



Winter 2014 • Volume 4

# Messenger



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### Be Part of the Messenger

Please send your articles, editorials, or anecdotes to [bwegner@milwbar.org](mailto:bwegner@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](mailto:jtemmer@milwbar.org).



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# Letter From the Editor



Charles Barr, *Editor*

The law biz is more competitive now than when I started practice an untold number of years ago. That is an understatement. Long gone are the days when the big firms called their own economic shots; their clients are calling most of those shots now. As for those of us who occupy (or in my case, occupied) the lower floors, there are simply more lawyers grappling for less clients who can afford to pay what a lawyer has to charge to maintain even a no-frills law practice.

All the more remarkable, then, is the flowering of *pro bono* culture in this legal community during the same period of time. When I started practice, the ethical obligation to perform *pro bono* service was largely honored in the breach. It was something that an underemployed lawyer might consider doing until his or her practice got on its feet. Things are completely different now. A broad array of *pro bono* opportunities is available from day one of law school through retirement. Appropriately enough, the winners of the MBA's annual *Pro Bono Publico* awards at the October 22 State of the Court Luncheon include a law student just beginning her career and a lawyer in retirement, both of whom have set standards of excellence in *pro bono* service. (See page 16.)

The big firms have bought into the *pro bono* renaissance in a big way, with structured, comprehensive programs to suit the talents and preferences of everyone from the most junior associate to the most senior partner. And lawyers in record-breaking numbers, from firms of all sizes, public agencies, and in-house legal departments, are signing up for the ever-increasing variety of *pro bono* projects. Witness the enthusiastic overflow crowd at the *Pro Bono* Cocktail Reception, the MBA's annual networking event for leaders of *pro bono* service programs and the lawyers seeking to participate in them. (See cover and page 21.)

Among those in the forefront of the *pro bono* revolution, none stands above Mike Gonring, who is passing the torch as *Pro Bono* Coordinator at Quarles & Brady. We profile his multifaceted and remarkable contributions to serving the legal needs of the indigent in and beyond the Milwaukee area. (See page 15.)

New *pro bono* leadership at Quarles will come from none other than Dawn Caldart, its new *Pro Bono* and Professional Development Director. Five years ago Dawn set sail on

uncharted waters when she took the helm at the Milwaukee Justice Center. Under her visionary guidance, the MJC has vastly diversified its services, has earned national and local recognition for its innovations, and has secured a permanent home in the county courthouse. We pay tribute to Dawn's accomplishments as the MJC's first executive director, and chronicle the ongoing successes of this linchpin *pro bono* project. (See page 19.)

Behind every good joke is at least a grain of truth and, let's face it: there is an inexhaustible supply of good lawyer jokes. I haven't heard any, though, about this legal community's firm embrace—with action, not just words—of *pro bono* service. ¡Viva la Revolución!

Apart from celebrating our robust *pro bono* culture, this edition of the *Messenger* offers a smorgasbord of "hard law" articles. Our Michael Best entries—we have double the fun in this issue—discuss a creative use of the civil rights laws to challenge a state waste management permit issued to hog farms, and how to shrink condominium projects that foundered during the recession. For the tax wonks among us—and we all secretly want to be tax wonks, don't we—Adam Tutaj explores the limits of the "limited partner" exclusion from self-employment income. Richard Saks updates us on the up-and-down voter ID war.

We have coverage of numerous bar association events, including Jeff Kremers' final State of the Court address. His insightful and dynamic term as Chief Judge of the Milwaukee County Circuit Court, which will end next July, is an act that will be hard to follow. We also review an important conference at the federal courthouse, co-sponsored by the Eastern District of Wisconsin Bar Association and the Wisconsin Association of African-American Lawyers, marking and evaluating the first 50 years of the 1964 Civil Rights Act.

Our regular contributors are here, too. Doug Frazier takes a look at the fruit behind the statute in his article on Wisconsin's unique Cranberry Law. Cinema critic Fran Deisinger reviews *The Conspirator*, a 2011 Robert Redford film about the "show trial" of those who allegedly conspired to assassinate Lincoln.

We hope you enjoy this edition of the *Messenger*, and as you turn the page on another year, don't forget that resolution to submit an article to our humble publication. From all of us in the *Messenger's* frenetic newsroom, happy holidays and a healthy, prosperous New Year.

—C.B.

## 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.

## Member News



Hupy and Abraham announced **Laura L. Mommsen** as a new addition to the firm in the Des Moines office.

Jackson Lewis announced that **Christopher Johnson** has joined as shareholder in the Milwaukee office. He focuses on litigation of labor and employment matters.



Gregg Herman

**Gregg Herman** of Loeb & Herman has been elected to a new three-year term as the Wisconsin representative to the Board of Governors for the American Academy of Matrimonial Lawyers. He has been a fellow of the AAML for 22 years and is a past president of the Wisconsin chapter.

**Valerie P. Vidal**, an attorney with the Milwaukee office of Quarles & Brady, has joined the Board of Directors for Meta House. Meta House is a non-profit organization dedicated to providing substance abuse treatment and services to women.

Reinhart Boerner Van Deuren welcomed shareholder **Douglas A. Pessefall** to the firm's Tax Practice. He is also a member of the firm's litigation and business law practice areas.



Laura L. Mommsen



Valerie P. Vidal

## Raising the Bar: Wisconsin Pro Bono Honor Society Seeks Nominations

Honorable Margaret Vergeront and Jeff Brown, Wisconsin Access to Justice Commission

As fall fades into winter, it is time to start thinking about nominating the 2014 members of the Wisconsin Pro Bono Honor Society. The Pro Bono Honor Society is an annual recognition program launched last year by the Wisconsin Access to Justice Commission and the State Bar of Wisconsin pro bono program as a way to salute the volunteer lawyers who help provide access to justice for low-income Wisconsin residents. The program got off to a good start with a class of 121 lawyers nominated for this recognition based on their service in 2013. We want to ensure that every lawyer who qualifies this year either self-nominates or is nominated by someone knowledgeable about his or her service.

**How much pro bono service qualifies for recognition?** The Wisconsin Pro Bono Honor Society recognizes Wisconsin lawyers who are meeting the highest standards of pro bono service by providing at least 50 hours of qualifying pro bono legal services to benefit low-income Wisconsin residents in a calendar year.

**What pro bono services qualify?** "Qualifying pro bono legal services" means the direct provision of legal services without fee or expectation of fee, or at a substantially reduced fee, to:

1. persons of limited means;
2. organizations in matters that primarily address the needs of persons of limited means; or
3. charitable, religious, civic, community, governmental, and educational organizations to secure or protect civil rights, civil liberties, or public rights so long as a substantial majority of such services benefit persons of limited means or organizations that serve persons of limited means.

**How do you submit a nomination?** Nominations can be made using a simple online form on the Access to Justice Commission's website at <http://wisatj.org/probonosociety>. You can nominate yourself, a lawyer in your office, or a volunteer in your pro bono program who met the above standard in 2014.

**What does inclusion in the Wisconsin Pro Bono Honor Society**

**mean?** It doesn't mean that you have to go to more meetings or incur other obligations. Instead, you will be helping to shine a light on the important role volunteers play in access to justice, and you will inspire other lawyers to follow your example. We will publish an annual list of the honorees on the Access to Justice Commission and State Bar websites, as well as in their publications. The Commission is working with other bar associations and judges to organize local recognition events. We will also be contacting local media to highlight the pro bono contributions of lawyers in each year's Pro Bono Honor Society.

**How can you help?** We hope that you will share information about this recognition opportunity with your colleagues and other lawyers.

At the Access to Justice Commission, our mission is to develop and encourage means of expanding access to the civil justice system for unrepresented, low-income Wisconsin residents. Our work spans a range of efforts to fulfill this mission, which includes increasing public and private funding, public outreach, encouraging collaborations in the legal services delivery system, and advocating for rule changes that will enhance access to justice. Supporting the expansion of pro bono legal services to low-income residents is an important part of the Commission's vision of a statewide civil legal services delivery system that is comprehensive, integrated, effective, and fair. We are proud to have this annual opportunity to recognize the Wisconsin lawyers who provided at least 50 hours of eligible legal services for no fee or a substantially reduced fee to benefit low-income clients.

You can always find pro bono opportunities that fit your interests and skills through a searchable online pro bono directory on the State Bar's website, [www.wisbar.org/probono](http://www.wisbar.org/probono). And the State Bar's Pro Bono Coordinator, Jeff Brown, is always available by phone (608-250-6177) or e-mail ([jbrown@wisbar.org](mailto:jbrown@wisbar.org)) to help you find the right pro bono opportunity.

We welcome your ideas and participation in our ongoing efforts. Feel free to contact us with any questions.

# Message From the President



Attorney David G. Peterson, Reinhart Boerner Van Deuren



**A**re you looking for something to enrich your career beyond the work you do in your office? The Milwaukee Bar Association can help you find what you are seeking. Through your membership in the MBA, you have access to events, committees, sections, and *pro bono* opportunities that can help you diversify your daily routine. If you get involved, you will improve your practice and help make the Milwaukee area a better place to work and live.

The events we host are outstanding. Events slated for 2015 include Judges Night, Law Day, the Memorial Service, the MBA Foundation Golf Outing, the State of the Court Luncheon, and the *Pro Bono* Cocktail Reception, to name just a few. If you have not attended these events recently, make an effort this coming year to attend one or all. I'm sure you will be glad you did.

The MBA's list of committees and sections is published on the MBA website, [www.milwbar.org](http://www.milwbar.org). We have 19 sections, covering a wide variety of substantive practice areas. Two new sections were added within the past few months: Solo & Small Firm and Veterans. We also have more than 15 separate committees, each of which offers you a chance to get involved. If you want to meet your peers and help shape our legal community, the MBA's sections and committees are the way to get it done.

Another way to enrich your practice is by taking advantage of the *pro bono* opportunities available through the MBA. The premier *pro bono* opportunity we have is our very own Milwaukee Justice Center at the Milwaukee County Courthouse. In 2013, we had 420 MJC volunteers serving 10,102 clients, with a combined total of 9,460 *pro bono* hours. And we are not even at our peak—more volunteers are needed. Beyond the MJC, there are more than 20 other programs in Milwaukee that could use your help. We have a list of *pro bono* opportunities on the MBA website; see the “*Pro Bono* Directory” under the Attorney Resources link.

Still other ways the MBA can help you enrich your career include the Lawyer Hotline, the LRIS Modest Means Panel, and the Speakers Bureau; or you can become a mentor or a mentee in the MBA mentorship program. If you have questions or are interested in any of these programs, contact Jim Temmer at the MBA: [jtemmer@milwbar.org](mailto:jtemmer@milwbar.org).

I mention these opportunities and benefits because within the next few days, you should receive the annual renewal notice for your MBA membership. This is the first year that renewal notices are being sent out by e-mail, so keep an eye out for it in your inbox.

Thank you for being a member this past year. We hope you not only renew your own membership for 2015, but consider asking a friend or colleague to join as well, so that they can also share in the opportunities and benefits that MBA membership provides. Through your membership and involvement, you are keeping the MBA vibrant and giving back to your community.

## Dee Is Newest Milwaukee County Circuit Judge

Governor Scott Walker has appointed T. Christopher Dee to Branch 37 of the Milwaukee County Circuit Court. He replaces Judge Karen E. Christenson, who retired August 1.

Dee ascends to the bench after 14 years with the Milwaukee County District Attorney's Office, where his focus was child protection. He has also worked in the Dane County District Attorney's Office, in the City Attorney's Offices in Madison and Kenosha, and as a private practitioner in Kenosha. The Governor previously appointed Dee to serve on the Wisconsin Advisory Board for the Interstate Compact on Juveniles.

Judge Dee is a graduate of the University of Wisconsin-Madison and of the UW Law School.



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# 2014 Milwaukee Bar Association Law and Technology Conference

## Event Information:

**Date:** Wednesday, December 3, 2014

**Time:** 7:30 AM to 5:00 PM

**Credits:** 6.0 CLE credits including 2.0 ethics credits

### Location:

Italian Conference Center • 631 East Chicago Street  
Milwaukee, WI 53202

## Wisconsin LAW & TECHNOLOGY Conference 2014

### SESSION DESCRIPTIONS

#### Social Media and the Ethics of Marketing

Mark Goldstein, Goldstein Law Group and Tim Pierce, State Bar of Wisconsin

#### Mandatory e-Filing: Are You Ready?

John Barrett, Clerk of Milwaukee County Circuit Court

In 2010, Wisconsin made significant changes to the laws on discovery of electronically stored information (ESI). In 2013, important changes were made to Wisconsin law on privilege and work product to assist attorneys in their management of ESI discovery and assist courts in the resolution of discovery disputes. Attorneys attending this session will understand each of those changes to Wisconsin law, be able to more effectively argue discovery-related motions, and better manage discovery of ESI.

#### A Judge's Perspective: Tips on Electronic Discovery and Recent Changes to the Privilege and Work Product Statutes

Honorable Michael R. Fitzpatrick, Rock County Circuit Court

In 2010, Wisconsin made significant changes to the laws on discovery of electronically stored information (ESI). In 2013, important changes were made to Wisconsin law on privilege and work product to assist attorneys in their management of ESI discovery and assist courts in the resolution of discovery disputes. Attorneys attending this session will understand each of those changes to Wisconsin law, be able to more effectively argue discovery-related motions, and better manage discovery of ESI.

#### Technology at the Deposition and Beyond, and How HIPAA's Effect on Court Reporters Can Impact Attorneys

Robert Gramann & Scott Marcus, Gramann Reporting

Learn about the latest in court reporting technology currently available to attorneys. As most businesses are learning, HIPAA can be an imposing force to deal with as a general matter. Learn how HIPAA requirements are changing the way in which compliant court reporting firms must now interact with lawyers and law firms with regard to delivery of specific services.

#### Why Re-Invent the Wheel? The Creation, Maintenance, and Use of Standardized State and Local Court Forms

Honorable Kevin Martens, Milwaukee County Circuit Court

#### Billing and Collections: the Art of Getting Paid

Lori Kannenberg Dorn, Lawton & Cates

Are your bills getting out and being paid on a timely basis? In this session, you will learn techniques to help your firm bill more effectively and get paid sooner. What types of bills get paid? What reports should you be running? Which collection practices actually work? An experienced law firm administrator will answer these questions and more.

#### Cloud Storage, Collaboration, and Synchronization

Jeff Krause, Solfecta, and Nerino Petro, Holmstrom & Kennedy

#### iPad at Trial: If We Can Do It ...

Matthew R. McClean, Davis & Kuelthau, and Pamela G. Orin, Digital Intelligence

#### How I Chose a Practice Management System

Nate Cade, Cade Law LLC

#### 50 Tips, Tricks, Tools, Sites, and Gadgets

Jeff Krause, Solfecta, & Nerino Petro, Holmstrom & Kennedy

Course materials will be provided on a thumb drive.

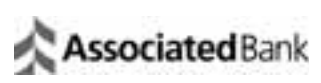
Register and pay online @

[www.milwbar.org](http://www.milwbar.org). Click on Law & Technology Conference.

## AGENDA

8:00-8:30	Registration – Visit with Our Sponsors	
8:30-9:20	Social Media and the Ethics of Marketing	
9:20-9:30	Sponsor Break	
9:30-10:30	<b>TRACK 1</b> Mandatory e-Filing: Are You Ready?	<b>TRACK 2</b> A Judge's Perspective: Tips on Electronic Discovery and Recent Changes to the Privilege and Work Product Statutes
10:30-11:00	Sponsor Break	
11:00-11:50	Technology at the Deposition and Beyond, and How HIPAA's Effect on Court Reporters Can Impact Attorneys	Why Re-Invent the Wheel? The Creation, Maintenance, and Use of Standardized State and Local Court Forms
11:50-12:00	Sponsor Break	
12:00-1:00	Lunch–Visit with Our Sponsors	
1:00-1:50	<b>TRACK 1</b> Billing and Collections: the Art of Getting Paid	<b>TRACK 2</b> Cloud Storage, Collaboration, and Synchronization
1:50-2:00	Sponsor Break	
2:00-2:50	iPad at Trial: If We Can Do It ...	How I Chose a Practice Management System
2:50-3:00	Sponsor Break	
3:00-3:50	50 Tips, Tricks, Tools, Sites, and Gadgets	
3:50-4:00	Sponsor Break	
4:00-5:00	Reception/Door Prize Drawings	

### sponsors



### exhibitors



# Welcome New MBA Members!

Matt Ackmann, *Marquette University Law School*  
William Bortz

Rachel Breger, *Creighton University School of Law*

Sean Brown, *Marquette University Law School*

Andrew Christopherson, *Lichtsinn & Haensel*

Honorable T. Christopher Dee, *Milwaukee*

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Mary Parmeter, *University of Wisconsin Law School*

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Erik Reichertz, *Marquette University Law School*

Kareem Salih, *University of Wisconsin Law School*

Joseph Sarmiento, *Meissner Tierney Fischer & Nichols*

Alyssa Schaller, *University of St. Thomas School of Law*

Sarah Schenck, *Reinhart Boerner Van Deuren*

Dan Schneider, *University of Wisconsin Law School*

Angela Schultz, *Marquette University Law School*

Michael Solberg, *Reinhart Boerner Van Deuren*

Thomas Talley, *West Virginia University College of Law*

Mark Tetzlaff, *Loyola University School of Law*

Cassandra Van Gompel, *Marquette University Law School*

Justin Webb, *U.S. District Court, Eastern District of Wisconsin*

Christa Wittenberg, *O'Neil, Cannon, Hollman, DeJong & Laing*

Elizabeth Wood, *Marquette University Law School*

Kiel Zillmer, *Marquette University Law School*

# CLE Calendar

## December 2014

All CLEs at MBA unless otherwise noted.

### December 4, 2014

#### Government Section

##### Wisconsin's November Elections: A Look Back at the Hot Issues (Voter ID, Coordinated Issue Advocacy) Shaping Wisconsin Politics

Presenters: Joanna Gibelev, Milwaukee City Attorney's Office; Joseph Russell, von Briesen & Roper

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

### December 5, 2014

#### Bankruptcy Section

##### A Primer on Preferences

Recovery of preferential payments made to creditors on the eve of bankruptcy is a bedrock principle of bankruptcy law. This program provides an overview of preference claims and explores some of the common, and not so common, defenses available to creditors.

Presenter: Rachel M. Blise, Foley & Lardner

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

### December 8, 2014

#### Corporate, Banking & Business Section Environmental Considerations in Real Estate Transactions—Environmental Due Diligence

Topics covered include:

- History of Phase 1 environmental site assessments and current status
- Identification of Recognized Environmental Conditions (RECs), including controlled RECs, historical RECs, and *de minimis* conditions
- Evaluating RECs and quantifying risks posed by property acquisition
- Understanding and evaluating contaminant vapors
- WDNR reporting requirements: purchaser and seller responsibilities
- Other common environmental conditions that impact transactions: what to look for and how to evaluate them
- Instruments for liability exemptions under WDNR regulations

Presenter: Christopher H. Valcheff, True North Consultants, Inc.

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

### December 8, 2014

#### Taxation Section and Milwaukee Tax Club, co-sponsors

##### The State of Business Tax Reform

Extenders, inversions, technical corrections, and comprehensive business tax reform in a new Congress

Presenter: Harry L. Gutman, Director, KPMG

Tax Governance Institute

Location: *University Club, 924 East Wells Street, Milwaukee*

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

### December 9, 2014

#### Health Law Section

##### Top Ten Priorities for a Health Care Compliance Program in 2015

From cybersecurity to RAC audits, learn about hot issues on which to focus your compliance program's attention in 2015. Michelle Bergholz Frazier is Chief Compliance Officer for Aurora Health Care and provides insight into important issues in health care compliance for the new year.

Presenter: Michelle Bergholz Frazier, Aurora Health Care

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

### December 11, 2014

#### Civil Litigation Section

##### Communicating with Clients: Protecting the Privilege

This presentation addresses communications between lawyers and their clients outside of the litigation context, primarily focusing on common issues that arise when business lawyers communicate with their clients. The presentation discusses which attorney-client communications are privileged in the first place, how the privilege can be waived, and how to protect privileged communications.

Presenter: Jessica Mederson, Hansen Reynolds Dickinson Crueger

Noon – 12:30 (Lunch/Registration)

12:30 – 1:30 (Presentation)

1.0 CLE credit

### December 12, 2014

#### Employee Benefits Section

##### Retirement Plan Investments and Responsibilities

A discussion of duties and responsibilities of plan sponsors relating to plan investments.

Topics include:

- Fiduciary duties of advisors—3(21) vs. 3(38)
- Selecting and monitoring investment options
- Selecting and monitoring service providers
- Reasonableness of fees
- Investment trends in the industry

*continued page 22*



# Environmental Groups Use Civil Rights Act to Challenge Hog Farm Permits

Attorneys David A. Crass and Cameron F. Field, Michael Best & Friedrich

In a novel approach, environmental and community health groups in North Carolina recently filed a petition with the U.S. Environmental Protection Agency claiming that a general permit issued by the North Carolina Department of Environment and Natural Resources (DENR) for thousands of hog farms in the state violates the Civil Rights Act of 1964.

The petition challenges DENR's issuance of a general permit covering more than 2,000 hog facilities in March of 2014. The groups claim the general permit contains inadequate standards for manure management, and that but for the race and national origin of the persons who are impacted by the decision, the DENR would have required more stringent environmental protection.

Because the DENR receives federal funding, the groups have challenged the state agency pursuant to Title VI of the Civil Rights Act, which requires that no project receiving federal funding discriminate on the basis of race, color, or national origin.

Environmental and community health groups have long challenged the manure storage and management practices of the hog farms in the state. The groups are opposed to the use of open-air manure pits and the irrigation of crop fields with liquid manure. The petitioners request that the EPA investigate the DENR's actions pursuant to the requirements of the Civil Rights Act, revise the general permit to require waste management systems at hog facilities, and suspend funding from the EPA to the DENR based on its alleged violation of the Civil Rights Act.

The petition, if granted, would be a precedent-setting use of the Civil Rights Act against a state environmental agency and could pave the way for similar challenges in other states.

A copy of the 48-page petition can be found at [www.waterwaystewards.us/wwsblog](http://www.waterwaystewards.us/wwsblog) ("Petitioning EPA on Civil Rights Violations/EarthJustice" (viewed November 2, 2014)).

The authors can be reached at [dacrass@michaelbest.com](mailto:dacrass@michaelbest.com) or 608-283-2267, and [cffield@michaelbest.com](mailto:cffield@michaelbest.com) or 608-283-2259.

## Applications Sought for U.S. Magistrate Judge Vacancy

The Judicial Conference of the United States has authorized the appointment of a full-time magistrate judge for the Eastern District of Wisconsin to fill the vacancy created by the retirement of Magistrate Judge William E. Callahan. December 15 is the deadline for applications. The Public Notice and application form are posted on the court's website, [www.wied.uscourts.gov](http://www.wied.uscourts.gov).

Happy Holidays  
from the MBA Staff!

## Volunteer Spotlight



Peter O. Bockhorst



Peter O. Bockhorst

Attorney Peter O. Bockhorst was born and raised on Milwaukee's south side and attended Pulaski High School. He went on to UW-Whitewater, earning a B.S.E. degree; Loyola University of Chicago, where he received an M.B.A. degree; and UW-Madison for his law degree.

Peter started practicing law in 1988 with the opening of his office in Milwaukee, and he has practiced there ever since. His general practice includes estate planning and probate, real estate, children's court matters, business matters, and criminal law.

Peter has volunteered numerous times to answer client questions for the MBA's Lawyer Hotline. To Peter, the most important aspect of volunteer programs is providing accurate and understandable information that enables the client to determine if his or her concerns merit the more detailed consideration they would receive if an attorney were retained.

Peter performs other volunteer work, as well. For over 20 years, he has been volunteering time on a monthly basis to answer questions at the Milwaukee County Wilson Park Senior Center, in much the same fashion as for the Lawyer Hotline.

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\*National Bar Association Hearing Committee on Lawyers' Professional Liability (1975). Profile of Legal Malpractice Claims, 2004-2012. Chicago, IL: Nat. Bar. June 2, 2013. Available at: [www.nabac.org](http://www.nabac.org)

# The Reel Law



Attorney Fran Deisinger, Reinhart Boerner Van Deuren

## The Conspirator

Directed by Robert Redford  
2011; 122 minutes

Most Americans, lawyers and laymen alike, want to believe and do believe that our judicial system, if not perfect, is at least earnest, that there is always an attempt to find the truth and to mete out justice in accordance with that finding. Not for us the cynical show trials of the despots, tyrants, and corrupt nations.

But extraordinary times and events have a way of straining any judicial system and any body politic, and no greater stress can befall a nation than civil war. The savage bloodletting in this country from 1861 to 1865 was traumatic enough. Then, just at the moment when the nation sighed and sobbed in relief, came that last shattering shot of the war, the shot that felled Abraham Lincoln.

*The Conspirator*, Robert Redford's 2011 film about the trial of John Wilkes Booth's alleged accomplices, presents that event as a classic show trial—an exercise designed and carried out to convict and execute, surely and quickly, the South's self-appointed avengers. Redford focuses the film on the fate of Mary Surratt (Robin Wright), the landlady at whose boarding house in Washington the assassins often met and allegedly conspired. These included not only Booth but a small coterie of southern sympathizers and sometime agents, including Surratt's own son John.

We see the story mostly through the eyes of its protagonist, Frederick Aiken (James McAvoy), a young Union captain whom we meet in the first scene of the film lying wounded on a battlefield—but nobly ordering aid workers to assist first the enlisted man lying beside him. This unsubtle point-making is common throughout the film. We meet Aiken next on a celebratory evening in Washington cut short by the terrible news that the President has been shot. With almost Gumpian luck, he happens to be so nearby as to find himself watching horror-struck as the dying President is carried across the street from Ford's Theater to the Petersen House. There, Lincoln is visited by the villain of the film, who, oddly enough in a movie in which John Wilkes Booth is a character, is *not* John Wilkes Booth, but rather Edwin Stanton (Kevin Kline), Lincoln's Secretary of War.

Soon enough (well, not really, but I will comment on the film's pace later) the suspects are gathered—minus John Surratt, who has escaped capture—and the focus shifts to Mary Surratt's defense in the military tribunal in which the conspirators are prosecuted. The judges are generals, the prosecutor a judge advocate. In short, the deck is stacked. Mary Surratt retains Reverdy Johnson (the superb British actor Tom Wilkinson), an able and experienced lawyer and a sitting senator from Maryland, and Johnson quickly recruits as his second chair young Captain Aiken, who it turns out is a lawyer in civilian life. He overcomes Aiken's revulsion at the job with a lecture about the lawyerly obligation to pursue justice. But then Johnson abandons the case to Aiken. (In historical fact, the tribunal disqualified Johnson from the defense because he had opposed loyalty oaths during the war.) Aiken is unhappy with the burden and hugely conflicted about the engagement, and McAvoy does a fine job portraying that emotional turmoil. Indeed, his performance is one of the more compelling features of the film. But as we know (from the movie's first scene), Aiken is a noble hero, and eventually he pursues his advocacy for Surratt against all odds and at great personal cost, including the scorn of his sweetheart, his friends and even, horrors, his private gentlemen's club.

Unfortunately for Aiken and Surratt, at every turn during the trial they are frustrated by objections and adverse rulings for which no explanations are offered and none seem apparent other than that they obstruct the defense. And when finally Aiken finds and calls to the stand a Union officer who will undercut crucial testimony for the prosecution that Mary Surratt helped prepare Booth's escape from Washington, he is astounded when the man contradicts what he had told Aiken only the previous day. After Aiken challenges him on his reversal, the officer blithely testifies that he had lied to Aiken but is telling the truth under oath now.

(Permit me to side bar: in one of my first federal court trials, an admiralty case before the estimable Judge John Reynolds in the Eastern District of Wisconsin, I put on the stand a man I had found and interviewed, who had assured me that the ship involved had been tied up to the dock's bollards, an important point. On the stand, however, he said the opposite. I barely got out a stuttering “But, but didn't you tell me ...” when six defense lawyers jumped to their feet objecting to my improper question. Judge Reynolds paternally admonished me: “Mr. Deisinger, I think you had better move on.” I learned the value of sworn deposition testimony that day.)

Apparently, the Union officer's testimony has been suborned by the prosecution, probably by Secretary of War Stanton himself, who is quite clearly the unseen puppet master pulling the tribunal's strings. As the case devolves toward conviction of Mary Surratt and the other defendants, Redford manufactures an evening scene in which Aiken spots and buttonholes Stanton as he and his wife are going to dinner. Aiken bitterly complains that the principles of justice he fought for in the war are being trampled, and demands to know why Stanton is pursuing Mary Surratt when he should have his sights on her son John, a real conspirator on whom Aiken is trying to pin the blame in an “empty chair” defense. Stanton lectures him that his only concern is preserving the Union; and when it comes to the Surratts, he coolly observes that it doesn't matter to him—he'll take either one.

The climax of the film, and one of the only moments of real excitement, comes after the verdict arrives: guilty, of course, with execution to be carried out the following day. Aiken pursues and obtains a middle-of-the-night writ of habeas corpus from a civilian Washington judge that will move Mary's case to civil authority. He rushes to Stanton's office to present the writ to him and then the next day makes his way to Surratt's cell to give her the good news. But while he is there, soldiers enter and announce that President Johnson has rejected the writ. Mary is taken out and hanged with the other conspirators.

This story arises from truly fascinating historical events, and the film is reasonably accurate in some respects. Redford has great actors to work with, actors who can make the story come alive, and the period sets are authentic if perhaps a bit too tidy. But the movie doesn't work well. It is glacially paced, and the slowness is exacerbated with a ponderous musical score, almost no humor, and little tension written into the script. Thus, a two-hour film feels like three.

Clearly, Redford means this film to remind us of current events, presumably the military trials in the shadow of 9/11. In itself, this is no crime; examinations of history are of little interest if they cannot illuminate the present. But in the absence of compelling artistic presentation, the analogy seems preachy. And from our parochial legal

*continued page 17*

# The Cranberry Brief

Attorney Douglas H. Frazer, DeWitt Ross & Stevens

**C**ranberries are a big industry in Wisconsin. For the past 20 years Wisconsin has led the world in cranberry production. In 2014 the Wisconsin cranberry crop is estimated at 5.3 million barrels. This bounty has not gone unnoticed. The Legislature has proclaimed the cranberry as the state fruit. Wis. Stat. § 1.10(3)(r). Wisconsin's Common Core standards now mandate that kindergartners learn the letter "c" by writing the word "cranberry," followed by a cranberry-pong contest during recess, followed by a pre-nap purge.

The cranberry culture (about 250 Wisconsin farms) has developed in a big way because of this little appreciated fact: Wisconsin has a Cranberry Law. Wis. Stat. § 94.26. It was enacted in 1867 and is largely unchanged. It may be among the state's oldest special-interest legislation still in effect. It's still in effect because it has worked. It has resulted in Wisconsin being the undisputed cranberry production capital of the world. Here is the story.

First, a cranberry cram. Cranberries are wetland plants that grow as low, creeping shrubs or vines. They have slender, wiry stems and small evergreen leaves. The fruit turns deep red when fully ripe. Cranberries have an acidic taste that can overwhelm their sweetness.

Cranberries are native to North America and were a significant food source to Native Americans in the region (a component of the legendary Indian traveling food called pemmican).

The cranberry plant produces a bud. The buds are formed in late summer, the season before they open and grow. Thus, the buds must survive through a Wisconsin winter in order to produce a crop the following year.

Wisconsin cranberries flower in late June and early July. The harvest method for cranberries varies according to their use. Fresh fruit is harvested with a picking machine. Fruit processed into juice, sauce, or sweetened dried cranberries is wet harvested. For wet harvesting, beds are flooded with 8 to 10 inches of water. Either a rake or a machine with a circular beater mounted on the front is driven through the bed to remove the berries from the vines. The berries float to the water's surface, are corralled into a corner, then conveyed or pumped out of the bed to a waiting truck.

Most cranberries are processed into products such as juice, sauce, jam, and sweetened dried cranberries, marketed by independent handlers under varying names and by Ocean Spray as Craisins®. The remainder is sold fresh to consumers. Raw cranberries are often marketed as a "super fruit" due to their nutrient content and antioxidant qualities.

Commercial cranberry cultivation in Wisconsin began near Berlin about 1860. Early marshes were developed by digging ditches around stands of native vines and encouraging their growth. The early crop was seriously threatened by frost, insects, weeds, diseases, and fires. During the early 1890s, the center of the Wisconsin cranberry industry shifted to just west of Wisconsin Rapids. Later, farmers planted bogs near Black River Falls, Warrens, and Tomah. These were followed by cranberry farms in northern Wisconsin, primarily around Manitowish Waters, Eagle River, Spooner, and Hayward.

Cranberry growers are subject to environmental regulations including the Federal Clean Water Act, state and federal wetland regulations, state nonpoint source water quality rules, and state and federal pesticide regulations. But Wisconsin cranberry growers also enjoy a bit of special



protection that is the catalyst of this unique farm product's growth in Wisconsin: the "Cranberry Law."

The 1867 Cranberry Law was "an Act to encourage the cultivation of cranberries." The provision expressly conferred upon cranberry growers the right to "build and erect, keep up and maintain such dam or dams upon and across any stream, ditch, sluice, slough or any body of water, as shall be necessary for the purpose of flooding said marshland." The Cranberry Law has allowed cranberry growers the right to appropriate public waters for their own use, and exempts the industry from some of the state regulatory permitting processes pertaining to navigable waters. Thus, cranberry growers do not need to obtain permits under Chapters 30 and 31 of the Wisconsin Statutes to divert water from public waterways.

A reason exists for this continued exemption. The water needs of cranberry cultivation are very special. In Wisconsin, farmers flood cranberry beds in early winter to allow ice to form and totally cover the vines. This protects the buds from damage during the severe Wisconsin winter.

Frost is also a threat. Farms install sprinklers to irrigate the beds. If the temperature drops too low, growers spray the beds to create a temporary ice shield that protects the fruit from freezing. (Typically, the ice melts the next day and the fruit is undamaged by the frost!)

On the other hand, cranberries cannot survive water inundation for very long while they are growing. During the growing season, farmers hold the water table at 12 to 18 inches below the surface.

A dependable source of water is central to the successful long-term cultivation of cranberries. Unlike annual crops, which if lost early can be replanted and harvested, or if lost late replanted the next year, a drought will kill the current cranberry crop and the vines, too. Replanting costs tens of thousands of dollars an acre plus a long wait: three years for the vines to bear fruit and five years for full production to resume.

Cranberry growers point out that the security of water access is what distinguishes Wisconsin from, say, Minnesota or Michigan. Those states have the soil and water for cranberry production but no viable cranberry industry. The difference: Wisconsin has the Cranberry Law and Minnesota and Michigan do not.

The law has its critics. Regulators like to regulate and the Cranberry Law erected an obstacle to that inclination. Others worry that cranberry farm expansion means fewer wetlands. The industry responds that

*continued page 20*

# Pro Bono Cocktail Reception

Attorneys Kelly Turenne, James Eric Goldschmidt, and Isaac Roang  
 ▼ proudly display their *Pro Bono* Honor Society certificates.



Honorable Richard Sankovitz emphasizes the importance of *pro bono* work.



Attorneys, judges, law students, and legal service providers discuss *pro bono* work at the MBA.



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Chief Judge Jeffrey A. Kremers delivers the State of the Court address.

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MBA President David G. Peterson welcomes guests to the 11th Annual State of the Court Luncheon.

# Thank You MJC Donors

Here is a list of top donors to the Milwaukee Justice Center as of October 30, 2014. These donor categories and names will appear on the MJC's "donor wall" in the reception area of Room G-9. As a partner in the Milwaukee Justice Center, the MBA sincerely thanks all those who have donated, as well as those who volunteer their services.

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▲ The Mobile Legal Clinic parked in front of the MBA during the 6th Annual Pro Bono Cocktail Reception.



▲ Honorable James Gramling, Jr. addresses the crowd.

# Girl Scout Event Held on November 1

On Saturday, November 1, over 70 Girl Scouts from various troupes around southeast Wisconsin met at the MBA to learn about legal careers, polygraph tests, DNA tests, and other legal and law enforcement topics. Volunteer attorneys and a Milwaukee police officer provided interactive demonstrations on topics that included fingerprinting and simulated arrests. Volunteers also led a discussion of whether or not parents should be held responsible for children's crimes. The Girl Scouts had a fantastic time, and we look forward to next year's edition of this popular annual event!

The MBA would like to thank the following volunteers for presenting to the Girl Scouts:

Officer Cheryl Wolf  
Attorney Danielle Bergner  
Attorney Tom Reed  
Attorney Alejandro Lockwood  
Attorney Colin McGinn

Over 70 Girl Scouts met at the MBA on Saturday, November 1 to learn about the law, and—fortunately—didn't buy into the theory that lawyers always have to look serious.



# Photo ID Update: Focus Now on U.S. Supreme Court

Attorney Richard Saks, Hawks Quindel

## Photo ID Still Enjoined in Wisconsin

The photo ID requirement for voting, enacted as 2011 Wisconsin Act 23, remained enjoined for the November gubernatorial election in Wisconsin. Two decisions upholding photo ID—by the Wisconsin Supreme Court on July 31 and a panel of the U.S. Seventh Circuit Court of Appeals on September 12—appeared to open the door for the first-time implementation of the hotly contested voting requirement in a major election. A petition for *en banc* rehearing of the September 12 panel order was denied by a 5-5 tie vote on September 30, but on October 9 the U.S. Supreme Court granted an application to vacate the September 12 order in a terse decision from six Justices, including Chief Justice Roberts and Justice Kennedy. The one-paragraph order vacated the Seventh Circuit's stay of Judge Lynn Adelman's April 28 decision in the consolidated cases of *Frank v. Walker* and *LULAC v. Deininger*, Nos. 11-cv-1128 and 12-cv-285. The U.S. Supreme Court stay did not address the merits of the law, but responded to concerns by its opponents that the eleventh-hour implementation of the law prior to a major election would result in chaos and confusion for election officials and disenfranchise many thousands of voters.

## Posner's Dissent Tees Up Scenario for U.S. Supreme Court

The on-again off-again status of the photo ID law for the November 4 election captivated many Wisconsinites. But the most persuasive and influential opinion may ultimately be the dissent issued on October 10 by Seventh Circuit Judge Richard Posner challenging both the panel decision authored by Judge Easterbrook, and the 5-5 denial of an *en banc* rehearing. *Frank v. Walker*, slip opn. at 3, available at: <http://pdfserver.amlaw.com/nlj/Wisconsin%20voter%20ID%20opinion%20on%20en%20banc.pdf> (viewed November 3, 2014).

Judge Posner's dissent, combined with the October 9 stay, gives photo ID opponents renewed hope that the U.S. Supreme Court will grant certiorari in *Frank v. Walker* and revisit its 2008 decision upholding Indiana's photo ID law, *Crawford v. Marion County Election Board*, 553 U.S. 181. The Posner dissent constitutes a critical reversal of position by the prolific and influential conservative jurist, who authored the majority opinion in *Crawford*, 472 F.3d 949 (7th Cir. 2007). That opinion was issued over a strong dissent by Judge Terrance Evans, who called the Indiana law "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic." 472 F.3d at 954. Posner's dissent in *Frank* observes that while little evidence substantiated Judge Evans' claim at the time, it was "a conjecture that now seems prescient." *Frank v. Walker*, slip opn. at 4.

The Posner dissent blisters Judge Easterbrook for robotically invoking the *Crawford* Court's conclusions in several key areas. First, critical distinctions exist between the Indiana and Wisconsin laws. Second, *Crawford* was predicated on a weak evidentiary record about the numbers of voters without photo ID, while the plaintiffs in *Frank* proved that over 300,000 voters lack photo ID and that procuring one is frequently burdensome or at least more than a *de minimis* inconvenience. Third, the plaintiffs in *Frank* clearly established that photo ID has zero effect on voter impersonation—the only type of voting fraud preventable by a photo ID requirement—and that photo ID has no effect on voter confidence.

Most importantly, however, Judge Posner challenged the notion that post-*Crawford* courts must turn a lazy or blind eye to the actual evidence about voting fraud and the burdens of photo ID, and simply accept as eternal truth the claimed inherent beneficial effect of photo ID laws on voter confidence:

... the panel conjures up a fact-free cocoon in which to lodge the federal judiciary. As there is no evidence that voter impersonation fraud is a problem, how can the fact that a legislature says it's a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials? If the Supreme Court once thought that requiring photo identification increases public confidence in elections, and experience and academic study since shows that the Court was mistaken, do we do a favor to the Court – do we increase public confidence in elections – by making the mistake a premise of our decision? Pressed to its logical extreme the panel's interpretation of and deference to legislative facts would require upholding a photo ID voter law even if it were uncontroverted that the law eliminated no fraud but did depress turnout significantly . . . . Does the Supreme Court really want the lower courts to throw a cloak of infallibility around its factual errors of yore? Shall it be said of judges as it was said of the Bourbon kings of France that they learned nothing and forgot nothing?

*Frank v. Walker*, slip opn. at 26, 27-28.

## Veasey Case Presents Another Potential Route to Supreme Court

On the same day the U.S. Supreme Court stayed the Wisconsin law, U.S. District Court Judge Nelsa Gonzales Ramos of the Southern District of Texas issued a sweeping decision invalidating Texas' strict photo ID law. *Veasey v. Perry*, --- F. Supp. 2d ---, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014). The Texas law was previously invalidated under Section 5 of the Voting Rights Act in *Texas v. Holder*, but that decision was itself rendered invalid when the U.S. Supreme Court struck down the preclearance provisions of the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. 2 (2013). *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated and remanded*, --- U.S. ---, 133 S.Ct. 2886 (2013). Immediately after *Shelby County*, Attorney General Holder filed a challenge to Texas' photo ID law under Section 2 of the Voting Rights Act, which proscribes election practices or procedures that "result in a denial or abridgement of the right to vote on account of race." 52 U.S.C. §10301(a), transferred from 42 U.S.C. §1973(a). The record in *Veasey* regarding the severity and scope of Texas' law in burdening minority voters, and the absence of any legitimate rationale for the requirement, is remarkably similar to the extensive factual record created in *Frank*. Judge Ramos found that over 600,000 Texas voters lack an acceptable photo ID, including 21.4% of those voters earning less than \$20,000 annually, compared to just 2.6% of those earning between \$100,000 and \$150,000. 2014 WL 5090258 at \*22, \*25. Moreover, due to Texas' expansive terrain, the travel time to a government office to get a state photo ID exceeds 90 minutes for 737,000 voters, and 87.6% of such voters who lack a household vehicle have that long a trip. *Id.* at \*31.

The Fifth Circuit stayed Judge Ramos' order and permitted photo ID to be implemented in Texas for the November 4 election. --- F.3d ---, 2014 WL 5313516 (5th Cir. Oct. 14, 2014). But the extensive record created in that case, as in *Frank*, creates a strong possibility that the U.S. Supreme Court will revisit the validity of photo ID laws via one or both of these cases. They provide the Court a ready opportunity in the current term to consider whether and under what standards photo ID laws across the nation may be implemented in a manner consistent with statutory and constitutional voting rights.

*The author represented the plaintiffs in one of the state cases challenging Wisconsin's photo ID law, Milwaukee Branch of NAACP et al v. Walker, 2014 WI 98, --- Wis. 2d ---, 851 N.W.2d 262.*

# Can You Shrink a Condominium Project?

Attorney Nancy Leary Haggerty, Michael Best & Friedrich

Many of us in commercial real estate feel that the recession is over, and thank heaven for that. In some ways, however, we are still reacting to the complications the recession wreaked on our business, and we need to have a clear understanding of what is legally possible, as well as a creative strategy, in order to find the best resolution for a partially built project.

I am frequently asked by lenders or developers, who want to buy an unfinished condominium project from a foreclosing lender, whether they can alter or shrink a condominium project to only those units that were actually built or sold to outside buyers, and sell the “extra land” for cash, or use it in a different configuration or for a different use. It may be easy to draw a line on a map but in reality, altering the layout of a declared condominium or deleting land from the project altogether is very difficult to do—difficult, but not impossible. For purposes of this article, the word “condominium” refers to the whole project, not to an individual unit in a project, which is the common vernacular.

There are many good reasons to want to shrink a condominium project, including:

- to give existing unit owners greater say on the association board and greater control over the condominium budget,
- to remove any need to seek approval of existing unit owners for development of the extra land,
- to reduce the real estate taxes charged to each unit by reducing the amount of land included in the common elements,
- to allow empty unbuilt areas to be sold for other uses and to use the cash proceeds of that sale to reduce the outstanding loan money owed by the Declarant, or
- to pay for needed amenities or improvements the bankrupt

Declarant can no longer fund, in order to make the condominium project comply with FNMA and other secondary mortgage market requirements, so that individual unit owners can more easily secure financing and more units may be sold.

If the “empty field” is not actually in the condominium project—that is, if it was not included in the legal description of the Condominium Declaration or its amendments, but was only identified as an “expansion area”—the shrinkage process may be simple, requiring only a review to make sure no cross-easements or agreements are necessary to allow the condominium project and the “extra land” to be operated separately.

If the “empty field,” however, was already included in the condominium project, it is much more difficult to shrink the project. All of that area will either be defined as a “unit,” owned by an individual owner, or a “common element,” owned in common by all unit owners. The condominium statute in Wisconsin allows amendment of the Declaration in several different ways and for several different purposes. For example, expansion of the condominium project into previously identified “expansion areas” during the period of Declarant control can be accomplished unilaterally by the Declarant. Some technical cleanup amendments may also be signed in the same way. Affected unit owners may amend the Declaration to merge their units into larger spaces or divide them into smaller pieces if the Declaration permits. Some amendments can be accomplished with the affirmative consent of two-thirds of the owners of all units in the condominium.

Removing land currently in the condominium, however, requires the consent of 100% of the unit owners and consent of their lenders.

*The author may be reached at [nlhaggerty@michaelbest.com](mailto:nlhaggerty@michaelbest.com) or 414-225-4961.*

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## Mike Gonring's Lasting Legacy

Attorney Valerie P. Vidal, Quarles & Brady

In the midst of a star-studded career in the world of sports, first as the Sports Information Director for Marquette University during the halcyon days of Al McGuire, then as a prize-winning sports writer who covered the Brewers for the *Milwaukee Journal Sentinel* and hosted a sports radio talk show, Mike Gonring had an epiphany. He decided it was time to go out and get a “real” job.

With that laudable goal in mind, Mike entered Marquette University Law School, from which he graduated *cum laude* in 1982. In the more than three decades since his graduation, Mike has made his mark in his chosen profession, both as a successful trial lawyer and a tireless advocate for the rights of those unable to afford legal representation. While maintaining his high-profile and successful national practice trying major product liability cases in state and federal courts throughout the country, Mike also managed to raise and educate ten children and play an active role in each of their lives.

Now Mike has reached yet another important milestone in a life dedicated to his family, the law, and his clients. In October, he began a phased retirement from his practice at Quarles & Brady and is transitioning out of his nationally acclaimed role as the firm's *Pro Bono* Coordinator. He leaves behind a legacy that will not soon be forgotten.

In his tenure as *Pro Bono* Coordinator for Quarles & Brady, Mike has spearheaded numerous initiatives, including programs dedicated to

providing legal representation to victims of domestic violence pursuing injunctions against their abusers, asylum seekers who have been driven from their homelands, and death row inmates seeking to appeal their convictions, to name just a few. “During the past 15 years, Mike has tirelessly dedicated himself to the development of a *pro bono* program at Quarles & Brady that successfully serves the indigent while at the same time providing experiences that build skills in our lawyers and improve our community,” said Kathie Buono, managing partner of the Milwaukee office.

In addition to coordinating major *pro bono* programs for other attorneys, Mike regularly averaged more than 250 hours of *pro bono* service per year. He has represented *pro bono* clients in matters concerning guardianship, Social Security disability, real estate law, family law, and criminal cases, among other areas of practice. Mike has handled more than 25 criminal appellate cases across the country, including a death penalty case that lasted more than eight years.

Mike has volunteered his services to organizations such as the Volunteer Lawyers Project of Legal Action of Wisconsin, the Legal Aid Society of Milwaukee, the National Center for Missing and Exploited Children, the Lawyers' Committee for Civil Rights Under the Law, the Wisconsin Civil Liberties Union, and the American Bar Association's Death Penalty Representation Project. He has been a charter member of the

*continued page 21*

# MBA Announces 2014 *Pro Bono Publico* Award Winners

At the State of the Court Luncheon on October 22 at the Wisconsin Club, the MBA introduced its annual *Pro Bono Publico* Award winners in the law student, organization, and individual categories. Meet the 2014 award winners:

## Law Student *Pro Bono Publico* Award Winner:

### **Brittney LaFond,** Marquette University Law School



Marquette law student Brittney LaFond receives the law student *Pro Bono Publico* Award.

Attending to a law school course of study is rigorous and time-consuming in its own right. But for Brittney LaFond, coursework comprises only a part of her law school experience. Another important part encompasses her significant contributions to *pro bono* public service.

During her first week at Marquette University Law School, Brittney signed up to get involved in *pro bono* service. Her interest in family law led her directly to the family law forms assistance clinic at the Milwaukee Justice Center. During her first year, Brittney also assumed a student leadership role in coordinating other law students choosing to do *pro bono* work at

the Milwaukee Justice Center. Brittney's commitment to the MJC continued to grow over the course of her law school career. Now as a third year law student, Brittney continues to volunteer her time to the MJC, working one-on-one with community members seeking assistance and striving to bring other law students on board.

In addition to her significant contributions to the Milwaukee Justice Center, Brittney has volunteered her time to the Marquette Volunteer Legal Clinic, the Domestic Violence Lawyer for the Day project in partnership with Quarles & Brady, and Youth Law Day at the law school. In all, Brittney has devoted over 250 hours of her time to *pro bono* public service, a distinction that will earn her special recognition at her law school graduation.

Brittney was selected to win the student *Pro Bono Publico* Award for these and other contributions to the community, her leadership in the creation of a *pro bono* culture, and her depth of public interest involvement.

## Individual *Pro Bono Publico* Award Winner:

### **David B. Bartel, Quarles & Brady**

**A**s you may know, there is a national movement to have retired lawyers become involved in *pro bono* service—so-called Second Act programs—as a means to close the justice gap. Attorney David Bartel of Quarles & Brady is an excellent example of someone who believes that the need for *pro bono* legal services does not stop when your practice ends.

So far in 2014 alone, David has already volunteered over 200 hours of *pro bono* service, all dedicated to persons of limited means. He is a regular volunteer in Quarles' partnership with the Marquette Volunteer Legal Clinic at the Hillview Building on the South Side. He is on the schedule for regular turns in probate court, as part of Quarles' partnership with Children's Hospital to provide guardianship for developmentally disabled adolescents who are about to become adults.

## Organization *Pro Bono Publico* Award Winner:

### **Michael Best & Friedrich**

Michael Best & Friedrich has been a supporter of the Milwaukee Justice Center since its inception in 2009. One Friday afternoon each month, Michael Best sends a team of volunteer lawyers to staff the Marquette Volunteer Legal Clinic (MVLC) located at the MJC in the Milwaukee County Courthouse.

Michael Best increased its commitment to the MJC by staffing the Mobile Legal Clinic with volunteer lawyers one Saturday each month. Michael Best attorneys also volunteer at MVLC locations throughout the city, including the House of Peace Community Center and the Milwaukee County Veterans Service Office.

Lawyers at Michael Best work with a wide variety of public interest law firms and agencies that are committed to increasing access to justice, including the Legal Aid Society of Milwaukee, Legal Action of Wisconsin, and Kids Matter. Michael Best lawyers volunteer to serve as *pro bono* counsel in the Seventh Circuit Court of Appeals and the United States District Courts for the Eastern and Western Districts of Wisconsin in matters involving *pro se* litigants.

Effective December 1, 2013, Michael Best launched an enhanced *pro bono* program, which brought two primary changes. First, associates are expected to log a minimum of 25 hours of *pro bono* work, and they can receive billable hour credit of up to 50 hours for combined *pro bono* work and civic, charitable, or trade association work. Second, a new *pro bono* committee was formed to help associates identify meaningful *pro bono* opportunities and to coordinate *pro bono* work.



David Bartel receives the individual *Pro Bono Publico* Award from Dave Peterson.

David is also an integral part of the Truancy Court project. Several years ago, the State Public Defender asked Quarles & Brady to take on what amounts to a lawyer-for-a-day program in the City of Appleton. The Outagamie County Circuit Court holds Truancy Court at the city's high schools and middle schools. Previously, students were unrepresented by counsel. David volunteers his time to represent these students.

In his nominating letter, Mike Gonring wrote that David "is a shining example of the difference lawyers can make, even when they leave the private practice of law." Outagamie County Circuit Court Judge Mark McGinnis wrote of David, "I have been extremely impressed by Attorney Bartel's professionalism, passion, and zealous advocacy for his clients."



# The Civil Rights Act of 1964 Fifty Years Later

Attorney Jeremy D. Heacox, U.S. District Court for the Eastern District of Wisconsin

On September 23, 2014, members of the judiciary, the bar, and the community gathered in the ceremonial courtroom of the federal courthouse for “The Civil Rights Act of 1964 Fifty Years Later,” a program co-sponsored by the Eastern District of Wisconsin Bar Association and the Wisconsin Association of African-American Lawyers. Program attendees heard from a number of distinguished speakers including Professor Robert S. Smith, UWM History Department; Dean Margaret Raymond, UW Law School; Honorable Patricia J. Gorence, United States Magistrate Judge; Attorney James H. Hall, Jr., NAACP President and civil rights attorney; Honorable Velvlea “Vel” Phillips, attorney and civil rights activist; Reuben K. Harpole, Jr., community leader; George F. Sanders, community leader; and James L. Santelle, United States Attorney. The purpose of the program was to reflect on the activism and legal advocacy that led to enactment of the Civil Rights Act of 1964, and to discuss civil rights activism in Milwaukee and the role of lawyers in enforcing the Act in federal court—a tall order to complete in just two and a half hours.

Professor Smith began the program by providing an overview of the Civil Rights Act, tracing its roots to President Abraham Lincoln’s Emancipation Proclamation in 1863, and recalling the Reconstruction Era and Jim Crow segregation, under which African-Americans endured “separate but equal” status. On June 11, 1963, President John F. Kennedy delivered his Civil Rights Address in which he called for a bill to end discrimination and to give all Americans equal access to public accommodations and education. President Lyndon B. Johnson signed the bill into law on July 2, 1964—landmark civil rights legislation outlawing discrimination based on race, color, religion, sex, or national origin.

Dean Raymond shared a few insightful stories from her time as a law clerk for Justice Thurgood Marshall, who was a key player in the civil rights movement and a lawyer in several significant cases, most notably *Brown v. Board of Education*. Judge Gorence discussed her experience working as a journalist for the *Southern Courier*, a newspaper that covered civil rights issues in the Deep South, during the summer of 1966. Attorney Hall tied the civil rights movement to Milwaukee, discussing the history of African-Americans in the city and key civil rights cases in the Eastern District, including *Amos v. Board of School Directors of the City of Milwaukee*, in which Judge Reynolds ruled—

## Reel Law continued from p. 10

perspective, little happens in the film’s trial scenes of lawyerly interest. What should be dramatic testimony evokes little excitement for the viewer under the heavy message that the fix is in and the testimony will be practically if not legally irrelevant. The only interesting sparks that fly in the trial scenes come during Aiken’s examination of Surratt’s tenant John Lloyd, played by the protean character actor Stephen Root, and then only because of Root’s effervescent acting.

I wanted to see this movie when it was announced because I am fascinated by the history it covers, and I wanted to like it when I saw it. Alas, unless you are seeking an evening soporific, I cannot recommend it. If you are equally interested in the events surrounding Lincoln’s assassination, your time would be better spent reading James Swanson’s *Manhunt*, a fine recent popular history that boils with the energy of those events—energy that *The Conspirator*, unfortunately, does not capture.

more than 20 years after *Brown*—that the entire Milwaukee public school system was unconstitutionally segregated.

The first portion of the program culminated in the introduction of special guest Vel Phillips, a civil rights pioneer in Milwaukee and throughout Wisconsin, who deservedly received a standing ovation from those in attendance. Ms. Phillips recounted a priceless anecdote about introducing President Jimmy Carter at an event in Milwaukee. Brushing aside opposition from colleagues within Ms. Phillips’ own party at the President being introduced by an African-American woman, President Carter remarked, “If the person who is introducing me is a spotted dog, then that spotted dog will bark 9 times (i.e., ‘Ladies and gentlemen, the President of the United States’).”

In the second portion of the program, several of the speakers were joined by Messrs. Harpole and Sanders and Attorney Santelle for a panel discussion. The panelists discussed the significance of the Civil Rights Act in Milwaukee, work on local civil rights issues since its enactment, and challenges the city faces going forward. The program concluded with remarks from Attorney Santelle, who characterized lingering inequalities as the “great unfinished business of America.” He noted that while much progress has been made, many issues remain to be tackled—not with desperation but with hope for a better future for all Americans.

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# State of the Court:

## Chief Judge Renews Call for Action on Downtown Children's Court

It is "well past time" to tear down the Safety Building and move the Children's Court from Wauwatosa to downtown Milwaukee, according to Milwaukee County Circuit Court Chief Judge Jeffrey Kremers. The Chief Judge spoke at the MBA's eleventh annual State of the Court Luncheon at the Wisconsin Club on October 22, 2014, to a full house of MBA members and guests, including Wisconsin Supreme Court Chief Justice Shirley Abrahamson.

"It is bordering on unconscionable what we are doing to the families of children being processed through the facility in Tosa," Judge Kremers asserted. The Children's Court facility is neither centrally located nor well served by public transportation, and therefore is difficult for many Milwaukee County families, particularly those who reside in the City of Milwaukee, to access. Judge Kremers noted that this year the MBA presented a resolution to the County Board Chairperson and County Executive calling for relocation of Children's Court downtown. Now, he said, "we need to take it to the next level." He asked MBA members and their clients "to reach out to local and state leaders to get this done. We can do better in Milwaukee." Judge Kremers added: "Everyone knows it will happen sooner or later. What's wrong with sooner? ... We need to find a way forward to get this done with the same urgency we are told is needed for a new Bucks arena."

The State of the Court address also decried the effects of racial segregation in Milwaukee. In a recitation of "sobering" statistics, the Chief Judge noted that Milwaukee ranks as the worst among American cities for racial segregation, segregation-based poverty, and the employment gap between whites and African-Americans. Wisconsin is the worst state for the student test score gap between whites and African-Americans and the incarceration rate of African-Americans. Judge Kremers reported on a day-long conference at Marquette University in mid-October to address the issue of how racial segregation impacts the criminal justice system and public perception of the community. Over 350 judicial officers, state prosecutors, public defenders, victim advocates, and corrections employees attended the conference, which the judge described as "a very good discussion but ... only a beginning." He declared that "we all have a role to play in the health of Milwaukee. It takes a collaborative effort to make a strong community."

The Chief Judge had more upbeat news on the court budget. On the county budget level, he reported that he made his "shortest appearance yet" before the County Finance Committee because the circuit court is satisfied with the County Executive's proposed budget and can operate within its constraints. In fact, the budget calls for funding the operational costs of the court's new criminal case management system, which will better track an increasing population of defendants out of custody on pretrial monitoring. This, Judge Kremers noted, achieves "substantial savings in jail bed costs." He added that he expects the County Board to support the County Executive's proposed budget for the courts.

On the state budget level, Judge Kremers observed that court support services surcharge to users of the court system, which brought \$42 million into state coffers last year, "did not come to the courts but instead to general purpose revenue for the state." The state paid only 36.5% of the costs of running the circuit courts in the 2012-13 budget cycle, compared to 43% of those costs in the 2002-03 budget cycle. Thus, the counties had to pick up 63.5% of circuit court costs in the last biennium, in addition to suffering a 10% cut in general funding from the state in that biennium. The Chief Judge asked his audience "to contact state leaders in all branches and tell them the court system needs their support."

In the Civil Division, Judge Kremers proposed a fee-based, in-house mediation program, whereby the assigned judge would refer appropriate cases to another circuit judge for mediation. This proposal emanates from concern about "the civil system losing its credibility as the place to resolve disputes." The Chief Judge also reported:

- Circuit court chief judges plan to petition the Wisconsin Supreme Court for mandatory e-filing.
- The courts now handle eight to ten firearm surrender hearings per week to ensure that those "who have been ordered to surrender firearms are in fact doing so."
- Work continues on new forms for Chapter 128 cases.

In the Family Division, Judge Kremers noted that the Wisconsin Supreme Court has clarified the standards for judges concerning their interaction with unrepresented litigants—important guidance in a division where more than 80% of cases feature at least one unrepresented party. The judge also described the new Milwaukee Visitation Center, designed as a safe place for parties in high-conflict divorce cases to conduct visitation periods or exchange children between parents. The Chief Judge called this "another terrific new asset for Milwaukee."

In the Children's Division, Judge Kremers reported on the progress of the Family Drug Court. "We are re-unifying more families and achieving some level of permanency more frequently than similarly situated families who do not go through the program," he stated.

And in the Criminal Division, the Chief Judge reviewed the court's numerous evidence-based decision making programs, including universal pretrial screening, early intervention and diversion, a central intake unit for alleged batterers in domestic violence cases, a mental health pilot project, and more than 25 programs at the House of Correction. He reported that Wisconsin is one of five states in competition for a grant to apply evidence-based decision making principles on a statewide basis, and that Milwaukee County, along with Eau Claire County, is leading the effort to obtain the grant.

In closing, Judge Kremers noted that this was his final State of the Court address. He will complete his term as Chief Judge next July and return to the bench. The packed house recognized his service with a standing ovation.

## Congratulations to Attorney Catherine La Fleur on the largest LRIS recovery for 2014!

### Upcoming Events

**December 3**

Law & Technology Conference

**June 9**

Annual Meeting

**February 10**

Judges Night

**August 5**

Golf Outing

# Milwaukee Justice Center Update

## Thank You and Best Wishes, Dawn Caldart!

The Milwaukee Justice Center staff and volunteers would like to thank former Executive Director Dawn Caldart, for her leadership. After five years with the MJC, Dawn recently accepted the *Pro Bono* and Professional Development Director position at Quarles & Brady.

Since April of 2009, Dawn has worked both in and outside of the clinic to expand services to Milwaukee's unrepresented litigants. She nurtured relationships with Milwaukee County and Marquette University Law School to create the collaborative approach that sustains the MJC's services. She recruited Milwaukee law firms to help staff the MJC's busy Marquette Volunteer Legal Clinic with attorney volunteers each Thursday and Friday afternoon. She expanded the family law forms assistance hours, resulting in the MJC's assistance to over 10,000 clients per year in both forms assistance and brief legal advice. Recently, Dawn oversaw the creation of the MJC's Mobile Legal Clinic, a legal assistance model that has received multiple awards and media recognition for its innovative approach to increasing access to justice in Milwaukee County.

Under Dawn's leadership and direction, the MJC underwent an extensive renovation, completed in July 2014. This renovation increased the space available to the MJC and enhanced the technology employed in its delivery of legal services. Additionally, Dawn helped craft a grant that will provide furniture, toys, books, and activities to fill the children's area in the MJC's waiting room, providing children an educational and interactive place to wait while their parents receive assistance.

For all of her work to develop, enhance, and sustain the MJC, Dawn received the 2014 Marquette University Law School Howard B. Eisenberg Service Award recognizing service to the community. Her impact on civil legal services in Milwaukee has been immense, and will continue to grow with her new position.

With much gratitude, the Milwaukee Justice Center thanks Dawn Caldart for the unwavering leadership, strong vision, and unlimited inspiration she has provided.

## Mobile Legal Clinic Named a 2014 "Top 5 Legal Innovation" in Wisconsin

The State Bar of Wisconsin has chosen the Milwaukee Justice Center Mobile Legal Clinic as one of the "Top 5 Legal Innovations" of 2014 and has recognized Attorney Mike Gonring for his vision and leadership in the clinic's development. Mike shares the cover of the November issue of *Wisconsin Lawyer*, alongside representatives of the other honorees.

For this award, the State Bar sought nominations of "lawyers and legal organizations that used technology in new ways to improve client services or serve a new market; created best practices to promote workplace diversity; developed new strategies for marketing and business development; provided *pro bono* or reduced-cost legal services in new ways; or created greater internal efficiency through operational changes."

In addition to Mike Gonring and the Mobile Legal Clinic, honorees include:

- Kelly Twigger of ESI Attorneys for "eDiscovery Assistant," a mobile application that collects and organizes rapidly changing electronic discovery resources, including rules, case digests, templates, checklists, and a glossary of terms.
- Anne Smith of UW Law School for the "Law and Entrepreneurship Clinic," a legal clinic assisting small businesses and non-profits in the business formation process.
- Honorable Karen Christenson of the Milwaukee County Circuit

Court for the "Family Drug Treatment Court," a holistic and dynamic approach to addressing parental substance abuse and family safety.

- Beth Ann Richlen of Wisconsin Judicare for the "Northern Wisconsin Legal Advice Project," an online brief legal advice clinic serving 33 counties within the Judicare service area.

A recognition ceremony will be held on December 5, 2014 in Madison at the State Bar Board of Governors annual meeting.

## Mary Ferwerda Touts Mobile Legal Clinic at National Juvenile Defender's Conference

During the last week in October, Mary Ferwerda, the MJC's Legal Director, presented at the National Juvenile Defender Center (NJDC) annual Leadership Summit in Louisville, Kentucky. The NJDC is a non-profit organization that is "dedicated to promoting justice for all children by ensuring excellence in juvenile defense [through] support to public defenders, appointed counsel, law school clinical programs, and non-profit law centers to ensure quality representation in urban, suburban, rural, and tribal areas." The NJDC Leadership Summit invites juvenile defenders from across the country to a weekend focused on innovative approaches to legal services for juveniles.

Mary was invited to speak on the work of the Mobile Legal Clinic to provide legal services in isolated neighborhoods of Milwaukee. In a breakout session entitled "Justice on Wheels," Mary was one of two presenters who discussed how their programs were created and how they serve communities unable to access other legal services. Mary spoke on a panel with Bert "Tiger" Whitehead IV, founder of Access Legal Care in Michigan. Access Legal Care provides services to all counties in Michigan through the use of a two-part legal model, including a "primary care" attorney who manages all aspects of the case and a "litigation attorney" who practices in the client's county and attends court hearings. Access Legal Care has been recognized by the American Bar Association for its groundbreaking approach to serving those in outlying areas of Michigan.

In addition, Mary showcased the development of the Mobile Legal Clinic and its outreach efforts as part of a panel in a plenary session of conference attendees on the topic of creating access to legal services in isolated communities. Though the Mobile Legal Clinic does not assist with criminal law issues and does not serve currently outside of Milwaukee County, the conference planning committee was interested in the project as a unique model of legal services and as a catalyst to considering innovative ways to provide assistance and support to juveniles in a post-disposition context. The Mobile Legal Clinic sparked interest for its approach to identifying and serving isolated urban environments, in contrast to the traditional view of isolated communities in rural settings.

Mary Ferwerda (Milwaukee Justice Center Legal Director), LaNita McWilliams (NJDC Staff Attorney), and Bert "Tiger" Whitehead IV (Founder of Access Legal Care) present "Justice on Wheels" at the 2014 NJDC Leadership Summit.



# New IRS Memo Offers Insights on Application of “Limited Partner” Exclusion for Self-Employment Tax

Attorney Adam J. Tutaj, Meissner Tierney Fisher & Nichols

The Internal Revenue Code (the “Code”) imposes a tax on “net earnings from self-employment.” See I.R.C. § 1402(a). The Code defines net earnings from self-employment generally as the gross income, less deductions, derived by an individual from any “trade or business” carried on by that individual. *Id.* Thus, the self-employment tax is only imposed on individuals; there is no self-employment tax applied at the entity level. Moreover, the only entity-level income of which pass-through triggers self-employment tax at the individual level is income of an entity that is treated as a “partnership” for tax purposes. *Id.*

Assuming that the “trade or business” in question is subject to the self-employment tax (there are a number of exceptions, and exceptions can make a big difference in how the tax applies. In this regard, it is not only the broad “tax” categories of C corporation, S corporation, and partnership that make a difference. Even within the “tax” partnership category (i.e., general partnerships, limited partnerships, limited liability companies, and other entities treated as partnerships for tax purposes), the form of legal entity selected may yield very different outcomes, depending on both its classification for state law purposes

and the substantive characteristics of such status under state law. This dynamic is particularly pronounced in the context of so-called “limited partners.”

Section 1402(a)(13) of the Code specifically provides that, in determining net earnings from self-employment, “there shall be excluded the distributive share of any item of income or loss of a *limited partner*, as such” — other than certain “guaranteed payments” made to that partner for services actually rendered to or on behalf of the partnership. (Italics added.) This “limited partner” exclusion is seemingly straightforward and categorical. It should apply to an individual with respect to his or her limited partnership interest, even if that individual also happens to be a general partner of the limited partnership. Similarly, it should apply in the fairly common situation where the same individual owns some or all of the stock of an S corporation that is the general partner of the limited partnership, in addition to owning his or her limited partner interest. See, e.g., *Crigraci v. Comm’r*, T.C. Memo 2002-202 (Aug. 12, 2002).

In 1997, the Service proposed changes to the self-employment tax regulations (the “Proposed Regulation”) that were intended

to create definitive rules governing how the “limited partner” exclusion applies in the context of limited liability entities other than state law limited partnerships—i.e., primarily limited liability companies. However, the Proposed Regulation came under fire from Congress over concerns that it would present a significant tax increase for small businesses and that it violated certain procedural requirements. See Patrick McCarthy, “LLCs and Self-Employment Tax,” *74 Practical Tax Strategies* 132, 134 (March 2005). Congress imposed a moratorium preventing the IRS from issuing final or proposed regulations defining a limited partner under § 1402(a)(13) of the Code, but the moratorium expired July 1, 1998. *Id.* Since then, Congress has not acted and the IRS has never withdrawn the Proposed Regulation.

In the past three years, two court cases have denied the application of the “limited partner” exclusion to active partners in professional service partnerships. The first, *Renkemeyer, Campbell & Weaver, LLP v. Commissioner*, 136 T.C. 137 (2011), held that practicing lawyers in a law firm organized as a limited liability partnership were not “limited partners” within the meaning of the exclusion. The second,

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## Cranberry continued from p. 11

cranberries are a wetland plant; growers, through water management strategies, have created, restored, and protected far more classic wetland acres than are used to grow the plant; and responsible water stewardship is the norm and not the exception. Cranberry farmers know they have a good deal in Wisconsin. Growers don’t want to abuse the privilege so they do their best to conserve the water resources at their disposal.

Historically, cranberry growers have aggressively defended their industry and have beaten back challenges to the law. *State v. Zawistowski*, 95 Wis. 2d 250, 290 N.W.2d 303 (1980) (Cranberry Law creates an exemption from the requirement of Chapter 30 permits to divert water for cranberry cultivation); *Tenpas v. DNR*, 148 Wis. 2d 579, 436 N.W.2d 297 (1989) (Cranberry Law supersedes dam regulations); *State v. Zawistowski*, 2008 WI App 51, 309 Wis. 2d 233, 747 N.W.2d 527 (unpublished) (cranberry marsh did not create nuisance by phosphorus discharge), *review*

*denied*, 2008 WI 115, 310 Wis. 2d 706, 754 N.W.2d 849. Although the two *Zawistowski* cases were 28 years apart, the defendant in each appears to have been one and the same: William Zawistowski a/k/a William Zawistowski, Jr. Not only did he prevail in both, but he also reportedly recovered his legal fees in the second case upon remand from the court of appeals under Wis. Stat. § 823.08, the Right to Farm Law. (See [wfbf.com/legislative/issue-backgrounders/wisconsins-right-to-farm-law](http://wfbf.com/legislative/issue-backgrounders/wisconsins-right-to-farm-law) (viewed October 29, 2014).) One might think twice before provoking Mr. Z, even if one is the State of Wisconsin.

Several marketing groups, called “handlers,” purchase cranberries from Wisconsin growers. The largest is Ocean Spray, a Massachusetts-based cooperative, which has about 60% of the cranberry acreage in Wisconsin under contract with its member growers. Only about 5% of the state crop is sold as fresh fruit.

For several years now there has been a cranberry glut—supply exceeds demand.

But don’t worry. Although a wholesale expansion of the industry—“cranberry creep” if you will—is not on the horizon, Warrens, Wisconsin is. Here is the home of the Wisconsin Cranberry Discovery Center and the Warrens Cranberry Festival. The last full weekend in September, this festival also features the well-regarded Cranberry Marsh Tours and Wisconsin’s biggest marching band parade.

Here is my Thanksgiving wish for you. Just before you dig into that tasty cranberry sauce so perfectly complementing that succulent turkey, think about the Native Americans sharing their cranberry harvest with the pilgrims. Then think about the cranberries on your plate. Think Wisconsin.

*Douglas H. Frazer, Northwestern 1985, is a shareholder in the Metro Milwaukee office of DeWitt Ross & Stevens. He focuses his practice on tax litigation and controversy. The writer wishes to acknowledge that his firm represents the Wisconsin State Cranberry Growers Association.*

**IRS continued from p. 20**

*Riether v. U.S.*, 919 F. Supp. 2d 1140 (D.N.M. 2012), held that a physician and his spouse were not “limited partners” in a diagnostic imaging business they owned and organized as a limited liability company, and were subject to self-employment tax on the earnings that passed through to them from the LLC.

The *Renkemeyer* court, observing that the Proposed Regulation was not controlling, based its decision on legislative history of the statutory exclusion itself. Noting that the provision was intended “to exclude for coverage purposes certain earnings which are basically of an investment nature,” the court concluded that the exclusion is not to be extended to “partners who performed services for a partnership in their capacity as partners.” 136 T.C. at 150 (quoting H. Rept. 95-702 (Part 1), at 11 (1977)). The *Riether* case, citing *Renkemeyer*, employed a similar analysis. See 919 F. Supp. 2d at 1158-60.

On September 5, 2014, the Service released Chief Counsel Advice Memorandum 201436049 dated May 20, 2014. This internal (and partially redacted) memorandum provided legal guidance to an IRS field agent and concluded that partners in an investment management company, organized as an LLC, were not limited partners and, therefore, were not exempt from self-employment tax under Code § 1402. The memorandum—which is not binding authority, but rather an expression of the Service’s view of the law—is instructive in a number of respects.

First, the memorandum is notable because it deals with the application of the limited partner exclusion of § 1402(a)(13) in the somewhat amorphous area of “management” services, rather than the more traditional fee-for-service professions, such as law and medicine. Specifically, it involves an investment management business operated as a state law LLC.

The LLC in question had taken the position that its members were limited partners for purposes of the exclusion in § 1402(a)(13). The Service, however, found that the partners performed extensive investment and operational management services for the partnership in their capacity as partners (i.e., acting in the manner of self-employed persons), and the management company derived its income from the investment management services performed by the partners. Accordingly, the partners of the management company were held not to be limited partners within the meaning of § 1402(a)(13), and they were subject to self-employment tax on their distributive shares of the management company’s income.

Second, the extent to which the memorandum employs the same analysis contained in the *Renkemeyer* and *Riether* cases to the facts at issue (which were a little more nuanced than in those cases) suggests that the IRS is simultaneously sharpening and simplifying its reasoning. In the case under consideration, the investment management LLC had

*continued page 22*

# Pro Bono Corner



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

At the MBA’s Sixth Annual *Pro Bono* Cocktail Reception on October 29, the legal community celebrated its *pro bono* efforts and also reflected on the continuing legal needs of Milwaukee residents. Judges, attorneys, and Marquette law students gathered at the MBA to discuss legal services to the underserved in our area.

Judge Richard Sankovitz spoke about the increasing importance of *pro bono* service with the widening wealth gap, and the opportunity *pro bono* work provides to narrow that gap by “stepping into the client’s shoes.” Attorneys Karen Dardy of the Legal Aid Society of Milwaukee and David Pifer of Legal Action of Wisconsin shared the need for *pro bono* assistance and options for *pro bono* service with their organizations. Attorney Eamon Guerin talked about how, as a newer lawyer, he incorporates *pro bono* service into his practice and why he feels it important to do so.

Following the presentations, Judge Sankovitz handed out certificates to the 2013 inductees into the *Pro Bono* Honor Society. Each Honor Society members provided at least 50 hours of qualifying *pro bono* service to benefit low income Wisconsin residents in 2013. If you wish to nominate yourself or a colleague for the 2014 Honor Society, the online nomination form is available at <http://wisatj.org/projects/probonosociety>.

Thanks to the MBA and Quarles & Brady for their sponsorship of this event.

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**Gonring continued from p. 15**

Equal Justice Fund, and a board member of Legal Action of Wisconsin for more than ten years. Mike chaired the State Bar of Wisconsin’s Legal Assistance Committee while also serving on the Milwaukee Bar Association’s Legal Services to the Indigent Committee and the *Pro Bono* Committee of the Eastern District of Wisconsin Bar Association.

Mike’s extraordinary devotion to helping others has earned him a number of awards. For example, he has been honored with a Lifetime Achievement Award from the State Bar of Wisconsin and a Distinguished Service Award from the Milwaukee Bar Association for his prodigious *pro bono* service. He has been honored twice as a leader in the *pro bono* community by the Volunteer Lawyers Project—first for his efforts in the area of *pro bono* recruiting, and then with a career achievement award. He also has been recognized for exceptional *pro bono* services by the Western District of Wisconsin Bar Association.

As a lasting tribute to Mike’s dedication to bridging the “justice gap,” the Milwaukee Mobile Legal Clinic was established in his honor. The Mobile Legal Clinic, a collaboration between Marquette University Law School, the Milwaukee Bar Association, and the Milwaukee Justice Center, travels throughout the city delivering volunteer legal services to underserved areas. After only one year of operation, the clinic has already received significant recognition: an inaugural 2014 Wisconsin Innovation Award, as well as inclusion in the *Milwaukee Journal Sentinel’s* Big Ideas 2013 and the State Bar of Wisconsin’s “That’s a Fine Idea! Legal Innovation Wisconsin.” The Mobile Legal Clinic will perpetuate Mike’s legacy by providing legal services to under-represented communities long into the future.

*continued page 22*  
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## CLE continued from p. 8

- Investment structure
- Fee structure

Presenters: Bob Borowski and Eric Novelty,  
Alpha Investment Consulting Group  
Noon – 12:30 (Lunch/Registration)  
12:30 – 1:30 (Presentation)  
1.0 CLE credit

## December 16, 2014

### MBA Presents

#### Recognizing “Overwhelm” and Preventing a Fall off the Ethical Cliff

An expanded view of “overwhelm” and an understanding of the factors that contribute to it; an increased awareness of how “overwhelm” shows up so you can intervene in ways that diminish its impact on your life; strategies you can employ that allow for a more healthy approach to managing “overwhelm” in your life; a belief that you can choose to more consistently focus your time, energy, and attention on those things that you care most about.

Presenters: Catherine A. La Fleur, La Fleur Law Office; Kimberly Binger, certified coach  
Noon – 12:30 (Lunch/Registration)  
12:30 – 1:30 (Presentation)  
1.0 CLE credit

## December 17, 2014

### Labor and Employment Section

#### Ethics Issues in Labor and Employment Law

Presenter: Professor Ralph Cagle, University of Wisconsin Law School  
Noon – 12:30 (Lunch/Registration)  
12:30 – 1:30 (Presentation)  
1.0 CLE ethics credit

## December 19, 2014

### MBA Presents

#### Ethics Nightmares: Tales from the Dark Side of Law

Attorney Andrew L. Franklin takes you through multiple ethical horrors. This seminar reviews various approaches to ethics, as well as how to better incorporate ethical conduct into your practices. Expect to be shocked and amused.

Presenter: Attorney Andrew Franklin, Adjunct Faculty, Cardinal Stritch University  
12:30 – 1:00 p.m. (Lunch/Registration)  
1:00 – 4:00 (Presentation)  
3.0 pre-approved CLE ethics credits

## IRS continued from p. 21

split its ownership into multiple classes of membership units (including multiple classes of voting and “non-voting” units), and the members reported some self-employment income to the extent of certain guaranteed payments to the partners. In this respect, it appeared that the LLC was essentially trying to replicate some of the dynamics of a state law “limited partnership”—not to be confused with a “limited liability partnership” which, in all relevant respects, is the same as a general partnership.

Nevertheless, the IRS blew past these apparent efforts to tee up distinctions based on the types of membership units held and the nature of the income passing through to the members from their units (i.e., earned versus unearned), and essentially reduced the analysis to this: (1) active management or service as a partner means you’re not a limited partner, and (2) if you’re not a limited partner, then your whole distributable share of the partnership income (regardless of the class of ownership from which it is derived) is subject to self-employment tax, full stop.

Finally, it is important to note that the memorandum does not specifically address the question of whether the same analysis would apply if the investment managers in question had been state law “limited partners” of an investment management business actually organized as a state law “limited partnership”—as opposed to members of a state law LLC structured as the functional equivalent of a limited partnership. The reasoning of the memorandum certainly suggests that the same analysis might apply, even though form has long controlled over substance when it comes to the application of the limited partner exclusion. Whether the memorandum presages a new worldview on this point remains to be seen.

One upshot—from a choice-of-entity perspective, at least—is that the memorandum *does* specifically recognize that the concepts of reasonable compensation and dividend distributions in the Subchapter S corporation context remain clearly distinct from the partnership realm, noting: “Management Company cannot change the character of its Partners’ distributive shares by paying portions of each Partner’s distributive share as amounts mislabeled as so-called ‘wages.’ Management Company is not a corporation and the ‘reasonable compensation’ rules applicable to corporations do not apply.” Chief Counsel Advice Memo. at 9. Thus, the use of an S Corporation apparently remains a viable planning technique for those looking to minimize their exposure to self-employment tax.

## Gonring continued from p. 21

Mike has also served as a mentor to innumerable attorneys starting their careers and those interested in *pro bono* initiatives. “I’m a better lawyer and a better person for having had the opportunity to work with Mike,” said Kristin Occhetti, an attorney who benefited from several of the *pro bono* programs Mike started. “I am eternally grateful for all that I have learned from him,” Occhetti said. The sentiment is echoed by many of the associates with whom Mike has worked over the years.

“Mike Gonring embodies the best of all the good qualities a lawyer should possess,” said his long-time law partner, Frank Daily. “His work and life have been informed by the Jesuit tradition of ‘Caritas’—be a person in service to others. He is fiercely loyal to all of his clients, and enhanced by his dry wit and refreshing irreverence, is a formidable adversary in the fight for justice. It has been an enormous privilege and a true blessing to practice with Mike for all these years.”

“My knowledge of Mike’s advocacy for clients is first-hand, as I tried my first case with him many years ago. He is a superb lawyer and one of the best writers I have known,” said Nancy Peterson, member of Quarles & Brady’s Executive Committee. “That he brought his talents to bear for so many *pro bono* clients of the firm is something for which I am very thankful and proud,” said Peterson.

“We will miss his passion and focus, but wish him all the best as he enters this new era,” said Buono.

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Please watch your inboxes (*and not mailboxes*) for your 2015 membership renewal invoice. The invoices will be e-mailed the first week in December. The e-mail will have a link that will take you directly to the MBA website to pay your dues by credit card. The e-mail will also have your member login information.

If you experience any problems or have any questions, please contact the MBA Office Manager, Molly Staab, at [mstaab@milwbar.org](mailto:mstaab@milwbar.org) or 414-276-5930.

We appreciate your membership and look forward to seeing you at many great events in 2015!

**Thank you!**



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