TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

In a single stroke of decisive action, our esteemed President, Paul Bohac, called an Executive Committee meeting to finalize plans for the summer meeting. After numerous speeches where we all took turns in recognizing each other (i.e. "My esteemed colleague from Black River Falls"), something that became harder to do as the evening progressed, the committee voted to overrule the President's first veto (he felt it was a moral issue) to set the summer meeting dates as Thursday, August 17 through Saturday, August 19.

Despite the efforts of YMCA liaison Bruce Brovold to negotiate a worse deal than last year, it appears we have the whole camp again this year.

Several new committees were formed, including the fancy drink committee to which all women were assigned. The guys will gladly drink fancy drinks but do not have enough imagination to order anything other than beer.

Bruce Hoesley is threatening to lead a bike trip Friday down the newly opened state bike trail running from Durand towards either Menomonie or Eau Claire, now crossing the Chippewa River. Those with bikes, bring them.

The Alma to Pepin boat trip will leave from again Alma this year. Meet at the Red Ram Saloon, (same place as last year, middle of Alma, can't miss it, after all this is Alma) by 1:00 p.m. Thursday TCB time to travel up river to the cabin. You can leave your car at the Alma Marina and we'll find a way to get it back to you or, better yet, be in the Pepin Harbor by 11:30 a.m., leave your car there, and ride by boat to Alma so you can ride by boat to Pepin.

The 1-person Golf Subcommittee, Steve Schultz, doesn't know what he is doing, so interested persons may wish to call Steve (715-672-8938) to let him know how many tee times to reserve and any recommendations for the course of the year.

The Friday canoe group, renamed several years ago as the Pirates of Pepin for commandeering all available lunch meats and beer (except Blatz), returning what beer remained in unusable condition (i.e. warm), will be headed by voyageur Dave "Blackie" Fugina. He promises no rain this year and he should know because, according to people in Fountain City, or at least his staff, if Dave is not god then the existentialists were right after all.

Never trust John Damon with technology. You would think that after college, law school, continuing judicial education and raising several children, someone would have taught him to dial a phone. At a recent probate hearing, all he had to do was call an 800 number for some telephone testimony. In what he claimed was an unintentional mistake, the resulting call to a 900 number produced what was described by those listening to the broadcast over the courtroom sound system as "heavy panting and moaning". How are you going to explain that to the county board, John? Testimony from a sick, overheated dog

victim in an animal abuse case?

From the Mondovi Herald: 25 Years Ago: January 8, 1981 "Diane Townsend-Anderson announces that James J. Duvall has joined her law office. Mr. Duvall will be the Assistant District Attorney plus handling taxes and divorce. Smoked Ham Shanks - 89¢/lb; Polish Kielbasa - $1.79/lb ..." (Nice to see I made the news together with ham shanks).

This is actually the Spring issue that didn't get put together until spontanteously transformed itself into the Spring/Summer issue. Sorry.

CRIMINAL LAW

A prior conviction for refusal (not OWI or PAC) cannot be collaterally attacked and can be used as a prior offense for penalty enhancement on a current charge, even if the defendant was not represented, because a refusal hearing is civil with no right to counsel. *State v. Krause*, 2006 WI App 43.

The defendant led a squad car on a high-speed chase. The squad car was destroyed by fire after the officer drove it into a field while pursuing the defendant. The Court of Appeals denied restitution for the loss of the squad car because the direct victims of the crime were the individual law enforcement officers, not the department. *State v. Haase*, 2005 AP 987

A police officer's wrongful testimony will not be imputed to the prosecutor in the absence of evidence of collusion by the prosecutor of intent to provoke the defendant to move for a mistrial and therefore does not bar retrial. *State v. Jaimes*, 2005 AP 1511

A recent US Supreme Court case held that officers may not do a consent search of a premises containing two occupants, one of whom consents to the search and the other of whom objects. One example might be a domestic abuse call from one spouse but receiving an objection from the alleged abusive spouse to enter the premises when the officer responds. Another exception to the warrant requirement might allow entry (such as the emergency doctrine if the threaten spouse is still located in the premises). But that might be hard to justify if both spouses greet you at the door and the officer has the opportunity to eliminate the emergency by having the abused spouse step outside. In short, nonconsent trumps consent. This might be a subject of training for law enforcement.

A Crawford objection prohibits the introduction of hearsay and other out of court testimony on confrontation grounds. But the Crawford objection is avoided if

there has been an opportunity for cross-examination at an earlier hearing, such as a Preliminary. Apparently some criminal defense attorneys are trying to preserve their Crawford objections by waving preliminary hearing in cases where they think there is some chance a prosecution witness might disappear prior to trial.
Alternatively, they are asking enough questions at the Preliminary to draw an objection from the DA on discovery principles to demonstrate a lack of opportunity to cross-examine at the Preliminary.

A defendant's 6th Amendment right to counsel was violated by allowing the defense attorney to appear by telephone at a change of plea hearing despite the fact that nothing was defective in the plea colloquy and nothing in the record to suggest any interference with the defendant's ability to communicate with his attorney. Sec. 967.08 does not authorize telephone appearances for plea hearings and the statutory violation is not subject to the harmless error rule. *Van Patten v. Deppinsch*, No. 04-1276 (7th Cir, filed 1-24-06).

Officer chasing a stolen car with two occupants briefly loses sight of the car. When he finds the car, both occupants are out of the car and running away. One of the men was caught and the officer recognizes that person as the driver. He is arrested but not given Miranda rights. At trial

while on the stand, for the first time the defendant states he was not the driver but in fact was the passenger. There is an objection to the DA's cross-examination raising the question why the defendant did not deny driving at the time of arrest or since, claiming this is an impermissible comment on the defendant's right to remain silent. *Brecht v. Abrahamson*, 507 US 619, the case against the guy that killed Roger Hartman, is cited that comment on preMiranda silence is permissible when the defendant testifies, whether that silence is prearrest, or postarrest and precharging, or after charges are filed. But no comment can be made on silence after Miranda rights of given. *State v. Anderson*, 2005 AP 446 (filed 2-21-06, unpublished).

Even though the mother failed to appear at a TPR Dispositional Hearing, the court erred by relieving her attorney from any further duties relating to the default judgment because, even though absent, the mother had the right to an attorney. *State v. Shirley E.*, 2005 AP 2752 (filed 2-14-06, recommended for publication). Is this a different result than allowing a criminal defense attorney to withdraw when a defendant fails to appear because a TPR can proceed in default, while a criminal case halts while the warrant is outstanding? Yet might there be other steps criminal defense counsel should take during the defendant's absence, such as preservation of testimony or evidence etc?

Sitting in the driver's seat of a running vehicle might not be enough to constitute "operating" a vehicle for OWI purposes. When the driver left the vehicle parked with the engine running, the defendant, a passenger, slid behind the wheel with her feet and body facing the passenger position. She never touched the ignition, the pedals or other controls of the vehicle, while she sat in the car to talk with another passenger about their relationship. The Court in *Village of Cross Plains v. Haanstad*, 2006 WI 16, held this did not constitute operating a motor vehicle.

ESTATE PLANNING

Chapter 880, guardianship, has been repealed and replaced with a new Chapter 54, and also Ch 55 Protective Placement has been substantially revised, by 2005 Wis. Act 264 and 387, effective Nov 1. 2006. A comprehensive outline of the revisions may be found at http://www.cwag.org/legal/. It looks pretty good.

A malpractice claim was filed against an attorney hired to form a condominium development for a married couple. Even though the real estate work was done satisfactorily, the wife claimed to

the attorney was negligent because he knew the marriage was at its end and therefore should have drafted a postnuptial agreement reclassifying the property as hers. Summary judgment was granted dismissing the case, but if one is working with clients of a troubled marriage, one may wish to document that they see independent counsel to protect their interest as between each other. *McGrane v. O'Brien et al*, 2005 AP 1649

Where a woman used annuity proceeds to purchase a life estate in her son's residence, the transaction was a divestment of assets warranting the termination of MA benefits because the life estate was purchased years after she was institutionalized without her having any realistic hope of use or enjoyment of the life estate and, as a practical matter, the life estate had no market value. *Klemmer v. DHSS*, 2005 AP 1303

You should have your client execute a new fee agreement after a bankruptcy filing for your agreement to be enforceable after the stay. *Bethea v. Robert J. Adams & Associates*, 352 F3d 1125, 1128-1129 (7th Cir 2003) held the fee agreement void after the filing and the attorney not only could not collect fees after that date, he had to return the fees collected for work performed after filing.

Unless there was an agreement between the property holder and

the person seeking transfer, the holder can require compliance with the provisions of §867.046(1m) before transferring the property regardless of the provisions of the ""Washington Will." *Maciolek v. City of Milwaukee Employee's Retirement System Annuity* 2006 WI 10. While the Defendant could pay pension death benefits funds without requiring compliance with §854.23, if it wants the protections that section affords, the estate is required to comply despite a Washington Will. Further the Court held that an HT-110 Termination of Decedent's Property Interest form can be used only for the five types of property listed in §§867.046(2). Since pension benefits are not included in the classes of property specified, the HT-110 will not transfer them.

FAMILY LAW

Pages 12 and 17 of Wisconsin Tax Pub. 113 appears to prohibit language of a type commonly found in Marital Settlement Agreements stating that each spouse will report their own income in the year of divorce without regard to Ch 766 and further specifies that sanctions can be imposed on the drafting attorneys at both the federal and state levels. Generally MPAs cannot retroactively elect out of Ch. 766, so if one was not done before the start of the year of divorce, may an attorney can draft language that is in violation of the tax laws. It could easily be caught, those, if wife doesn't report enough alimony income or husband deducts too much in the year of divorce and someone shows a copy of the MSA to an auditor to substantiate his/her position. Also, the IRS Circular 230 rules can also seek enforcement actions against those in practice before the IRS regarding improper behavior. Does drafting tax language equal practice before the IRS?

§71.10(6m)(b), which reads in part "The department shall not apply ch 766 ...to collect from an individual .. if a judgment of divorce under Ch. 767 apportions that liability to the former spouse ....", apparently does not change how tax is calculated under Ch 766, only who pays that tax.

Award of attorneys fees to a prevailing petitioner in a post judgment action to enforce a placement order is mandatory. *Borreson v. Yunto*, 2006 Wis App 63 (filed 3-23-06).

In a guardianship dispute between parents and a third party, a parent is entitled to custody unless the parent is either unfit or unable to care for the child there are other compelling reasons to award custody to a third person. *In re the Guardianship of Nicholas C.L.*, 2005 AP 1754 (Recommended for publication)

Does a hearing before the FCC count as a preliminary contested matter prohibiting judge substitution? §801.58 isn't really clear. According to the famlaw listserv, rule as practiced in the 9th Judicial District is that the judge has to have heard the contested matter so as to preclude later substitution, based on the basic intent of the rule that you don't get one kick at a particular judge, become unhappy with the decision and decide to go judge-shopping for a different one.

A Court's decision (Judge Wahl, Eau Claire County) to exclude overtime income as a source of funds for child support as matter of general policy, without exception, is an abuse of discretion. *Jarman v. Welter*, 2005 AP 1616 (filed 2-16-06, unpublished).

GENERAL PRACTICE

Al Morgan, officially now middle aged, points out that if you hold down the Ctrl key on your key board and turn the small wheel in the middle of your mouse, the print size will change - it will either get larger or smaller - depending on which way you turn the wheel. Now Al has to write something worth reading!

When a court makes its findings orally and then makes a written Order stating "for reasons stated on the record", the court should order the reporter to prepare the portion of the transcript in which

the court sets forth its findings and attach the transcript to the order in order to comply with the requirements of §767.24(6)(a) that the court state in writing why its findings relating to custody or placement are in the best interests of the child. *Frafjord v Frafjord*, 2005 AP 2663

MUNICIPAL

Reviewing an Arkansas tax sale procedure, the US Supreme Court held that when mailed notice of a tax sale is returned unclaimed, the state must take additional reasonable steps to provide notice to the property owner before selling the property for back taxes if reasonable to do so. *Jones v. Flowers*, № 04-1477. This decision may cast doubt on the constitutionality of Wisconsin's tax sale procedure in §75.12.

REAL ESTATE

Where the Seller did not sign the agreement required under the Time-Share Act, the buyer may rescind the contract, even after 5 year's use. *Ott v. Peppertree Resort Villas, Inc*. 2006 Wis App 77 (filed 3-23-06).

A landowner of land enrolled in the Managed Forest Law program transferred the land to a corporation of which he was a secretary by a deed dated January 7, 2003 and recorded one year later, on January 2, 2004. The MFL transfer form was completed within 30 days of recording, but not within thirty days of the deed date. The DNR's finding of a program violation was upheld in *Research Planning v. State of Wisconsin*, 2004 AP 3208 (filed 3-2-06, unpublished).

MISCELLANEOUS

See the attached training article for the summer meeting. It may not be exactly PC, but I can always hope to be fired. Besides, I'll blame it on Bob Hagness, who sent it to me.

This newsletter reviews mostly unpublished cases, believing published cases are covered elsewhere. Ideas for this newsletter are sincerely appreciated. If you run across an interesting idea, have a question you would like others to consider, please send them. We all benefit by working together.

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.

Thanks to those that contributed to this newsletter.

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