TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

President "Johnny Cash" Damon, the man in black, exercising his executive privilege in the name of national security, has declared the Winter TriCounty Bar meeting as set for Friday, January 11, 2008 at the golf club in Whitehall. Lunch on your own at noon, followed by the educational seminars from 1:00 to 4:30, with the business meeting and dinner to follow. Be there or risk detention in secret prisons in Trempealeau County being subjected to painful experiences not defined as torture, like continual listening to recording of the Damon brothers singing show tunes.

Beth Ellingson may be a new face at the bar meeting in January. Beth is starting her law practice in Galesville, having practiced in Milwaukee previously. The man she says is her spouse is a public defender based in La Crosse. Beth is from suburban Whitehall originally. She is a former nun, speaks Russian, and is a master in martial arts, a talent which she says aids negotiations. She will accept referral of all your nonpaying and demanding clients. Most of this is not true, but she did not return my call so I made it up. Her fault, she will learn.

Chris Bloom, formerly practicing with Jon Seifert and Steve Schultz, sends his greetings and thanks from Maasin City in the Philippines, He decided to move to the Philippines after traveling there to be married so his wife and he could remain together after their wedding on September 21 until her INS papers were approved.

When the fact that on average an adult elephant produces about 500 lbs of dung per day somehow came up in conversation at the summer meeting, Bruce Brovold exclaimed "That's three of me!". Al Morgan pointed out, perhaps more often than absolutely necessary, that that made Bruce a third of a turd.

Also overheard at the summer meeting:
"Despite the content, I just love to hear him talk."
"I get more loving than Davy Crockett."
"Bruce is my buckeroo."
"Never pay a stripper with a credit card."
"Direct me to a lucky place."

On her maiden canoe trip, Susan Fisher showed up with a first aid kit, definitely a first for the TriCounty. She was immediately designated safety team leader. She began a risk assessment and designed an Integrated Hazard Operations Procedure (IHOP), which made everyone hungry so we had ham sandwiches, pancakes being hard to come by on the river. Band aids turned out not to be needed. This time.

John Newton is still trying to get rid of his nickname of "Poop" Newton. Last year it was "Just call me Hammer". This year he completed the canoe trip as "Captain Cocktail". You still don't get to pick your own nickname, John, but maybe …

Who won the sensational Thursday night Smackdown 2007, *Bruce Kostner vs. The Wall*? Don't ask Bruce. He won't know.

At the conclusion of a recent hearing, one of the parties was very complimentary about how Judge Duvall handled the hearing. Judge Duvall surreptitiously looked to the court reporter to make sure she was getting it all down. After the defendant left, Jon Seifert rose and stated "May the record reflect that the person who just said all those nice things about Judge Duvall is under guardianship and has been declared incompetent."

CIVIL

A default judgment was properly entered when a defendant did not file a timely answer, even though the court did not first strike the untimely answer from the record. *Keene v. Sippel*, 2006 AP 2580.

If the defendant does not respond to an amended complaint, judgment may be entered even though he did answer the original complaint. The Court of Appeals in *Schuett v.* Hanson, 2006 AP 3014, found that the amended complaint nullified the original complaint and therefore no issue had been joined as to the only operative complaint. The case did not discuss *Strawberry v. Zellmer*, 22 Wis. 2d 356 (1964), in which the Supreme Court held that issue is joined when the original complaint is answered and subsequent events cannot undo that. It also did not consider the various ways a complaint might be amended. There are at least four possibilities: amending the caption only, adding new facts but no additional claims, adding no new facts but citing new additional legal theories, or dropping all original facts and claims and adding new ones.

If a confidential medical record is filed in court, it is not confidential under HIPAA, Sec. 146.82 or otherwise. Courts are not "covered entities" under HIPAA. Further, a recent informal AG opinion, I-03-07 discussed the interaction between the public records law and HIPAA, finding that HIPAA provides that it may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. 45 C.F.R. Sec. 16a.512(a). It opines that the Public Record law is a disclosure "required by law" authorizing release of medical records contained in court's files. The logic would appear to apply to other public record custodians too. So consider this when filing

counseling records etc with the court.

At a recent seminar, it was discussed whether notice of the procedure of how to respond to a Summary Judgment Motion should be given to a pro se defendant, in addition to the standard hearing notice. It is apparently so required in federal court under *Timms v. Frank*, 953 F.2d 281 (7th Cir. 1992). The authority appears to be the due process clause and the right of litigants to meaningful access to the court. This is a hot topic with the WI Supreme Court currently too. The issue could come up quite commonly in mortgage foreclosures, collections, etc. To guard against a motion to reopen based on constitutional principals, would good practice suggest giving the information on procedure to a self represented person? *Timm* suggests this notice should include both the text of the Summary Judgment statute and a short and plain statement in ordinary English that any factual assertion in the movant's affidavits will be taken as true by the court unless the nonmovant contradicts the movant with counter-affidavits or other documentary evidence.

A passenger in a vehicle was injured in an accident which was the fault of two separate drivers. One driver was fully insured and the other was underinsured. Can the

passenger claim against his own underinsured motorist coverage because one of the tortfeasors was underinsured, even though the other was not? No, answered the court in *Marotz v. Hallman*, 2005 AP 1579.

There is no uninsured motorist coverage for a "miss and run" case where there was no impact between the insured vehicle and the unidentified vehicle, even if the unidentified vehicle hit a third vehicle. *DeHart v. Wisconsin Mutual*, 2005 AP 2962

An installment promissory note does not have the right of prepayment in the absence of an agreement to the contrary. If the note is silent on the issue of prepayment, the debtor has no right to prepay. *Henrici's Management Corp. v. Ingram*, 2006 AP 2240.

The admissibility of animations for demonstrative purposes is discussed in *Roy v. St. Lukes Medical Center*, 2006 AP 480, but the discussion is interesting as to demonstrative evidence in general. The expert testified that the animations were the best approximation or representation of what happened. In addition, there was an animation illustrating the other party's theory. The court admitted it, holding that the animation was a graphic illustration of the doctors previously disclosed opinion, similar to drawing a picture to illustrate testimony. The court distinguished an Illinois case in which the animations were excluded because they made no attempt to account for conflicting expert testimony presented at trial and the expert could not state that the animation was an actual portrayal of what it purported to show.

A reducing clause in an Uninsured Motorists Coverage reducing benefits by the amount of Workers Compensation benefits paid was held to be clear and unambiguous, even though neither the policy holder nor the insurance agent understood it. *Williams v. Rural Mutual Insurance*, 2007 AP 866

CRIMINAL LAW

When a defendant is arrested and confined in another state under a Wisconsin fugitive warrant, he is entitled to sentence credit from the date he was arrested in that other state until the date he is sentenced on the out-of-state charge if he is also being held on the Wisconsin warrant. There is no requirement that the defendant be in custody in another state "exclusively" on the Wisconsin warrant in order to be entitled to concurrent credit against the Wisconsin sentence. *State v. Carter*, 2006 AP 1811.

A fine imposed without a determination of an ability to pay at the time of sentencing must be vacated. *State v. Ramel*, 2007 AP 355. What would this case say about to the large fines dictated by the OWI sentencing guidelines, which generally in practice are assessed without an individualized determination of ability to pay?

The invocation of the right to remain silent must be clear and unequivocal. There can be no possibility of reasonable competing inferences. Police have no duty to ask clarifying questions. *State v. Markwardt*, Nº 2007 AP 2871.

The DA may comment on the fact that the defendant's wife did not appear despite being subpoenaed by the state. The state did not ask the jury to draw an adverse inference from the defendant's failure to call his wife. *State v. Cockrell*, 2005 AP 2672.

An officer's knowledge that a vehicle's owner's license is revoked will support reasonable suspicion for a traffic stop so long as the officer remains unaware of any facts that would suggest that the owner is not driving. *State v. Newer*, 2006 AP 2388.

When a jury requested clarification of the term "materially impaired" in an OWI case, it was error for the Court to decline to define it

using the definition contained in S*tate v. Waalen*, 130 Wis. 2d 18. S*tate v. Hubbard*, no. 2006 AP 2753.

Bank records are not admissible in a criminal trial without a live witness from the bank. *State v. Doss*, 2006 AP 2254. Self authentication of certified bank records violates the confrontation clause. *Crawford v. Washington*, 124 S.Ct. 1354 (2004) held that business records are not testimonial, but the argument is that the certification is an out-of-court statement produced in anticipation of litigation. However this case may conflict with authority from the federal courts and other jurisdictions. For example in *US v. Ellis*, 460 F.3d 920, the Seventh Circuit held that the certification does not purport to convey information about the defendant, but merely establishes the existence of procedures necessary to create a business record. However *Doss* may currently be the law in Wisconsin.

A photo lineup is not impermissibly suggestive even though the photos were shown to the witness simultaneously rather than sequentially, rejecting the argument that the holding in *State v. Dubose*, 2003 AP 1690, that one-person show ups are impermissibly suggestive controls photo lineups as well. *State v. Drew*, 2006 AP 2552.

An out of state administrative suspension based on probable cause and a prohibited test result may not be used as a prior for WI OWI purposes. Only out of state convictions and refusals count as priors under §346.65. *State v. Machgan*, Nº 2006 AP 2836.

The State has no right to an interlocutory appeal of a ruling granting a defendant's collateral attack of a prior OWI conviction. *State v. Knapp*, 2007 AP 1582

FAMILY LAW

Where deposits into an account comprised of nonmarital funds exceeded what the spouse could prove came from nonmarital funds, it will be presumed the excess deposits were of marital funds. The spouse asserting nonmarital character has the burden of proving the tracing and, failing that burden, the account itself converted into marital funds. *Wright v. Wright*, 2006 AP 2111

How does one find out if there is a Voluntary Acknowledgement of Paternity filed as to a child? Call the State Vital Records office at (608) 266-1373.

REAL ESTATE

Where a utility has maintained electrical power poles and transmission lines on property for more than 10 years, it obtains a prescriptive right to continue the use under §893.28, despite the fact that the use was initially permissive. *Williams v. American Transmission Co.*, 2007 AP 52.

A residential lease must include any nonstandard provisions on a separate sheet labeled NONSTANDARD RENTAL PROVISIONS on the following three subjects:

1. expanding reasons for withholding a security deposit (s. ATCP 134.06(3)(b))
2. expanding a landlord's authority to enter the tenant's dwelling unit (s. ATCP 134.09(2)(c)); and
3. *lien agreements on the tenant's personal property* (s. ATCP 134.09(4)(b).

Further, those nonstandard provisions should be initialed or signed by the tenant to give a presumption that such provisions have been specifically identified and approved. Also a landlord may not use a nonstandard rental provision to avoid a duty otherwise required by law or rule.

However the stats and regs do not prohibit other types of nonstandard provisions in a lease, such as pets, or overnight guests etc, but a landlord may not use

nonstandard rental provision on these other subjects to avoid a duty otherwise required by law or rule, such as normal wear and tear carpet cleaning.

MISCELLANEOUS

Actually the day before this newletter was sent out, Beth Ellingson and I did reach each other by phone. She did provide some further information, but I thought if I started correcting inaccuracies in this newsletter now, the whole thing would fall apart. She did mention her dad was the Trempealeau County Coroner (1970-71). I hope he taught her something because a coroner's skill could come in handy at the summer meeting, even though we now have a first aid kit.

Bob Hagness shared an article from Judicature which contained a story about a great trial lawyer at a banquet where he was scheduled to deliver the keynote address. They were having dinner prior to his speech, and as the waitress passed his table, he said to her, "Lady, get us some more butter." She looked at him and replied, "You're going to have to say please." The great lawyer looked surprised and said to her, "Ma'am, you must not know who I am. I'm the keynote speaker here tonight." She replied, "That's very interesting. But the problem here is that you don't seem to know who I am." He said, "No, I don't. Who are you?" She said, "I'm the one who decides whether or not you get some more butter . . . and you're going to have to say please."_____

It is not the intent of this Newsletter to establish an attorney's standard of due care. Articles may make suggestions about conduct which may be well above the standard of due care. This publication is intended for general information purposes only. For legal questions, the reader should consult experienced legal counsel to determine how applicable laws relate to specific facts or situations. No warranty is offered as to accuracy.

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