Spring 2014 • Volume 1

MBA Messenger

Girls Take Over MBA for a Day: Fourth Annual Girl Scout Workshop

Milwaukee Bar Association
424 E. Wells St.
Milwaukee, WI 53202-3746

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"ABSOLUTELY THE NO.1 SHOW in the world, absolutely best."

—Kenn Wells, former lead dancer of the English National Ballet

5,000 YEARS OF CIVILIZATION. LIVE ON STAGE!

SHEN YUN 2014
神韻晚會

"Incredible... Groundbreaking..."
—MSNBC

"Beautiful... a nimble mastery."
—Chicago Tribune

ShenYun.com

"It was an extraordinary experience ... the level of skill, but also the power of the archetypes and the narratives were startling. And of course it was exquisitely beautiful."

—Cate Blanchett, *Academy Award-winning Actress*

"Absolutely beautiful ... It has become this one big poetic event. It was so inspiring, I think I may have found some new ideas for the next Avatar."

—Robert Stromberg, *Academy-Award winner, production designer for Avatar*

"It was inspirational and educational — a performance that I encourage everyone to see and all of us to learn from."

—Donna Karan, *creator of DKNY*

"This is the finest thing, the finest event I've ever been to in my life ... This is the profound, quintessential end of entertainment, there is nothing beyond this, nothing."

—Jim Crill, *former Bob Hope producer*

"I am completely enchanted ... I do hope there is a recording of your wonderful erhu player, and it will haunt me and make me remember this marvelous evening."

—Her Royal Highness Princess Michael of Kent

"I have reviewed over 3,000 to 4,000 shows since 1942. I give this production 5 stars. That's the top ... I've seen enough Broadway shows that still cannot compare to what I saw tonight ... mind blowing."

—Richard Connema, *renowned Broadway critic*

MARCH 5-6, MILWAUKEE

DATE & TIME
Wednesday **March 5** 7:30 p.m.
Thursday **March 6** 7:30 p.m.

VENUE
Milwaukee Theatre

PRICE
$150, $110, $90, $80, $60, $50

3 EASY WAYS TO ORDER
Online: milwaukeetheatre.com
Hotline: 888-974-3698 / 866-848-9982
Box Office: 500 W. Kilbourn Ave., Milwaukee, WI 53203

APRIL 10-11, MADISON

DATE & TIME
Thursday **April 10** 7:30 p.m.
Friday **April 11** 7:30 p.m.

VENUE
Overture Center for the Arts

PRICE
$100, $80, $70, $60, $50

3 EASY WAYS TO ORDER
Online: overturecenter.com
Hotline: 888-974-3698 / 608-258-4141
Box Office: 201 State Street, Madison, WI 53703

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Regular Features

In This Issue:

Be Part of the Messenger

Please send your articles, editorials, or anecdotes to editor@milwbar.org or mail them to Editor, Milwaukee Bar Association, 424 East Wells Street, Milwaukee, WI 53202. We look forward to hearing from you!

If you would like to participate, we have seats available on the *Messenger* Committee. Please contact James Temmer, jtemmer@milwbar.org.

The MBA *Messenger* is published quarterly by the Milwaukee Bar Association, Inc., 424 East Wells Street, Milwaukee, Wisconsin 53202.
Telephone: 414-274-6760
E-mail: marketing@milwbar.org

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
- Increase public awareness of the crucial role that the law plays in the lives of the people of Milwaukee County.

MBA Officers, Board of Directors, and Staff

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Mary Ferwerda, *Legal Director*

Contact Information

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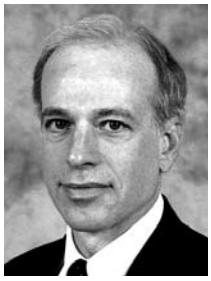
Letter From the Editor



Charles Barr, Editor

The Third Annual Milwaukee Justice Center Campaign runs from March 17 through March 28. By now you probably know that the Milwaukee Justice Center dispenses basic, practical guidance to Milwaukee County residents who must navigate the civil legal system without an attorney because they cannot afford one and cannot obtain publicly-funded legal aid. The MJC was conceived in honor of the MBA's Sesquicentennial in 2008, and is our signature public service project.

The MJC is a dynamic resource that continues to expand and improve its vital services. In 2013, it teamed with Marquette University Law School to roll out the Mobile Legal Clinic, which brings volunteer lawyers and law students to economically depressed Milwaukee neighborhoods one Saturday a month. And as you'll read in these pages, other strategic partnerships have now enabled the MJC to provide Spanish-speaking assistance to clients (see page 15), and to launch a Foreclosure Legal Advice Clinic (see page 16). This year, the MJC will move into its expanded permanent quarters in Room G-9 of the courthouse—a crucial logistical upgrade to its unique service delivery model.

Beyond any doubt, the MJC has become an essential component of Milwaukee County's civil justice system. The center again served over 10,000 clients last year, despite the courthouse fire shutdown in July. The number of volunteers and volunteer hours both increased significantly compared to the previous year. Page views at the upgraded MJC website skyrocketed more than 25%.

As a matter of pure economics, the ratio between the MJC's lean operating budget and the value of services delivered would be the envy of most private enterprises. More importantly, however, the value of the MJC's role in the delivery of justice in the community is incalculable. Simply put, it makes Milwaukee County a better place to live by making justice more accessible and enhancing both the quality and efficiency of our courts.

It is up to the members of the Milwaukee Bar Association to contribute the funds to operate this groundbreaking public service project. Each of us chose the law as a profession, and chose to practice it—or at least to maintain a professional connection—in this community. The Milwaukee Justice Center is intimately related to those life-shaping choices. Therefore, I hope you'll also choose to participate in this year's MJC campaign with as generous a tax-deductible donation as your personal circumstances permit. Simply go to www.milwbar.org, click on "Milwaukee Justice Center," and use your credit card; or send a check to the MBA Foundation, Inc., 424 East Wells Street, Milwaukee, WI 53202.

This issue of the *Messenger* kicks off 2014 by recognizing some noteworthy career milestones in our legal community. Former circuit judge and newly-minted mediator Charles Kahn profiles our own Chief Judge Jeff Kremers, whom the State Bar of Wisconsin recently honored as 2013 Judge of the Year. Laura Gramling Perez reviews the careers of two giants in the history of Milwaukee legal aid—John Ebbott and Tom Cannon—on the occasion of their retirements. Judge Michael Dwyer highlights a petition pending in the Wisconsin Supreme Court to regulate and facilitate limited service representation. We present the second and final installment of the late Professor John Skilton's article analyzing the Gettysburg Address. Our "hard law" articles smoke out the hazy legal issues involving e-cigarettes, and recent upheaval in the law governing recovery of Medicaid payments from estates and divestments. Regular contributor Doug Frazer reviews a memoir that unblinkingly confronts some uncomfortable aspects of legal education and practice. And we have photos from last month's Judges Night and the Fourth Annual MBA Girl Scout Workshop.

We hope you enjoy this edition of the *Messenger,* and that by the time you read this, 15 degrees no longer qualifies as a "warm up" here at shiver.milw.com. While this may be the "spring" issue more in ardent hope than in meteorological reality, take heart: somewhere, thousands of miles away, pitchers and catchers have reported.

—C.B.

Member News

Andrus Intellectual Property Law, celebrating its 75th anniversary, announced that **Benjamin R. Imhoff** and **Tambryn K. Van Heyningen** have become partners in the firm.


Benjamin R. Imhoff


Tambryn K. Van Heyningen


Joshua J. Brady

Galanis, Pollack, Jacobs & Johnson announced that **Joshua J. Brady** has joined the firm as a shareholder, with emphasis in creditors' rights and commercial business litigation.

Grzeca Law Group, a full-service immigration law firm, welcomed **Theodore Chadwick as** an associate in its Milwaukee office.


Theodore Chadwick


James R. Shaw

Petrie & Stocking announced the addition of **James R. Shaw,** who focuses his practice on general civil and business litigation, business law, construction law, and estate planning.

Quarles & Brady announced the addition of four associates in its Milwaukee office: **Rachel H. Bryers** in the Health Law Practice Group, **Jacob Fritz** and **Michael Piery** in the Intellectual Property Practice Group, and **Patrick Taylor** in the Corporate Services Practice Group.


Rachel H. Bryers


Stephen C. Elliott


L. Katie Mason


Carolyn M. McAllister


Nathan J. Nueberger


Jessica Hutson Polakowski


Katie D. Triska

Reinhart Boerner Van Deuren announced that six of the firm's attorneys have been named shareholders: **Stephen C. Elliott** in the Real Estate Practice, **L. Katie Mason** in the Business Reorganization Practice, **Carolyn M. McAllister** in the Employee Benefits Practice, **Nathan J. Nueberger** in the Business Law Practice, **Jessica Hutson Polakowski** in the Intellectual Property Litigation and Tax Litigation Practices, and **Katie D. Triska** in the Labor and Employment Practice.

von Briesen & Roper welcomed five attorneys to its Milwaukee office: **Lee Anne N. Conta** as a shareholder in the Litigation and Risk Management Practice Group; **Brittany L. Finlayson** as an associate in the Business Practice Group; **Patrick C. Greeley** and **R. Lynn Parins** as associates in the Banking, Bankruptcy, Business Restructuring and Real Estate Practice Group; and **Jaime D. Levine** as an associate in the Business and Corporate Law Practice Group.

Susan Lovern Is Environmental Litigator of the Year

The Messenger congratulates Susan E. Lovern, a member of the MBA's Board of Directors, for her recognition by Best Lawyers® as the 2014 Milwaukee "Lawyer of the Year" in environmental litigation. Susan practices with von Briesen & Roper.

Volunteer Spotlight

Nicholas J. Zepnick


Nicholas J. Zepnick

Nicholas Zepnick is an associate with Foley & Lardner. He has a mechanical engineering background and focuses his practice on intellectual property matters, particularly patent prosecution and patent counseling.

Through the MBA, Nicholas has worked with the Milwaukee Justice Center as a volunteer attorney at the Marquette Volunteer Legal Clinic. As a volunteer attorney, he provides guidance in family law, landlord/tenant disputes, small claims, and various other practice areas. His *pro bono* work includes the Wills for Heroes program, which was created in the wake of September 11, 2001 to assist emergency personnel in preparing estate planning documents. Working at Foley has also afforded Nicholas the opportunity to engage in patent preparation and patent counseling on a *pro bono* basis.

Nicholas feels that the most important aspect of these volunteer programs is the people whom they help. The services are often critically important to those people and provide guidance they might not otherwise be able to access. In Nicholas' view, this makes it crucial for attorneys to spend time giving back to the community.

Nicholas and his wife Kendra live in Cedarburg and enjoy outdoor activities, including skiing, camping, and hunting. They are also involved in various outreach activities through their church.

Save the Date!

Fourth Annual MJC 5K Run for Justice

Date: Wednesday, June 18, 2014 @ 7:00 pm

New to the run this year:

- 1-Mile Kids Run. Kids will be accompanied by volunteer runners during the race!
- Platinum sponsorship opportunity ($2,500) for up to 50 complimentary race registrants, and much more.

Register by April 30: http://milwaukee.gov/MJC/MJC5K.htm

Message From the President

Attorney Beth E. Hanan, Gass Weber Mullins

When my father retired from The Hartford Insurance Group, he didn't get a gold watch. He wasn't much for jewelry, but has always been big on loyalty and history. So the company gave him this plaque of the corporate emblem. You may recognize the proud stag pictured here as Edwin Landseer's "Monarch of the Glen." The company acknowledged that my dad had always put company interests before his own, and because he was a lifelong sportsman, the Monarch image stirred him.

But this particular plaque has its own history. As the story goes, it had hung in an old Hartford Fire Insurance office in Springfield, Illinois. An agent from that office sold Abraham Lincoln a fire insurance policy on Lincoln's house the day before Lincoln left for Washington, D.C., for his first inauguration. That Lincoln connection imbued the plaque with an even deeper sense of tradition and commitment.

How many stories do you think are bound up in the collective careers of MBA members? Two-thirds of our current members are over 45. That adds ups to a lot of stories—stories of loyalty to client and to firm, stories of pride in achieving creative and just legal outcomes, stories too of struggle and disappointment. At the MBA, there are multiple ways those stories get told. If you are part of the MBA mentor program, you can learn about courageous decisions, bumps in the road, and innovative solutions by talking to a more senior lawyer about his or her career. And every May, the MBA recognizes the accomplishments of Milwaukee lawyers and judges who have passed on, but whose stories still deserve to be shared. The annual Memorial Service—this year set for May 9—is a time for reflection and commemoration, and often for rededication. If you go, it is sure to strike a chord.

We know that new and unimagined stories lie ahead. In 2014, the MBA's theme is "The Future of the Profession," and our goal is to host deep-thinking panel discussions about the changes to law practice over the past several years, as well as understanding how we can shape the future. The MBA's newest section, the Corporate Counsel Section, will allow in-house lawyers to gather for highly relevant CLE programs, manageable *pro bono* opportunities, and also occasions to discuss with private practitioners more focused means of providing legal services. In-house lawyers from large corporations to smaller non-profits will find a home in this new section.

By the time you read this issue of the *Messenger,* Judges Night 2014 will have taken place. How many stories did you hear there over elegant hors d'oeuvres and fine drinks? Did you make a new connection, or enjoy social conversation with one of our judges? And just days from now, the MBA will host a judicial forum, where candidates for several circuit court seats will tell their own stories—of practice, of community involvement, of judicial philosophy. Bring your lunch and bring a friend, and grab more than just television sound bites to help you cast your votes.

Contributions of both your time and your treasure can lead to success stories, when you volunteer at the Milwaukee Justice Center, and contribute to the upcoming MBA Foundation's annual Milwaukee Justice Center Campaign, which funds MJC operations. The number of clients served by the MJC, both at the courthouse and through the Mobile Legal Clinic, has grown to almost 1,000 per month. That number will get an added boost when, in observance of Law Day, the MBA will offer three free walk-in legal clinics at area libraries on Saturday, May 10.

If you aren't already an active MBA member, join us now, and encourage your colleagues to do the same. Learn some history. Learn about what you can become. Make the commitment and be part of the tradition. There may not be a historic plaque at the end of your career, but the professional satisfaction will be wholly tangible.

Upcoming Events

Judicial Forum
Thursday, March 6
Featuring candidates
Cedric Cornwall and
Laura Gramling Perez

Annual Meeting
June 10

Golf Outing
August 6

Memorial Service
May 9

CLE Calendar

Spring 2014

March 5, 2014
Corporate Counsel Section
In-House Counsel and the Attorney-Client Privilege
This presentation will focus on issues concerning the privilege as experienced by in-house counsel, as well as practical advice for dealing with those issues.
Presenters: John Kirtley and Jonathan Ingrisano, Godfrey & Kahn
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 7, 2014
Government Law Section
Regulating Wisconsin's Frac Sand Industry
This presentation will focus on the rapid growth of the Wisconsin frac sand industry and the manner in which state and local government are seeking to regulate it.
Presenter: Joseph Russell, von Briesen & Roper
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 10, 2014
Corporate, Banking & Business Law Section
Noncompetition and Other Restrictive Clauses in Wisconsin
A discussion of the current landscape of Wisconsin law pertaining to covenants not to compete (in both employment and sale-of-business contexts), employment-based non-solicitation clauses, liquidated damages provisions, arbitration clauses, and forum selection clauses. Attorney Schlicht will also discuss issues involved in attempting to place restrictions on independent contractors, franchisees, and distributors.
Presenter: Jane C. Schlicht, Hinshaw & Culbertson
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 11, 2014
Health Law Section
Walking on Sunshine: an Industry Perspective on the Physician Payments Sunshine Act and Final Rule
With the first report by manufacturers under the U.S. Sunshine Act due to the federal government on March 31, the impact of that law is occupying the minds of many physicians, hospital executives, and life sciences industry leaders. Join us for a presentation and discussion with members of GE Healthcare's legal department who are part of the company's efforts to interpret and operationalize the law.
Presenters: Timothy B. Caprez, Senior Counsel, Compliance, GE HealthCare; Christian J. Krautkramer, JD, MPH, Compliance Project Leader, GE HealthCare
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 13, 2014
Civil Litigation Section
Third-Party Discovery
Topics will cover preservation letters to third parties (including obligations imposed by such letters and enforcement of such obligations), issuance of subpoenas (in-state, out-of-state, and federal), and the enforcement of subpoenas.
Presenter: Jennifer A.B. Kreil and Pamela J. Tillman, Meissner, Tierney, Fisher & Nichols
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 14, 2014
Employee Benefits Section
Health Care Reform Update: Pay, Play, or Delay?
This presentation will cover the final mental health and substance use disorder parity regulations released in November 2013. Because these new regulations take effect with plan years beginning on or after July 1, 2014, health plans should quickly consider them. This presentation will also address Affordable Care Act concerns with respect to mental health and substance use disorder benefits, including how to determine whether treatment for a mental health or substance use disorder is an "essential health benefit" subject to the Affordable Care Act's annual/lifetime limit prohibitions and cost-sharing rules.
Presenter: Sarah L. Fowles, Quarles & Brady
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 17, 2014
Tax and Real Property Sections
Real Estate Exchange Transactions
Topics will include recommended exchange documentation and closing statement drafting, "reverse" and "build to suit" exchange structuring, and tenant-in-common arrangements and planning. Time permitting, the floor will be open for any other exchange topics on which attendees have questions.
Presenter: John A. Sikora, Weiss Berzowski Brady
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 18, 2014
Intellectual Property Section
Third Party Intellectual Property and Domain Registry Notices—Trolling, Fishing, or Scamming?
What do you do when your client receives a notice offering help in registering its trademark, domain name, or other intellectual property? What if it is a renewal notice from a previously unknown third party? What if the notice is from a company in Washington, D.C. that sounds legitimate? Or from China? Are these all just scams or should they be investigated further? Are there other mysterious trolls lurking about? Experienced in-house and outside intellectual property counsel will help to navigate these very "fishy" waters.
Panelists: Michael Baird, Corporate Counsel, Uline, Inc.; Dirk Vanover, Associate General Counsel, BuySeasons, Inc.; Michael Gratz and Michael Carton, Boyle Fredrickson
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 19, 2014
Environmental Law Section
Key 2014 Reminders for Compliance with the Federal Clean Air Act
This presentation will cover key components and 2014 deadlines related to compliance with the Federal Clean Air Act, including: (a) the final National Emission Standards for Hazardous Air Pollutants (NEHSAPs) for Industrial, Commercial, and Institutional (ICI) boilers and Reciprocating Internal Combustion Engines (RICE); (b) Residual Risk or Risk and Technology Reviews (RTR) of existing Maximum Achievable Control Technology (MACT) standards; and (c) Risk Management Plan (RMP) regulations.
Presenter: Renee Lesjak Bashel, Project Manager, SCS Engineers, Madison, WI
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 21, 2014
Real Property Section
The Ins and Outs of Estoppels Letters and SNDAs
In-depth discussion of the estoppel letter and the subordination, non-disturbance, and atonement agreement—always parts of a lease, too often neglected
Presenter: Anne Wal, von Briesen & Roper
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

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Welcome
New MBA Members!

Daniel Ark, *Quarles & Brady*
Ilana Avital, *Legal Action of Wisconsin*
Danielle Bailey, *Cross Law Firm*
Adam Bardosy, *Mallery & Zimmerman*
John Barlament, *Quarles & Brady*
Rachel Bell, *Reinhart Boerner Van Deuren*
Elizabeth Blutstein, *Quarles & Brady*
Nicholas Boerke, *Michael Best & Friedrich*
Anne Carroll, *Michael Best & Friedrich*
Donald Chewning, *Winter, Chewning & Geary*
Alyssa Dowse, *Quarles & Brady*
Nicole Druckrey, *Quarles & Brady*
Edward Evans, *Michael Best & Friedrich*
Rachel Farrington, *Michael Best & Friedrich*
Kyle Flanagan, *Reinhart Boerner Van Deuren*
Sara Geenen, *The Previant Law Firm*
David Groose, *Quarles & Brady*
Thomas Hayes, *Law Office of Thomas E. Hayes*
Jennifer Jackson, *Quarles & Brady*
Nathan Jurowski, *Nathan M. Jurowski, Attorney at Law*
Michael Keepman, *Habush Habush & Rottier*
Georgia Konstantakis, *Konstantakis Law Office*
Brandon Krajewski, *Quarles & Brady*
Daniel LaFrenz, *Michael Best & Friedrich*
James Law, *Reinhart Boerner Van Deuren*
John Leppanen, *Law Office of Arthur Heitzer*
Eric Lowenberg, *Penegor & Lowenberg*
Lisa Lyons, *Quarles & Brady*
Anthony Marino, *Michael Best & Friedrich*
Steven Martin, *Reinhart Boerner Van Deuren*
Kate Maternowski, *Reinhart Boerner Van Deuren*
Kathryn Muldoon, *Quarles & Brady*
Andrea Murdock, *Halloin & Murdock*
Justin Musil, *Reinhart Boerner Van Deuren*
Renee Nawrocki, *Diane S. Diel, S.C.*
Plymouth Nelson, *Michael Best & Friedrich*
Spiros Nicolet, *Midwest Green Card*
Aaron Nodolf, *Michael Best & Friedrich*
Yvonne Ochilo, *Ochilo Law Offices*
Odalo Ohiku, *Law Office of Odalo J. Ohiku*
Patrick O'Neill
Todd Palmer, *Michael Best & Friedrich*
Kristi Papez, *Marquette University Law School student*
Jeremy Perri*, *State Public Defender's Office*
Jeffrey Perzan, *Law Offices of Jeffrey Perzan*
Andrew Price, *Reinhart Boerner Van Deuren*
Jennifer Rathburn, *Quarles & Brady*
Nicole Rosen, *Reinhart Boerner Van Deuren*
Lindsay Ruch
Sheridan Ryan, *Medical College of Wisconsin*
KaLynn Ryker
Leila Sahar, *Quarles & Brady*
Annie Schumacher, *Merit Title*
Sara Stellpflug, *Reinhart Boerner Van Deuren*
Patrick Taylor, *Quarles & Brady*
Rachel Taylor, *Quarles & Brady*
Timothy Teicher, *Michael Best & Friedrich*
Gilbert Urfer, *Adams Urfer*
Tonya Vachirasomboon, *Quarles & Brady*
Patrick Wait, *Wait Law Offices*
Deanne Wecker, *New England School of Law student*
Jonathan Wertz, *Medical College of Wisconsin*
Kathryn Westfall, *Reinhart Boerner Van Deuren*
Annamarie Wineke, *Wineke Law Office*

CLE continued from p. 7

March 25, 2014
Elder Law Section
Aid and Attendance Redux: Understanding the Veterans' Needs-Based Benefit
This session will cover the requirements for the needs-based benefit for veterans and their widows, called Aid and Attendance or A&A. It will compare and contrast A&A and Medicaid, and will also update on the status of the VA "divestment" bill.
Presenter: Carol J. Wessels, Nelson Irvings & Wessels
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 25, 2014
Estate & Trust Section
Dynasty Trusts and DAPTs: Top Tier States and the Future for Wisconsin
Dynasty trusts and domestic asset protection trusts (DAPTs) have become integral parts of many estate plans. This presentation will explore Wisconsin's favorable dynasty trust rules and the efforts to bring DAPT legislation to Wisconsin.
Presenter: Eido M. Walny, JD, AEP, EPLS, Walny Legal Group
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 26, 2014
Labor & Employment Section
Healthcare Worker Retaliation: a Judge's Insight into Protection and Enforcement
Discussion of the elements of healthcare worker retaliation claims under the intricacies of five Wisconsin statutes. Judge Schacht will provide his useful insights into litigation involving healthcare workers who were retaliated against for reporting their employer's abuse, exploitation, or neglect of patients or residents.
Presenter: ALJ James Schacht, Equal Rights Division, Wisconsin Department of Workforce Development
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 CLE credit

March 27, 2014
LawReview CLE and MBA, Co-Sponsors
Elder Law: Basics of Elder Law from A to Z
Presenter(s): TBA
8:30 - 9:00 a.m. (Continental Breakfast/Registration)
9:00 – 12:15 (Presentation)
3.5 CLE credits

March 27, 2014
LawReview CLE and MBA, Co-Sponsors
Adoption Law 101
Presenter(s): TBA
8:30 - 9:00 a.m. (Continental Breakfast/Registration)
9:00 - 12:15 (Presentation)
3.5 CLE credits including 1.0 CLE ethics credit

March 27, 2014
LawReview CLE and MBA, Co-Sponsors
Personal Injury 101
Presenter(s): TBA
12:45 - 1:00 p.m. (Registration)
1:00 – 5:15 (Presentation)
4.5 CLE credits including 1.0 ethics credit

March 27, 2014
LawReview CLE and MBA, Co-Sponsors
Handling Your First Divorce
Presenter(s): TBA
12:45 - 1:00 p.m. (Registration)
1:00 – 5:15 (Presentation)
4.5 CLE credits including 1.0 ethics credit

March 28, 2014
Family Law Section
A View from the Bench: a Roundtable Discussion
Discussion of various areas of family law practice, including suggestions for best advocacy practices before the court
Panelists: Honorable Maxine White (Presiding Judge, Family Division); Honorable Carl Ashley; Honorable Frederick Rosa; Honorable William Sosnay; Family Court Commissioner Sandy Grady; Deputy Family Court Commissioner Ana Berrios-Schroeder
12:30 - 1:00 p.m. (Registration—no lunch)
1:00 - 4:00 (Presentation)
4:00 - 5:00 (Reception—hors d'oeuvres & wine)
3.0 CLE credits

March 31, 2014
MBA Presents
Attorneys' Guide to College Funding
Learn strategies that may save you or your clients thousands of dollars on the cost of college. Determining how to pay for college most efficiently is one of the biggest problems facing clients today.
Presenter: Brad Baldridge, CFP®, Baldridge College Solutions, LLC
Noon – 12:30 (Lunch/Registration)
12:30 – 1:30 (Presentation)
1.0 pre-approved CLE credit

May 9, 2014
MBA Family Court Bench/Bar Committee and Family Law Section
Thirteenth Annual Family Court GAL Training Seminar
Presenters: TBA
Location: Marquette University Law School
Noon - 12:30 (Lunch/Registration)
12:30 - 4:00 (Presentation)
3.5 CLE general and GAL credits

*Congratulations to Jeremy, winner of a $100 gift certificate for Thief Wine. Jeremy qualified for the drawing by submitting his MBA membership application at Judges Night. Even in the lawyer biz, a little luck never hurts.

Wisconsin Supreme Court Petition Promotes Limited Service Representation

Honorable Michael J. Dwyer, Circuit Judge, Milwaukee County Circuit Court

On March 21, 2014, the Wisconsin Supreme Court will conduct a hearing on a petition filed by the court's Planning and Policy Advisory Committee, which seeks to provide support and guidance for lawyers who wish to provide limited scope representation (LSR) to clients in Wisconsin. LSR, sometimes referred to as unbundled legal services, is a relationship between a lawyer and a client that limits the services the lawyer provides to something less than full representation. Common examples of LSR include providing advice only, drafting pleadings or other documents, and limited appearances in court. The petition proposes to regulate LSR through the amendment and creation of statutes and the Supreme Court Rules of Professional Conduct for Attorneys.

LSR is not a new concept. It is increasingly seen as a way to address the dramatic increase in the number of litigants who self-represent, as well as the lack of access to justice illustrated by the 2007 Wisconsin State Bar Unmet Legal Needs Study. Support for LSR has steadily grown in the recent past. In 2013, the American Bar Association House of Delegates approved a resolution endorsing LSR and encouraging lawyers to offer it as a means of increasing access to justice. Forty-two states have authorized LSR and have taken steps to promote its use.

LSR has been specifically authorized by the Wisconsin lawyer's code of ethics since 2007. (SCR 20:1.2(c).) Given the conservative nature of the legal profession, the lack of clear direction on a number of important practical and ethical issues has limited the provision of LSR. The purpose of the petition is to address these deficiencies and thereby promote the use of LSR.

The petition can be briefly summarized as follows:

1 *Informed consent in writing.* The petition provides guidance on the creation of the relationship. It seeks a requirement that with limited exceptions, the relationship must be documented in a writing that identifies the scope of the work. It also seeks to create a presumption that will make it difficult for a client who signs an LSR agreement to expand the lawyer's obligations.

2 *Limited appearances and withdrawals in litigation.* Currently, no rule clearly describes the procedures for making a limited appearance or withdrawing after one has been made. The petition envisions that lawyers wishing to make limited appearances in cases will do so with assurance that the limitation of their representation will be honored.

3 *Service guidelines.* The petition proposes clear rules on who must be served with legal documents when a client is engaged in an LSR relationship.

4 *Communication guidelines.* Lawyers are ethically prohibited from directly communicating with a represented party. The petition advocates for clear rules to address this issue when the "represented party" is in an LSR relationship.

5 *Document preparation.* The drafting of documents by lawyers who do not appear for a client, commonly referred to as ghostwriting, has been controversial. The petition seeks to require a client to disclose that a document has been prepared with the assistance of a lawyer, but not to disclose the identity of the lawyer.

Needed:

Law Day Volunteers

Law Day 2014 is right around the corner, and the Milwaukee Bar Association is seeking volunteers for its free walk-in legal clinics. On Saturday, May 10, four Milwaukee-area libraries will host the free clinics, which offer a one-on-one meeting with an attorney to any interested member of the public. These meetings will provide information and referrals appropriate for each individual's legal situation. We are currently seeking volunteers from 1:00 – 4:00 p.m. at the following locations:

Mobile Legal Clinic
South Side • Forest Home Library
1432 W. Forest Home Ave.

Downtown Central Library
814 W. Wisconsin Ave.

West Side • Center Street Library
2727 W. Fond du Lac Ave.

North Side • Brown Deer Library
5600 W. Bradley Rd.

Please contact Britt Wegner at 414-276-5931 or bwegner@milwbar.org if you are interested in participating.

For the Sake of Argument:

a Working Lawyer's Clear-Eyed Look at Legal Education and the Practice of Law

Attorney Douglas H. Frazer, DeWitt Ross & Stevens

Douglas H. Frazer

Why are law professors drawn from those who have never really practiced law? Why do lawyers advance arguments that are not correct, just not-false? Why does judicial decision-making often seem arbitrary?

Working lawyers, in their day-to-day practice, experience strange realities mixed with confounding ironies. Often these take the form of "inconvenient truths." Airing these truths, however, can occasion anything from bad feelings to massive retaliation. It's seldom done.

Joel Jacobsen's memoir, *For the Sake of Argument: A Life in the Law* (Kaplan Publishing) throws caution to the wind. He says what many lawyers think. With a coroner's candor, Jacobsen dissects the illusions that shroud much of a working lawyer's world.

Jacobsen left high school early and majored in writing at U.C. Santa Barbara. He started law school at the University of New Mexico and transferred to Northwestern. In between he took a Fulbright year studying law in Germany. He has practiced with a big firm, a small firm, and for the past 20-odd years as a New Mexico assistant attorney general handling criminal appeals.

Law School

Law school, Jacobsen observes, "plays a vastly more important role in the careers of lawyers than medical school does in the career of doctors. Unlike a doctor, many will always judge a lawyer by the brand name on his or her diploma. Without the arbitrary distinction that law school rankings bestow, there would be no way to tell law schools apart but the architecture."

Until the 19th century, law was understood as a practical rather than academic discipline. With urbanization, "reading the law" expanded from apprenticeship to independent trade schools. Then universities, discovering the profit center that law schools could be, brought legal studies "in-house" and conferred on it "academic" status.

Unlike most academic fields, however, in law "there's no natural relationship between scholarship and teaching. Law professors never make discoveries. They rarely collect data through experiment or observation. What's called legal scholarship is mostly just heavily footnoted argumentation – very long op-ed pieces on esoteric topics."

"Increasingly," says Jacobsen, "law school faculties consist of professors who have not practiced law, have little interest in teaching students to practice law, and who pay scant attention to the work of practicing lawyers. Students go to law school to learn how to be a lawyer, but the professors aren't interested in teaching that. Frequently, they can't."

Law schools attempt to compensate by using practitioners as adjunct professors. Students often give adjuncts high marks. "But if a practitioner can step in and do a professor's job, doesn't that mean the professor hasn't been doing anything that requires special academic expertise?" That, Jacobsen suspects, "taps into a deep anxiety for law professors, who worry about not being viewed as *real* academics. They don't, by and large, do research, and what little they do never amounts to much …. Their professional journals aren't even peer-reviewed."

How about the work of molding minds to "think like a lawyer" through the Socratic Method? In the hands of law professors, says Jacobsen, "all that I ever observed was really the reverse of the Socratic Method. It was a way to reveal one's need to bully and belittle those who make themselves vulnerable by seeking to learn."

Then there are the writing instructors, "the scullery maids of the legal academy for reasons that strike students as ironic: because they teach skills of tremendous practical value. Such work is, more or less by definition, of little academic interest. Meanwhile, the professors' academic interests are, more or less by definition, of no value to students who want to learn how to practice a profession."

"The legal academy," Jacobsen concludes, "that treats itself as the norm and the practice of the profession as a deviation doesn't deserve to be taken seriously as an academic subject. It doesn't deserve to be taken seriously, period."

The Practice of Law

Jacobsen knows that what lawyers do is sometimes hard to explain to outsiders.

Part of this is the peculiar nature of legal practice. A lawyer's job "isn't to question authority but to manipulate it to the advantage of his or her client." The concept of not-false is essential to this task. "With rare exceptions, says Jacobsen, "lawyers are scrupulously careful never to say in court or write in their pleadings any proposition that can be proved false. It doesn't have to be correct, just not-false."

Big firm practice, in Jacobsen's experience, is a source of high remuneration but a frequent cause of unhappiness. To maximize profit, big firms need to cultivate and project the trappings of prestige. Prestige, however, is double-edged sword. On one hand "[p]restige shields the corporate counsel from blame if the big firm loses the case. From the counsel's point of view, it's easily worth millions of dollars of the company's fund to buy that peace of mind."

On the other hand, prestige often serves to rationalize the superficial, "a term of art for the condition of having adopted someone else's values as one's own." When lawyers internalize such image-based values, "predictable things happen, many of them involving alcohol, divorce, clinical depression, and suicide, all of which lawyers experience two to three times as frequently as non-lawyers." Prestige, cautions Jacobsen, may be "the single most efficient method for engineering [our] own misery."

One of Jacobsen's early sources of professional dissatisfaction was the many morally neutral areas of practice: little to brood about, even less to care about. This led him to criminal appellate work—a field he found morally charged, and satisfying. For many lawyers, preparing good legal documents, championing a client's cause, getting a good result, or helping a client out of a jam is satisfaction enough. But Jacobsen has a point. From time to time each of us should take on work that will allow us to believe that we are contributing to a cause bigger than ourselves and more meaningful than a client's finances.

Finally, Jacobsen exhorts lawyers to remember the law's variety. The practice of law can involve many fields and many career options. We cannot be bound by non-competes; we are all free agents. "Switching from litigation to appellate practice, and from civil to criminal law, and from the private to the public sector," he notes, "made my career one I no longer minded having."

The Judiciary

Judicial opinions "look like literary text, and often read like narratives, but they are

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Hands Off. Hands On. Hands Down.

Chief Judge Jeffrey Kremers Is the 2013 Judge of the Year

Attorney Charles Kahn

Milwaukee County has 47 elected circuit court judges and a dozen or so municipal judges, along with rafts of court commissioners and probate officials. Managing the institution employing these strong-willed and independent operators is no easy task.

As one of the circuit court judges (from 1992 through 2013), I was concerned in 2008 when our magnificent chief judge, Kitty Brennan, jumped ship to take a position on the Wisconsin Court of Appeals. Whom would the Wisconsin Supreme Court select to replace her? We needed someone with the passion, courage, and charisma to represent the courts and improve the delivery of justice in our community. We needed someone with the drive and acumen to make tough changes our system required. What we did *not* need was a micro-manager looking over the shoulders of my 45 colleagues and me, telling us how to run the courtroom and how to handle our caseloads.

Frankly, I was worried when I learned that Jeffrey Kremers was being considered for the position. Jeff is hard to read in personal interactions. He seldom smiles; he speaks far too bluntly; and—from my perspective—I'd say he's a little too tall.

I am happy to report my concerns were unwarranted. Jeff's work as chief judge has been superb. Last September I joined others encouraging the State Bar of Wisconsin to name him 2013 Judge of the Year.

Here's why.

Hands off

Chief Judge Kremers (pronounced "cray-merz"—as in meteorite "craters") effectively utilizes a hands-off approach with other judges. He operates under the assumption that each judge is competent and that each will utilize methods and procedures to best fulfill her or his judicial responsibilities. Of course, Judge Kremers holds administrative meetings and delivers dreaded "Chief Judge Directives" when needed. But from day to day, each independently elected circuit and municipal court judge is allowed to do his or her work without interference or unnecessary review. Refreshingly, when it comes to judicial rotation this chief makes every effort to assign each judge to the type of cases that judge prefers, without the slightest hint of favoritism or pay-back.

Hands on

Most impressive is Judge Kremers' tireless focus on improving the ability of our courts to best serve the public. It is thrilling to see the development and implementation of the Praxis evidence-based bail-setting system. This excellent program saves taxpayer money and allows people who would otherwise languish unnecessarily in pretrial detention to get back to work and to their families. It didn't happen just because it was a good idea. Judge Kremers marshaled and inspired the team that worked night and day to get it done.

Among many other accomplishments, Judge Kremers:

- redeveloped, enhanced, and strongly supported the Day Reporting Center to reduce recidivism by providing educational and rehabilitative services to non-violent offenders.
- worked with the county board and county executive to return the House of Correction to a meaningful model of correction. New management has instituted realistic educational and drug recovery programs to teach inmates pro-social behaviors they can use upon release from their short-term confinement.
- energetically supports the Milwaukee Justice Center that former Chief Judge Michael Skwierawski worked so hard to develop. This vital service uses Milwaukee Bar Association and Marquette University Law School volunteers to provide *pro bono* consultation for thousands who need help with civil legal issues.
- enhanced accessibility to the court campus by getting the county to reopen the State Street door to the Safety Building. For years, victims, defendants, and witnesses had been ordered to appear at "821 West State Street," only to find the door locked and a small, confusing sign directing them to another entrance to get to court.

Milwaukee County Chief Judge Jeffrey Kremers (smiling)

In the aggregate, these activities would certainly qualify Jeff as Judge of the Year. But there is a larger accomplishment that resulted from a test of his leadership and sets him apart: the July 2013 courthouse fire. Although some sections of the building remained closed for several weeks, Chief Judge Kremers insisted that the core functions of the courts reopen immediately. The fire could have caused chaos and gridlock, but our chief judge leaped into action the minute he learned

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Judges Night 20

Over 450 people enjoyed Judges Night 2014. ▲

▲ John Franke, Judge Stephanie Rothstein, and Judge Marshall Murray

◀ Christopher Liro, Christopher Scherer, Aaron Olejniczak, and Michael Aprahamian

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Joseph Russell and Mark Schmidt ▲

James Barton, Donald Jacquart, and Mark Pollack ▲

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4th Annual MBA Girl Scout Workshop

60 Girl Scouts and 18 parents from across southeast Wisconsin gathered for a day of legal presentations and a mock trial at the MBA.

Police Officers Cheryl Wolf and Colleen Sturma outfit a Girl Scout in standard police gear during the "Careers in the Law" presentation.

Thank you to our Girl Scout Workshop volunteers!

Officer Cheryl Wolf
Officer Colleen Sturma
Attorney Danielle Bergner
Attorney Thomas Reed
Attorney Anne Jaspers
Attorney Alejandro Lockwood

Attorney Alejandro Lockwood preps the girls for their mock trial presentation.

MBA Memorial Service Set for May 9

The MBA will host its annual Memorial Service on Friday, May 9, at the Milwaukee County Courthouse. Following is a list of judges and attorneys who will be honored at the service. If you know of others who should be included on the list, please contact Katy Borowski at 414-276-5933 or kborowski@milwbar.org.

Robert Gardner Alexander
Michael Ash
Kathleen M. Baird
Eliot M. Bernstein
Ira Blain Bordow
James Patrick "Pat" Brody
Keith Christiansen
A. David Cook
Leonard C. Donohoe
Gerald "Jerry" Flanagan
Eugene J. Fons
Robert H. Friebert
Jon Peter Genrich
Robert J. Griffin
Clayton R. Hahn, Sr.
Robert J. Kalupa
David Warren Lers
Kathryn "Kate" McGrane-Sargent
David Minko
Michael P. Mulhern
Rickard Thomas "Rick" O'Neil
Charles G. Panosian
George Papageorge
Seymour "Sy" Pikofsky
John J. "Jack" Poehlmann
Mary B. Riedl
Honorable William J. Shaughnessy
Francis J. "Frank" Schwoegler
Karen J. Stevens
Honorable Donald Walter Steinmetz
Donald S. Taitelman
Robert Browning Trainer
Edmond J. "Ned" Vaklyes, Jr.
Mark F. Vetter

Clearing the Air:

Workplace Smoking Policies Must Contend With Rising Use of E-Cigarettes

Attorneys David W. Croysdale and Anne M. Carroll, Michael Best & Friedrich

The growing popularity of electronic cigarettes, or "e-cigarettes," has sparked a new dilemma for employers, who have to decide how to address their use at work. The use of e-cigarettes, which became readily available in 2006, has ballooned dramatically in recent years, forcing employers to decide what place, if any, "vaping" has in the workplace.

E-cigarettes are tobacco-free, battery-operated devices that mimic cigarettes by turning nicotine, flavor, and other chemicals into an aerosol that is inhaled by users. E-cigarettes emit a smoke-like vapor upon exhaling, and most are manufactured to look just like conventional cigarettes or cigars. Some even resemble everyday workplace items such as pens and USB memory sticks.

No federal law regulates where e-cigarettes can be smoked, and no state has completely banned them. This is partly due to the fact that most smoke-free laws were enacted before e-cigarettes were on the market. Twenty-four states and the District of Columbia have laws prohibiting tobacco cigarettes in the workplace, but only three—New Jersey, Utah, and North Dakota—have added e-cigarettes to those laws. Most U.S. cities have not addressed the issue of e-cigarettes, and, except in a few locations, their use is not specifically prohibited under the same laws or ordinances that ban tobacco smoking. The Food and Drug Administration does not regulate the recreational use of e-cigarettes. The agency, however, is expected to issue a proposed rule that should clarify the health effects of the devices.

This scarcity of laws or regulations on e-cigarettes creates a hazy picture for employers who are unsure how e-cigarettes fit into their current policies on smoking. When developing e-cigarette policies, factors employers should consider include health and safety, productivity, public confusion, and health plan coverage.

At first blush, the health risks associated with tobacco cigarettes—including the dangers of secondhand exposure—do not seem to apply to e-cigarettes, but the vapor emitted from an e-cigarette does contain nicotine and other chemicals, which may affect co-workers and customers. Even though the jury is still out regarding the long-term effects of vaping, employers who permit the use of e-cigarettes in their workplaces need to prepare themselves for employee questions about exposure to this vapor.

Some argue that permitting employees to use e-cigarettes at work will actually help productivity by cutting down on the number of times a smoker has to head outside during the day. The lost productivity associated with smoking breaks adds up over time, which is one reason many employers have smoking policies in the first place. If smokers can ditch even a few outside smoking breaks during the day by using e-cigarettes at their desks, that could mean big savings for employers over time.

Because e-cigarettes look like tobacco cigarettes and emit vapors when users exhale, customers and other employees may assume that an employee using an e-cigarette is smoking a tobacco cigarette. Permitting employees to use e-cigarettes might also result in enforcement problems under workplace tobacco policies and smoke-free laws if it becomes difficult to police whether an employee is vaping or smoking.

Finally, employers should consider how employees' use of e-cigarettes might affect their status under health plans with premium differentials for tobacco users. E-cigarettes do not contain tobacco, and a switch to e-cigarettes might improve health among the estimated 45 million smokers in the U.S. Nevertheless, some employers, like UPS and Wal-Mart, already consider use of e-cigarettes as tobacco use for purposes of determining additional premiums, because the health effects of e-cigarettes are currently unknown.

When it comes to e-cigarettes in the workplace, where there's vapor, there may be fire. The popularity of e-cigarettes is growing fast, and businesses must act now to have e-cigarette policies in place.

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¡Bienvenidos!

Spanish-Speaking Assistance Comes to Milwaukee Justice Center

The Milwaukee Justice Center is excited to partner with Marquette University for the spring semester of 2014 as a new service-learning site for the undergraduate Service Learning Program. Students enrolled in Dr. Julia Paul's "Intro to Spanish for the Business Professions" are enhancing their education with practical translating experience in the Family Law Self-Help and the Brief Legal Advice Clinics. Students attended a one-hour orientation to the Milwaukee Justice Center and its services prior to beginning their scheduled shifts. Approximately 18 students are working two to three-hour shifts once a week, from the first week of February through the last week of April.

Service Learning is a component of academic courses that offers students an opportunity to perform several hours of community service in a setting that relates to the coursework. This combination of academic study and community service enriches students' learning, personal growth, and sense of civic responsibility. Marquette University's Service Learning Program, founded in 1994, is a unit of the Center for Teaching and Learning. The focus of this collaborative learning style is to "bring campus and community together in partnership to share resources, meet real community needs, and help educate students to become the change agents of tomorrow." (MU Service Learning Mission Statement, http://www.marquette.edu/servicelearning/about_mission.shtml (viewed February 16, 2014).)

Language, particularly when English is not known or not an individual's first language, can be a significant barrier to advocating for oneself and accessing the justice system. The addition of the Service Learning volunteers will aid the MJC in serving individuals for whom English is a second language. By providing Spanish translation, the MJC is better able to understand and address clients' needs, and provide more accurate instruction to help them navigate the courthouse. The MJC welcomes the Service Learning Program as a partner in its mission to serve the legal needs of unrepresented, low-income individuals in Milwaukee County.

The Questionable State of Estate Recovery

Attorney Krista LaFave Rosolino, Milwaukee County Circuit Court

The Wisconsin Legislature created considerable drama over the state's right to recover Medicaid expenditures from estates and divestitures in 2013 by adding significant weapons to the state's collection arsenal, followed by a partial pullback. While federal law requires states to seek reimbursement for Medicaid (also known as Medical Assistance and Title 19) from the recipient's estate and non-probate assets, states may determine the scope of that recovery. Wisconsin 2013 Act 20 greatly expanded the state's powers to recover Medical Assistance expenditures, including the costs of nursing homes, hospital services, and long-term care services. Act 20's revisions were proposed as a way to save millions of dollars, but the Legislature quickly realized the bill's unforeseen negative impacts.

While Act 20 specified a July 1, 2015 deadline for the Joint Committee on Finance to approve a plan by the Department of Health Services for enforcement of the changes, DHS requested and received JCF's approval for enforcement of the majority of the changes last September. The unenforced provisions remained on the books, leading to concern that DHS would eventually seek to enforce them. 2013 Wisconsin Act 92, passed in December, repealed those provisions and made the changes effective October 1, 2013, thereby removing those enforcement concerns.

Federal law allows individuals to gift, sell, or transfer certain assets without affecting Medical Assistance eligibility, even if a transfer is for less than fair market value. Federal law defines these exempt assets, including life insurance policies, a car, and business assets such as businesses and farms. Act 20 included a provision that these assets would make an individual ineligible for assistance. Families risked losing their farms or businesses in order to receive Medical Assistance if their children could not pay fair market value.

Act 92 protects family farms and businesses by recognizing the federal exemptions. Act 92 also removed a provision that gave DHS the ability to void certain transfers of real property that were made to defraud or delay recovery of payments.

Act 20 affected marital property by greatly expanding the definition of "property of a decedent." The statute, had it been left intact, would have allowed DHS to recover up to 100% of marital property and any property that had been marital property for the five years prior to eligibility. This conflicted with federal law that limits property of a decedent to that in which an institutionalized person had an interest at the time of death. Act 20 also created a presumption, rebuttable only by clear and convincing evidence, that the surviving spouse's property was marital property also held by the institutionalized spouse. This would have required individuals to itemize property owned by each spouse in order to demonstrate that it is substantially more likely than not that the property was not marital property.

Act 92 removed the "clear and convincing" standard, and linked the statute to Wis. Stat. § 766.31, part of the marital property code. While the Legislature did not explain removal of the "clear and convincing standard," the likely effect is to reduce the evidentiary burden of demonstrating that property was not marital property. The change also brought the statute in line with the state's marital property laws. In addition, Act 92 reinstated DHS's ability to promulgate rules under which a surviving spouse may request a waiver of recovery due to hardship.

Although Act 92 removed Act 20's provisions relating to DHS's ability to void property transfers, exclusion of exemptions for certain property, definition of the property of a decedent, and the marital property presumption, and also reinstated waiver due to hardship, it did not address all of the Act 20 changes.

Prior to Act 20, the spouse of an institutionalized person could refuse to sign the Medical Assistance application or to provide a list of assets or income, without affecting eligibility of the institutionalized spouse. Under Act 20, DHS may deny Medical Assistance eligibility of the institutionalized spouse when his spouse refuses to disclose the assets or to sign the application. Without the option of spousal refusal, attorneys must consider other alternatives to create eligibility for an institutionalized spouse. This may also lead individuals to consider divorce as a way to allow one spouse to be eligible.

Act 20 created a five-year look-forward provision for divestments by the non-institutionalized spouse. For the five years following the initial eligibility determination, any divestment by the non-institutionalized spouse that violates the divestment rules applicable to the institutionalized spouse can render the institutionalized spouse ineligible for Medical Assistance. This appears to violate 42 U.S.C. § 1396r-5(c)(4), which states that no resources of the non-institutionalized spouse are deemed available to the institutionalized spouse after the initial month of eligibility.[1]

While the Legislature has repealed many of the controversial aspects of Act 20, significant issues remain. It is unlikely that we have seen the end of estate and divestment recovery changes for Medicaid. During this period of transition, it is especially important that attorneys stay abreast of changes in the law in order to best advise their clients.

[1]Brenda R. Haskins, "Asset Transfer Strategies," Medicaid: Beyond the Basics (National Business Institute CLE, September 23, 2013).

Milwaukee Justice Center Launches Foreclosure Legal Advice Clinic

In yet another expansion of its services to *pro se* litigants, the Milwaukee Justice Center, in partnership with Legal Aid Society of Wisconsin and the Metro Milwaukee Foreclosure Mediation Program, initiated a limited service Foreclosure Legal Advice Clinic on Mondays from 10:00 to 11:30 a.m. beginning February 10. This pilot project provides brief legal advice and referral information to *pro se* litigants who are referred to the clinic by the courts. At this time, the clinic cannot accept walk-in referrals.

Lincoln's Gettysburg Address in Perspective

Robert H. Skilton *This is the second and final installment of the late Professor Robert H. Skilton's in-depth study of the philosophical and political underpinnings of Lincoln's Gettysburg Address. The first installment was published in the Winter 2013 edition of the* Messenger *to mark the sesquicentennial anniversary of that immortal speech.*

"The Proposition That All Men Are Created Equal"

Lincoln was not so naive as to believe that all men are created equal *in every respect,* or to think that the Declaration of Independence claimed so much. Such could be said only with respect to Siamese twins. But he did think that the "proposition" expressed in the Declaration was intended to apply to *all,* and regardless of race, and not merely to English ethnics or Caucasians. Thus the "proposition" contained in the Declaration was irreconcilably opposed to the continuance of the South's "peculiar institution" of slavery. Lincoln's construction of the language of the Declaration comported with a long-held conviction that it was completely immoral for one person to hold another in slavery.[6]

When Lincoln referred in the Gettysburg Address to the "proposition," he was obviously saying that slavery was wrong, and that its stamping out should be part of the unfinished work facing the Union. While his *central* objective was always the preservation of the Union, he was moving from opposition to the *extension* of slavery toward the position that the preservation of the Union and the *abolition* of slavery went hand in hand.[7] The Emancipation Proclamation, a limited war measure, was in the immediate background (effective January 1, 1863). The time would come (1865) when Lincoln would speed the Thirteenth Amendment to the total destruction of slavery.[8]

The cynical observation that "all men are created equal, only some are more equal than others" would not have troubled Lincoln. He was talking about a "proposition," not reality completely fulfilled.

More than six years before the Gettysburg Address, Lincoln had explained what was meant by "the proposition that all men are created equal." On June 26, 1857, as a sort of warm-up to the Lincoln-Douglas debates, he said:

> Chief Justice Taney, in his opinion in the Dred Scott case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they did not at once, *or ever afterwards,* actually place all white people on an equality with one or another. And this is the staple argument of both the Chief Justice and the Senator, for doing this obvious violence to the plain unmistakable language of the Declaration. I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right,* so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. The assertion that "all men are created equal" was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism . . . . I have now briefly expressed my view of the meaning and objects of that part of the Declaration of Independence which declares that "all men are created equal."

In contrast, the majority opinion by Chief Justice Taney in *Dred Scott v. Sanford*[9] (above referred to by Lincoln) and so, also, Senator Stephen Douglas, had taken the position that the words "all men are created equal" in the Declaration of Independence should be interpreted through and governed by the circumstances at the time they were written:

> The enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this Declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Thus, to Justice Taney, the words of the Declaration were frozen in the iceberg of history.

Lincoln's view, on the other hand, saw the words as a slogan of a banner, to be carried forward to persuade the future increasingly to apply its doctrine. In the realm of constitutional interpretation, many analysts have followed Lincoln, and given a dynamic, hortatory meaning to such phrases as "due process," "equal protection," and the like.

Rather than being found guilty of hypocrisy, the signers in 1776 may have hoped and expected that the institution of slavery would wither away, as not being worth the while. But, whatever the signers' intent may have been in using the language "created equal" in the Declaration of Independence, Lincoln in the Gettysburg Address clearly meant *all* persons when he said all; and that meaning has since prevailed with dynamic force.

"A Great Civil War, Testing Whether That Nation, or Any Nation So Conceived and So Dedicated, Can Long Endure"

Is a democracy inherently too weak to survive internal division? Can free elections be held in wartime?

The thought expressed is that the future of representative democracy world-wide is being tested is this contest for the survival of the Union. Democracy, a fragile experiment, was at odds with the general pattern of monarchy and dictatorship.

In his first message to Congress, on July 4, 1861, Lincoln referred to the taking of Fort Sumter by the militia of secessionist South Carolina, and

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Gettysburg continued from p. 17

said:

> In this act, discarding all else, they have forced upon the county, the distinct issue: "immediate dissolution, or blood."
>
> And this issue embraces more than the fate of these United States. It presents to the whole family of man, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—can, or cannot, maintain its territorial integrity, against its own domestic foes. It presents the question, whether discontented individuals, too few in numbers to control administration, according to organic law, in any case, can always, upon the pretences made in this case, or on any other pretences, or arbitrarily, without any pretence, break up their Government, and thus practically put an end to free government upon the earth. It forces us to ask: "Is there, in all republics, this inherent, and fatal weakness?" "Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"

This sounds like an 1861 overture to the Gettysburg Address of 1863. Subsequently, in 1864, he was to return to the theme, with special reference to the national election which had just been held, when Lincoln was elected to a second term. On November 10, 1864, in response to serenaders who came to hail the result, he said:

> It has long been a grave question whether any government, not *too* strong for the liberties of its people, can be strong enough to maintain its own existence in great emergencies.
>
> On this point the present rebellion brought our republic to a severe test; and a presidential election occurring in regular course during the rebellion added not a little to the strain. If the loyal people, *united,* were put to the utmost of their strength by the rebellion, must they not fail when *divided,* and partially paralized, by a political war among themselves?
>
> But the election was a necessity.
>
> We cannot have free government without elections; and if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us. The strife of the election is but human-nature practically applied to the facts of the case. What has occurred in this case, must ever recur in similar cases. Human-nature will not change. In any future great national trial, compared with the men of this, we shall have as weak, and as strong; as silly and as wise; as bad and good. Let us, therefore, study the incidents of this, as philosophy to learn wisdom from, and none of them as wrongs to be revenged.
>
> But the election, along with its incidental, and undesirable strife, has done good too. It has demonstrated that a people's government can sustain a national election, in the midst of a great civil war. Until now it has not been known to the world that this was a possibility. It shows also how sound, and how strong we still are. It shows that, even among candidates of the same party, he who is most devoted to the Union, and most opposed to treason, can receive most of the people's votes. It shows also, to the extent yet known, that we have more men now, than we had when the war began. Gold is good in its place; but living, brave, patriotic men, are better than gold.

There comes to mind the remark of Benjamin Franklin. When asked at the conclusion of the Constitutional Convention of 1787, in which he had participated, "What have you wrought?" Franklin replied, "A republic, if you can keep it."[10]

"The Last Full Measure of Devotion"

What had brought them here, to die?

Some had come, under compulsion, in answer to the Voice of Authority. Some were here because they heeded Public Opinion, having no firm opinion of their own. Some had been lured by the excitement, the glamor of things military, some to prove something to themselves, or perhaps to impress a girl.

There were some who fought on the Union side because they thought for various reasons that the Union must be preserved. Some fought to free the slaves.

For most, were not their reasons mixed? Would it not be right to suppose that even the poorly motivated comprehended higher causes for action, and in varying degrees identified themselves with such, and that even the highly motivated were human enough to take account of other considerations as well?

Thrilling the blood of all was the spark of patriotism. Let us not disparage their motives. There was idealism that youth knows best of all. There was loyalty and love that youth knows in full measure. Whatever had brought each to his rendezvous with death, each had now given, in precise equality, the last full measure. Each in his own way, they all had come to that place where they gave, in exact count and weight, the sum of devotion.

On March 18, 1864, Lincoln said:

> This extraordinary war in which we are engaged falls heavily upon all classes of people, but the most heavily upon the soldier. For it has been said, all that a man hath will he give for his life; and while all contribute of their substance the soldier puts his life at stake, and often yields it up in his country's cause. The highest merit, then, is due to the soldier.

Thus comes rephrased the Gettysburg theme, "the last full measure of devotion," now as the direct descendent of John 15:13: "Greater love hath no man than this, that a man lay down his life for his friends." The antiphony is subdued and in their case not necessarily antithetic: "He that killeth with the sword must be killed with the sword." Rev. 13:10.

"The Great Work . . . the Unfinished Task Remaining Before Us"

Victory, peace, emancipation, amnesty, forgiveness, and then . . . the spreading of the tree of liberty growing in the free soil of the United States . . . a vast future opening up for generations-to-come of Americans . . . . Lincoln had no small conception of the great work, the unfinished task remaining. His tragic death deprived his country of his leadership and vision, left not fully answered the question of how his pragmatic mind would have developed solutions to the problems of reconstruction.

Pressed by the day-to-day business of running the government and winning the war, and of a temperament that was disposed to wait for events to ripen before setting the course exactly, Lincoln nevertheless gave indications of his concept of the great work, the unfinished task, and some inevitable difficulties in the way. A fair and forgiving spirit was revealed in his setting of the conditions for approving interim governments for Southern states.

The words of the Gettysburg Address come back to us, in different context, when we read what Lincoln said to the One Hundred Sixty-

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Fourth Ohio Regiment on August 18, 1864:

> There is more involved in this contest than is realized by every one. There is involved in this struggle the question whether your children and my children shall enjoy the privileges we have enjoyed. I say this in order to impress upon you, if you are not already so impressed, that no small matter should divert us from our great purpose. There may be some irregularities in the practical application of our system . . . . There may be mistakes made sometimes; things may be done wrong while the officers of the Government do all they can to prevent mistakes. But I beg of you, as citizens of this great Republic, not to let your minds be carried off from the great work we have before us. This struggle is too large for you to be diverted from it by any small matter. When you return to your homes rise up to the height of a generation of men worthy of a free Government, and we will carry out the great work we have commenced.

And certainly anyone who ponders over the Gettysburg Address should not fail to associate with it the famous concluding lines of the Second Inaugural (March 4, 1865):

> With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just and lasting peace, among ourselves, and with all nations.

As the war drew to a close, Lincoln kept saying, to curb vindictiveness: "Judge not, that ye be not judged."

"This Nation, Under God"

Was the scourge of civil war a punishment visited by God upon the nation for the crimes of slavery? This from the Second Inaugural, like something from the Old Testament:

> Neither party expected for the war, the magnitude, or the duration, which it has already attained. Neither anticipated that the cause of the conflict might cease with, or even before, the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not that we be not judged. The prayers of both could not be answered; that of neither has been answered fully. The Almighty has His own purposes. "Woe unto the world because of offences! for it must needs be that offences come; but woe to that man by whom the offence cometh!" If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."

North and South must share the blame and pay the price. One can almost hear the chanting of the Battle Hymn of the Republic by Julia Ward Howe: "Mine eyes have seen the glory of the coming of the Lord / He is trampling out the vintage where the grapes of wrath are stored / He hath loosed the fateful lightning of His terrible swift sword / His truth is marching on."

Lincoln's belief that this is a nation under God was a recurring theme. One more illustration must suffice—the concluding lines of his eloquent tribute on July 6, 1852 upon the death of Henry Clay:

> Henry Clay is dead. His long and eventful life is closed. Our country is prosperous and powerful; but could it have been quite all it has been, and is, and is to be, without Henry Clay? Such a man the times have demanded, and such, in the providence of God was given us. But he is gone. Let us strive to deserve, as far as mortals may, the continued care of Divine Providence, trusting that, in future national emergencies, He will not fail to provide us the instruments of safety and security.

Lincoln thus expressed the hope of America—that in times of national emergency God would supply a leader sufficient for the times. A prescient speech! Another, and much greater national emergency was in the offing when this eulogy was delivered, and Lincoln would then be at the helm.

"A New Birth of Freedom"

Here again Lincoln uses a phrase that ripples out without limit, leaving much to the imagination. Of course he had in mind the end of slavery. But why a "new birth"? Why not simply say "an extension"? Was it that he saw that measures of total war crush freedom, and if it comes back after war, it comes back from the dead? Possibly, considering the harshness of some of the measures, such as suspension of habeas corpus, that Lincoln believed necessity required, and in his view were thus constitutionally permissible.[11] Did he have in mind, as the nation evolved from a pioneer society and struck new equations in human relationships appropriate for changing times, that the principle of human liberty would be more clearly defined, and applied with new perspective?

Some light may be shed by considering what he said on April 18, 1864, at the Sanitary Fair in Baltimore:

> The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing.* With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatable [sic] things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatable [sic] names—liberty and tyranny.
>
> The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a *liberator,* while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty; and precisely the same difference prevails today among us human creatures, even in the North, and all professing to love liberty. Hence we behold the processes by which thousands are daily passing from under the yoke of bondage, hailed by some as the

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> advance of liberty, and bewailed by others as the destruction of all liberty. Recently, as it seems, the people of Maryland have been doing something to define liberty; and thanks to them that, in what they have done, the wolf's dictionary, has been repudiated.

One of the best books about the Civil War Between the States is entitled *Battle Cry of Freedom,* very appropriately so called by the author, James M. McPherson.[12] A song with that slogan was a rallying cry for the Union side—many of us even today know the words and music. It seems the South also had its own song, with the same tune and slogan, but, of course, with different words expressing the South's contrasting idea of what constituted freedom—in that one, the right of states to secede. As Lincoln said, people may have differing ideas on this subject.

"Government of the People, by the People, for the People"

It was Lincoln who said, in another famous triad, "You can fool some of the people all of the time, and all of the people some of the time, but you can't fool all of the people all of the time."[13] Thus with his customary wit he expressed his belief in ordinary people and in popular government. He knew that public opinion could be manipulated; he held to the view that the people of the South had been misled by a small group in control. The task of the statesman was to give the people the facts, so that they would have the basis for intelligent decision.

The presidential election of 1860 had given him a "constitutional majority," though he received only a minority of popular votes.[14] "We, the People" had established the Constitution of the United States, and through the Electoral College, had declared him President. Ballots, not bullets, should be the recourse of the dissatisfied.

The majestic phrase, with which the Gettysburg Address draws to a conclusion, has antecedents. It reminds us of Marshall's celebrated opinion in *McCulloch v. Maryland.*[15] In that case the Supreme Court of the United States sustained the constitutionality of the act of Congress establishing the Bank of the United States. In the course of his opinion Marshall considered and rejected the contention that the federal government's powers emanated from the states. The true view was that the powers of the federal government were granted by the people. (This accords, not only with the Preamble—We the People—but also with the fact that conventions elected by the voters of the several states, and not the legislatures of the states, ratified the Constitution.) Marshall declared:

> The government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.
>
> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, "this constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.

Thus Marshall's description of the government of the Union as being a government of all, with powers delegated by all, representing all, and acting for all, means of, by, and for all of the people of the United States taken as a whole, and leads directly to reference to the supremacy clause and the subordination of the states to the will of Congress when it acts within its constitutional powers.

Beveridge, in his *Life of Marshall,* observes:

> The nationalist ideas of Marshall and Lincoln are identical; and their language is so similar that it seems not unlikely that Lincoln paraphrased this noble passage of Marshall and thus made it immortal. This probability is increased by the fact that Lincoln was a profound student of Marshall's Constitutional opinions and committed a great many of them to memory.
>
> The famous sentence of Lincoln's Gettysburg Address was, however almost exactly given by Webster in his Reply to Hayne: "It is . . . the people's Government; made for the people; made by the people; and answerable to the people." (Debates, 21st Cong. 1st Sess. 74; Also Curtis, 1 355-61.) But both Lincoln and Webster merely state in condensed and simpler form Marshall's immortal utterance in *McCulloch v. Maryland.*[16]

Lincoln was familiar with Webster's phrase. Herndon, Lincoln's law partner, wrote that Lincoln, while preparing the First Inaugural Address in Springfield, "locked himself in a room over a store across the street from the State House, having beside him only Henry Clay's great speech delivered in 1850, Andrew Jackson's Proclamation Against Nullification, a copy of the Constitution . . . [and] Webster's Reply to Hayne."[17]

However, it was Lincoln's genius in reworking the materials that put the phrase into immortal form.

A reading of the First Inaugural Address (March 4, 1861) and of Lincoln's Message to Congress (July 4, 1861) will show what thoughts were associated in Lincoln's mind with the famous phrase, for these speeches develop fully the theme of "government of the people, by the people, for the people."

These words at the end of the address, like a shot, a salvo, challenge the world to hear and to heed: representative democratic government—government of the people, by the people, for the people—is best suited to invigorate the "self-evident truth" that all persons are created equal, and thus to achieve full realization of the inalienable rights of all to life, liberty, and the pursuit of happiness. These are fighting words. Like the Declaration of Independence,[18] the Gettysburg Address takes a place in a select group as a quasi-constitutional document, giving impetus to the interpretation of the Constitution of the United States.

* * * * * *

The last words of the Gettysburg Address had been spoken. Lincoln turned from the crowd and sat down. A brief prayer ended the ceremonies. The crowd and the dignitaries, including Lincoln, shuffled off the field. Not long after, the train, with Lincoln aboard, left the station.

[6]While Lincoln for a long time regarded slavery as immoral, he was a Whig until he became a Republican, and supported Henry Clay in his effort to keep the Union together. Clay was the chief architect of the "compromise" of the Act of 1850 that put teeth into the federal Fugitive Slave Act; attempts to enforce it in the North caused popular indignation in some places, and led to the growth of the Abolitionist Movement. (Against that backdrop, Harriet Beecher Stowe wrote *Uncle Tom's Cabin.*) But as an admirer of Clay, Lincoln probably supported the enforcement of the Act. In 1848, shortly before going to Washington to sit in the House of Representatives, Lincoln represented a slave owner in efforts to secure the return of a slave who sought freedom in Illinois. This caused Wendell Phillips to refer to him as "slave hound of Illinois." *See* Stewart, *Holy Warriors - The Abolitionists and American Slavery* (Hill and Wang, New York 1976) at 184. The best construction to place upon this episode, to some observers bizarre (*see* Duff, *supra* n.2), is that Lincoln believed that enforcement of the right of Southerners to retrieve slaves in the North was a vital part of the compact cementing the Union. A complex character such as Lincoln's may defy pigeoning by simplistic analysis.

[7]*See* Wheeler, *Sword Over Richmond* (Harper Rowe 1986), asserting that the failure of McClellan's

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Legal Action and Legal Aid Legends to Retire

Laura Gramling Perez, Presiding Court Commissioner, Milwaukee County Circuit Court

Milwaukee will mark the end of an era this year in its civil legal services programs for low-income people. John Ebbott, Executive Director of Legal Action of Wisconsin, and Tom Cannon, Executive Director of the Legal Aid Society, have announced their retirements. Ebbott will leave Legal Action in June; Cannon will depart Legal Aid in September. Notably, both men are leaving the organizations where they started their careers.

Ebbott has practiced law since graduating from New York University Law School in 1968. He started his career in Milwaukee with Freedom Through Equality, Inc., a predecessor to Legal Action. After working with the Migrant Legal Action Program in Washington, D.C.; in private practice with Krek, Ebbott, & Friederichs in Jefferson, Wisconsin; and with the Public Service Commission in Madison, Ebbott joined Legal Action as its Executive Director in 1990.

Cannon graduated from the University of Wisconsin Law School in 1971. After law school he joined Legal Aid as a staff attorney, and served as its Executive Director from 1977 to 1981. After spending time as an assistant professor in Marquette Law School and as a partner at O'Neil, Cannon & Hollman, Cannon dabbled in retirement before returning to Legal Aid in 2000, again serving as its Executive Director.

Legal Action and Legal Aid each provides civil legal services to low income people, at no cost to them, in a variety of practice areas, including housing, consumer, senior, public benefits, and family law. Legal Aid is one of America's oldest public interest law firms, founded in 1916 (with the participation of the Milwaukee Bar Association) as part of an early campaign by what came to be known as the United Way. Today, approximately 40 lawyers and other staff members serve clients at Legal Aid offices in downtown Milwaukee and at the Vel R. Phillips Juvenile Justice Center in Wauwatosa. Legal Action was formed in 1973 by a merger of Freedom Through Equality and Milwaukee Legal Services, organizations created in the late 1960s. Legal Action is now funded in part through the federal Legal Services Corporation, and serves clients with over 80 lawyers and staff in six offices throughout Wisconsin.

While the organizations vary somewhat in size and focus, they share a strong commitment to providing zealous, full-service representation to the poorest and most vulnerable among us. Cannon and Ebbott, who have known each other since their days as young lawyers over 40 years ago, meet informally about once a month to talk about their work. Their agencies collaborate across a wide range of issues, said Cannon, including efforts to increase state funding for civil legal services, amicus briefs, development of intake and referral procedures, and a Civil Gideon petition before the Wisconsin Supreme Court. Both men have received the Wisconsin Equal Justice Fund's Howard B. Eisenberg Lifetime Achievement Award—Ebbott in 2006 and Cannon in 2011—as well as numerous other awards and honors.

Both Cannon and Ebbott's children whet their appetite for the law by observing their fathers' work over the years. Ebbott's daughter is a lawyer in Legal Action's Oshkosh office, while his son is a lawyer in private practice in Deerfield. Cannon's children chose government service: his daughter is an assistant US Attorney in Chicago, and a son is an assistant Illinois State Attorney General.

Ebbott has devoted considerable energy in the past decade to create a right to appointed counsel for indigent parties in certain civil cases, a movement known as Civil Gideon. He has been frustrated by the limited progress on this issue, and noted that many court clerks in this state will not accept motions for appointment of counsel. Nevertheless, Ebbott has accomplished a great deal. "His recent [Civil Gideon] work . . . has made an important contribution to judges becoming aware of this great need, and will hopefully lead to more poor people being provided with legal assistance," said Mike Sperling, a Milwaukee attorney and Legal Action board member. Ebbott has asked others at Legal Action to take over the Civil Gideon effort, but will help out as necessary.

Much has changed during the more than four decades that the two colleagues have been involved in civil legal services. Ebbott observed that his organization's client base has broadened, as many formerly in the middle class slip into poverty. Indeed, as Cannon pointed out, the two organizations together are able to serve only about five percent of those who would otherwise qualify for their services. Both agencies have faced considerable funding pressure in recent years, accompanied by pressure to do less full-service work and provide more brief advice services without actually representing clients in court. When asked what else he would have liked to accomplish, Cannon replied, "I wish I'd been able to raise more money." "The biggest feature is how things have *not* changed," said Ebbott, pointing out that many of the poverty-related issues with which his agency struggled in the 1960s and '70s exist today.

Notwithstanding the work they wish they had accomplished, both men have left considerable legacies. Cannon, reflecting on his long career, expressed pride at maintaining the Legal Aid Society's independence as an advocate for Milwaukee's most vulnerable citizens. "[Tom's] tireless dedication has been a sustaining force in Legal Aid's ability to provide services to low-income individuals and families," said Karen Dardy, an attorney with Legal Aid. Sperling added, "John has been a tireless and passionate advocate for many years for legal services for the poor . . . . He will be sorely missed."

Congratulations to Tom Cannon and John Ebbott on their well-earned retirements.

The author chairs the MBA's Legal Services to the Indigent Committee, and formerly served on the Legal Action Board of Directors.

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of the disaster. With the help of County Executive Chris Abele, Clerk of Circuit Court John Barrett, and dozens of others, he developed a plan to get the most crucial criminal courts up and running in just one day. Civil and family courts were down only two weeks. His hands-on direction of the massive venture to fully restore court services was nothing less than awesome.

Hands down

As a circuit court judge in Milwaukee, I worked with several dedicated and effective chief judges. In my 21 years on the bench, no one did a better job than Jeff Kremers. At a ceremony during the annual Judicial Conference in November, the State Bar of Wisconsin honored our 2013 Judge of the Year. The bar recognized that, among the 249 circuit court judges, it is Milwaukee County Chief Judge Jeffrey Kremers who deserves this designation—hands down.

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exercises of political power …. A working lawyer doesn't read a judge's opinion to understand the real-life dispute that was the occasion of the judge's ruling, but to understand the ruling. The *judge* is the important character; the parties are mere props."

While Jacobsen acknowledges the existence of hard-working, level-headed, even-handed judges who have some idea of what their decisions might mean in the real world, he suggests that it is an illusion that the bench is mostly populated with such individuals. To the contrary, Jacobsen believes that judges commonly manipulate the law's seemingly closed-system way of thinking to hand down technically justifiable but dishonest—and frequently ridiculous—rulings.

He devotes a chapter to "A Taxonomy of Bad Judges." The categories include the lush, the cliché master, the lazybones, the bully, the retiree, the federal magistrate, the ditherer, the old fool, the control freak, and the "genius." Here are a few observations:

> The incompetence of [federal] magistrates is supposed to be corrected by district judges, who in theory review every magistrate's ruling. But the district judges are the magistrates' sponsors. They respond defensively to any suggestion that their protégés have no clue what they're doing. After all, if the magistrate's an idiot, what would that say about the judge who selected him or her?

The genius judge, of course, is so considered only in his own mind. Because he feels:

> the psychological need to dominate intellectually by refuting the arguments of whichever lawyer strikes him as a threat, but lacks the intellectual ability to refute them on their own terms, he would misrepresent either the lawyers' arguments or the facts of the case, or both. Rather than dealing with a case as it was presented to him, the judge would deal with straw men of his own invention, straw being a substance he could outthink a good two-thirds of the time.
>
> Such a judge runs little risk of having his lies exposed, because most lawyers reading his opinions will know nothing about the case except what he himself chooses to reveal (or invent). The lawyers in a position to expose his lies would fall into one of two camps: those who weren't going to risk their client's victory by complaining; and those whose complaints would sound like sour grapes – and would provoke massive retaliation.
>
> In theory, the other judges serving on an appellate panel would refuse to sign off on dishonest opinions. But why would they want to? What would be in it for them? As Judge Richard Posner has pointed out, appellate judges benefit in multiple ways by raising no objections to their colleague's opinions. Going along to get along is rewarded by increased leisure, while scruples only mean extra work.

Judicial dishonesty and lack of accountability, Jacobsen believes, is rife. "[E]very court in the United States," he says, "without exception, is equally committed to the proposition that it's more important for the judiciary to have a good reputation than to deserve one." More disturbing still, the phenomenon of "government by judges" is growing:

> We all try to believe that we live in a government of laws, not men. The law, however, exists to protect us from judges – as from all powerful people, whether elected, appointed, or violent. Power, including that of judges, will always tend toward the arbitrary. Lawyers are generally enthusiastic supporters of government by judges, believing it promises them a kind of reflective power: they can hope to influence policy by influencing the judge. Down that path lies cognitive dissonance. Lawyers who believe in the rule of law while encouraging its opposite—rule by judges—must maintain constant watchfulness to avoid becoming consciously aware of their own self-deception.

Where does this leave us? With a need for a drink.

Jacobsen may overstate his case. His career, after all, is adumbrated by place and time. The federal and state judges in and around Wisconsin, for instance, seem a lot more conscientious, capable, and intelligent than those Jacobsen describes.

Justice has many aspects. To navigate the fun-house, perspective, humor, and Zen-like detachment (easier if you are working for the government) help. Jacobsen, I think, would agree. "Be careful how you define victory," he concludes. "You might not win more cases that way, but you'll lose fewer."

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Peninsular Campaign marked a turning point.

[8]In his annual message to Congress, December 6, 1864, Lincoln urged Congress to approve. Congress promptly followed suit, and the same year (1865) the amendment was ratified by the States. This is first of the three Civil War Amendments—so called because they are a direct consequence of the outcome of the Civil War. Most notably, Section 1 of the Fourteenth (1868) represented a drastic shift in federal-state relationships; its due process and equal protection clauses applied to the states the protection of the U.S. Constitution, in these respects. The first ten amendments to the Constitution (the Federal Bill of Rights) as originally written, applied only against acts of the federal government, and not against acts of the states. The Fourteenth Amendment, by its own terms, went a long way to correct this deficiency; and eventually the Supreme Court would interpret its due process clause as a vehicle to apply major portions of the first ten amendments directly to the states. The doctrine that all persons are created equal in political rights was thus given extended scope.

[9]60 U.S. 393, 409 (1856). In this regrettable case, the Supreme Court of the United States, with some dissents, went out of its way to shoot itself in the foot in holding that the Missouri Compromise was unconstitutional as violative of "substantive due process"—a first time application of "substantive" as distinguished from "procedural" due process under the Fifth Amendment.

[10]*The Constitution of the United States* (Commission on the Bicentennial of the United States Constitution 1986) at 43.

[11]In his assertion of broad wartime executive powers, Abraham Lincoln stands as the archetype "strong President." For further details, mostly favorable but including some criticism, *see* Bernard Schwartz, "President Lincoln as a Constitutional Lawyer," 67 ABA J. 177, et seq. (Feb. 1981).

[12]Oxford Univ. Press (1988).

[13]Citing Stephenson, *Autobiography of A. Lincoln,* (1927), *The Oxford Dictionary of Governments* (3rd ed., Oxford University Press 1978) at 314 attributes this phrase to Lincoln, in a speech at Clinton, September 8, 1858. However, it also recognizes the possibility that the phrase originated with Phineas Barnum.

[14]"Lincoln received less than 40 per cent of the votes in the presidential election of 1860. Yet since nearly all of them were cast in the northern states, he won a clear and constitutional majority in the electoral college." Lincoln's popular vote was 1,865,593; Douglas garnered 1,382,713, Breckinridge 848,356, and Bell 592,906. The Electoral College vote, on the other hand, gave Lincoln a clear majority of 180 votes; the other candidates collectively got 123 votes. Even if the opposition popular vote had been for one candidate instead of three, Lincoln's electoral vote majority would not have been much affected, in view of the geographical distribution of voting. Fehrenbacher, *Prelude to Greatness—Lincoln in the 1850's* (McGraw-Hill Paperbacks 1962) at 159-60.

[15]17 U.S. (Wheat) 316 (1819).

[16]Vol. II, p. 293 fn. 2.

[17]Basler, *supra* n.4, at 588-89.

[18]William Ebbott of the Law Library of the University of Wisconsin reported a LEXIS search that uncovered about 190 instances where opinions of Supreme Court Justices referred to the Declaration of Independence. In a good many instances, the reference to the Declaration did not concern the U.S. Constitution. Thus, the date of the Declaration was treated as a cut-off, beyond which the law of Great Britain was not treated as presumptively received as part of American common law. But there were many instances where opinions referred to the Declaration as having constitutional significance. Thus, various asserted rights have been identified in opinions as "inalienable" rights "that governments are instituted among men to secure." *See,* e.g., opinion in *Curtis Publ. Co. v. Butts,* 388 U.S. 130, 149 (1967). The Gettysburg Address has been cited in about eight opinions. In *Gray v. Sanders,* 372 U.S. 368 (1963), Justice Douglas, writing for the Court, gave dynamic force to words in the Gettysburg Address in the area of district reapportionment cases, when he stated, at 381: "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote." The quotation has been several times repeated and applied.