. Van de Kamp is a 2005 graduate from Marquette University Law School. While a law student, he clerked for the Office of the General Counsel at the Department of Health and Human Services in Washington, D.C.

Kelly A. Baxter has joined Quarles & Brady as Manager, Practice Group Marketing. In her new position, she will be responsible for working with attorneys throughout the firm to assist with their individual and practice group marketing needs, as well as various other special projects associated with office-wide image building and marketing.

Quarles & Brady announced that partner **Kathryn M. Buono** has been named to the Firm's Executive Committee. Buono also serves as Chair of the Firm's Corporate Services Practice Group. Buono focuses her practice in the areas of mergers and acquisitions and private equity investments. In addition, she has several years of experience litigating commercial disputes. Her experience includes representing buyers and sellers in acquisition and divestiture transactions; representing individual investors, institutional investors and management in private equity investments; and advising publicly and privately held businesses in general corporate and commercial matters.

Quarles & Brady also announced that **Sally Merrell**, a partner with the Firm, has been named to the Women's Fund of Greater Milwaukee Inc.'s board for 2006. Merrell focuses her practice in the areas of estate planning, probate and charitable gift planning. Her experience includes representing families in transferring assets from one generation to another, developing charitable giving plans, representing clients before the Internal Revenue Service and other state taxing authorities and more.

Fifty-two Quarles & Brady attorneys from the firm's Milwaukee office were listed as Super Lawyers in the November 2005 issue of *Milwaukee Magazine*. They are:

- **Patricia K. Ballman** - family law
- **John T. Bannen** - estate planning/trusts
- **Andrew M. Barnes** - bankruptcy
- **Darryl S. Bell** - antitrust litigation
- **Kathryn M. Buono** - mergers & acquisitions
- **Daniel E. Conley** - business litigation
- **Gerald E. Connolly** - real estate transactions
- **Frank J. Daily** - professional liability defense
- **John W. Daniels, Jr.** - real estate transactions
- **James F. Daly** - estate planning/trusts
- **Bruce C. Davidson** - securities & corporate finance
- **Jeffrey O. Davis** - business litigation
- **Kevin A. Delorey** - real estate transactions
- **Robert H. Duffy** - labor & employment
- **Julianna Ebert** - bond/government finance
- **Matthew J. Flynn** - general litigation
- **Chris K. Gawart** - estate planning/trusts
- **Conrad G. Goodkind** - securities & corporate finance
- **Michael J. Goring** - civil litigation defense
- **Kathleen A. Gray** - estate planning/trusts
- **Kenneth V. Hallett** - securities & corporate finance
- **Lawrence J. Jost** - real estate transactions
- **David B. Kern** - labor & employment
- **David L. Kinnamon** - estate planning/trusts
- **Daniel J. LaFave** - civil litigation defense
- **Michael H. Lappin** - mergers & acquisitions

- **Fredrick G. Lautz** - mergers & acquisitions
- **Ely A. Leichtling** - labor & employment
- **John H. Lhost** - estate planning/trusts
- **Henry J. Loos** - estate planning/trusts
- **Larry J. Martin** - administrative law
- **Thomas P. McElligott** - environmental land use
- **Michael S. McCauley** - environmental land use
- **Sally C. Merrell** - estate planning/trusts
- **Jeffrey Morris** - business litigation
- **Mary Pat Ninneman** - labor & employment
- **Richard C. Ninneman** - general litigation
- **Michael J. Ostermeyer** - real estate transactions
- **W. Stuart Parsons** - business litigation
- **Nancy K. Peterson** - environmental land use
- **Joseph E. Puchner** - real estate transactions
- **Stephen E. Richman** - bond/government finance
- **John A. Rothstein** - business litigation
- **Patrick M. Ryan** - mergers & acquisitions
- **Carl R. Schwartz** - intellectual property
- **Walter J. Skipper** - mergers & acquisitions
- **Rebecca A. Speckhard** - bond/government finance
- **Paul J. Tilleman** - estate planning/trusts
- **Eric J. Van Vugt** - business litigation
- **Arthur A. Vogel Jr.** - environmental land use
- **Ronald L. Wallenfang** - construction/surety
- **David D. Wilmoth** - tax
- **Brian D. Winters** - public utilities

Prominent Milwaukee Law Firm Changes Name

Michael E. Hupy & Associates Became Hupy and Abraham on January 1

His hard work, perseverance and a history of settling multi-million dollar accident cases made Atty. **Jason F. Abraham** a shareholder in the law firm of Michael F. Hupy & Associates back in 1999. He has continued to shine as one of the firm's top lawyers, and Abraham's accomplishments were celebrated January 1st with a name change of the firm. The new name will be Hupy and Abraham.

"We didn't just add the name of a lawyer to our firm. We added the name of a top rated lawyer with a proven expertise at handling million dollar cases, who has worked at the firm for thirteen years, and has been a shareholder for six," said Atty. Michael F. Hupy.

"It's an honor to have my name linked with Michael Hupy. He is an excellent attorney and someone who is committed to making our community a better place. I can't thank him enough for the opportunities he has given me," said Abraham.

At the young age of 38, Attorney Abraham is ranked among the best in Martindale Hubbell. Licensed to practice law in Wisconsin, Indiana and Missouri, along with the United States District Courts for the Eastern and Western Districts of Wisconsin, he is also a Certified Civil Trial Specialist, a member of the State Bar of Wisconsin, American Bar Association, Million Dollar Advocates Forum and the Association of Trial Lawyers of America. Among his many accomplishments is a history of winning numerous settlements and verdicts, totaling more than \$60 million.

SAVE THE DATE

2006 MBA Judges Night

The Benchmark of a Good Time.

Please join us on
February 21, 2006
The Grain Exchange Room
5:30 p.m. - 8:00 p.m.

Savor a variety of tantalizing hors d'oeuvres and dessert while you enjoy the music of *A Portrait of Jazz*.

Reserve your firm table today!
(\$400.00/ table)

Join us for the next Corporate Casual event

The Art of Corporate Casual

How to create & maintain the ultimate business wardrobe

Tuesday, January 24, 2006
5:00 - 6:00 p.m. Networking
6:00 - 6:30 p.m. Program
Hotel Metro, 411 East Mason St.

Speakers: Laura Lutter, Aala Reed and Dori Panthofer of nVogue, Inc.

R.S.V.P. to register@corporatescasual.org
For more information visit www.corporatescasual.org

Cost: Free for members; \$20 for non-members
Heavy hors d'oeuvres and cash bar provided.

Corporate Casual is an organization that provides relationship development opportunities exclusively for experienced accountants, attorneys & bankers.

Corporate Casual
Empowering Professionals to Thrive in Business

"As Milwaukee's only targeted networking group of its kind, Corporate Casual helps busy professionals build their networks efficiently."
Sara L. Davis, Director of Marketing & Brand Management, Kohler Co.