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Mr. Hayne is a past President of WACDL and has chaired the Criminal Law Sections of the WSBA, WSTLA and KCBA. He has taught trial practice at the University of Washington and Seattle University Schools of Law, the National Institute of Trial Advocacy and the Trial Masters Program. He has been a featured speaker at over 80 CLE programs in the U.S. and Canada and has published articles in the Bar News, Trial News, Defense and Overruled magazines. Mr. Hayne is also a founding member of the Washington Association of Criminal Defense Lawyers, the National College for DUI Defense, and the Washington Foundation for Criminal Justice.
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Blast from the past holds fast

Just finished reading the article on “Courtesy and Decorum in the Courtroom” in July Bar News. Like the typical busy lawyer, I skipped the intro and went straight to the 14 points on litigation behavior. They were so interesting that I re-read the article from the beginning, which is when I discovered that it had been delivered as a lecture in 1935. Amazing. If future selections in the “Blast from the Past” department are just as relevant to today’s practitioners, you are on to a good thing. Thanks for publishing this piece; it contains lots of sage advice.

Eric Nordlof, Auburn

Acting up on Death with Dignity

Margaret Dore’s article in the July Bar News (“Death With Dignity: What Do We Tell Our Clients?”) raised a number of issues with the recently enacted Death with Dignity Act. Ms. Dore’s article should prompt legislative consideration of amendments that would address the issues identified.

Jeffrey W. Rogers, Renton

Thank you for running Margaret Dore’s article discussing the downsides of Washington’s new Death with Dignity Act, which legalizes physician assisted suicide. I am a physician who has studied assisted suicide and euthanasia since 1988, especially in the Netherlands. I agree with Ms. Dore, that patient “choice” is not always the case. Dutch doctors have practiced assisted suicide and euthanasia for decades. Although the law calls for performing assisted suicide and euthanasia with the patient’s consent, it is often involuntary. The law also calls for obtaining a second opinion of another physician, but this is often never done. By 1991, the Remmelink Report showed that 1,040 people (an average of three per day) were actively killed by Dutch doctors without the patient’s knowledge or consent. In addition, 8,100 patients died as a result of doctors deliberately giving them overdoses of pain medication, not for the primary purpose of controlling pain, but to hasten the patient’s death. This pattern continues to this day.

Early death can save money for healthcare systems as well as for surviving family members. Once assisted suicide is accepted, abuses are possible and difficult to control. Those who believe that Washington’s new assisted suicide act will assure their “choice” are naive.

William Reichel, M.D., Washington, D.C.

Ms. Dore’s article was improperly titled. Perhaps it could have been called “How you should vote next time” or “Only the worst can come from this Act” or “Here’s how I feel about the Act.” Framed in the manner and tone in which the article was written, I could not use it as a basis for advising clients.
There isn't too much objectivity on display and balance in presentation is one of the duties we owe to clients. Moreover, I find it a shame that the article limited itself to attacking the Act without including some constructive comments on how to cure some of the problems perceived by Ms. Dore. That might have actually provided some balance. If you don't want to avail yourself of the benefits offered by the Act, then don't. But please don't have the gall to believe that you should be able to control my ability to make these kinds of very personal decisions for myself.

David Loring, Seattle


I am the executive director of the Euthanasia Prevention Coalition, and chair for the Euthanasia Prevention Coalition, International. I agree with Margaret Dore that Washington's new assisted suicide law is not about autonomy or "choice," but about enabling third parties to "pressure others to an early death or even cause it." The safeguards in the Act are primarily for third parties, not patients.

A recent report by MetLife Mature Market Institute describes elder financial abuse as a crime "growing in intensity." (See www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf, p.16.) The perpetrators are often family members, some of whom feel themselves "entitled" to the elder's assets. (Id., pp. 13–14.) The report states that they start out with small crimes, such as stealing jewelry and blank checks, before moving on to larger items or coercing elders to sign over the deeds to their homes, change their wills, or liquidate their assets. (Id., p. 14.) The report also states that victims "may even be murdered" by perpetrators. (Id., p. 24.)

With Washington's new law, perpetrators can instead take a "legal" route, by coercing an elder to sign the lethal dose request. Once the prescription is filled, there is no oversight. Perhaps more importantly and as reported by Ms. Dore, prosecutors are required to treat the death as "natural." It's the perfect crime.

By publishing an article, which describes the problems with so-called "death with dignity," the Bar News does a great service. Thank you.

Alex Schadenberg, London

I am glad to see Margaret Dore's article.... One problem that is personal to me, is that legalizing assisted suicide encourages people diagnosed with terminal illnesses to give up hope. In 2005, I was diagnosed with a rare form of terminal endocrine cancer; this along with having contracted Parkinson's disease earlier has made for a challenging life. Like most people, I sought a second opinion from the premier hospital in the nation that treats this form of cancer, M.D. Anderson, in Houston. But they refused to even see me, indicating they thought it was hopeless. Obviously, they were wrong.

Proponents say that assisted suicide is just an "option." A patient hearing this "option" from a doctor, who they view as an authority figure, may just hear he has an obligation to end his life. This is one of the tragedies of our new law.

Chris Carlson, Spokane
The Letter from the WSBA Marked “CONFIDENTIAL”

Taking a closer look at lawyer discipline

There is probably no profession more regulated than ours. The Rules of Professional Conduct control, inter alia, who we can work for (RPC 1.7, 1.8, 1.9, 1.10, 1.11, Conflicts); who we can speak to about our work (RPC 1.6 and 1.9, Confidentiality of Information and Duties to Former Clients); how much we can charge, how we must keep track of the money we receive, and when we can spend it (RPC 1.5, Fees, and RPC 1.15A and B, Safeguarding Property and Required Trust Account Records); how we can advertise our services and obtain employment (RPC 7.1–7.4, Communication Concerning a Lawyer’s Services, Advertising, Direct Contact with Potential Clients, and Communication of Fields of Practice and Specialization); how quickly we must get our work done (RPC 1.3, Diligence, and RPC 3.2, Expediting Litigation); and the quality of the claims we make (RPC 3.1, Meritorious Claims and Contentions). Our professional responsibilities extend to the justice system, third persons, and our opponents (RPC 3.3, 3.4, and 3.5, Candor Toward the Tribunal, Fairness to Opposing Party and Counsel, Impartiality and Decorum of the Tribunal, and Title 4, Transactions with Persons Other Than Clients). Our personal behavior may also be the subject of discipline (RPC 8.4, Misconduct). The RPCs even regulate with whom we may share our affections (RPC 1.8 (j)), prohibiting sex with clients.

The primary policy reason for the extensive regulation of lawyers is that we are not simply business people. By virtue of our licenses, we are authorized to represent people in the most life-defining events imaginable, in addition to helping to develop the law in a government of laws. The legal profession is a regulated monopoly controlled by our Supreme Court through an express grant of authority contained in Article 4 Section 1 of the Washington Constitution and protected by the Court through the application of the separation of powers doctrine. See Washington State Bar Ass’n v. State of Washington, 125 Wn.2d, 901, 906, 890 P.2d 1047, 1050 (1995). Our Court has, in turn, delegated the function of lawyer discipline to the WSBA, its appointed agent. See GR 12.1(a)(7) and GR 12.1(b)(6).

The Rules for Enforcement of Lawyer Conduct, in addition to setting out the procedural process “by which a lawyer may be subjected to disciplinary sanctions or actions for violation of the Rules of Professional Conduct” (ELC 1.1), describe the spheres of authority with regard to lawyer discipline among the various components of the system, including the Supreme Court and the WSBA Board of Governors. The ELCs provide that the Board of Governors is to, inter alia, supervise “the general functioning of the Disciplinary Board, review committees, disciplinary counsel, Association staff” but the Board has “no right or responsibility to review hearing officer, hearing panel, or Disciplinary Board decisions or recommendations in specific cases.” See ELC 2.2.

Along with the bar exam, lawyer discipline is the WSBA’s most important function. It is also the WSBA’s most expensive department. For the WSBA’s fiscal year 2008–2009 (October 1, 2008, to September 30, 2009), the budget for the Office of Disciplinary Counsel (ODC) and the disciplinary-related functions of trust account audits and the Office of General Counsel’s supervision/oversight of hearing officers and the Disciplinary Board is $4.7 million. (The WSBA’s total budget for this fiscal year is approximately $20 million.)

During the course of a 30-, 40-, or 50-year career in the law, some of us will be the subject of a grievance. Some grievances are baseless, but all are reviewed by the Office of Disciplinary Counsel. Some are diverted when the lawyer agrees to corrective action. In many instances, the grievance will be dismissed and no disciplinary action will be taken against the lawyer. Some grievances, however, will result in disciplinary action, ranging from the most serious — disbarment, the ultimate professional penalty — to suspension of up to three years, reprimand, or admonition. If a lawyer is sanctioned (reprimanded, suspended, or disbarred), the WSBA lawyer directory entry for the lawyer (or former lawyer) will contain a permanent notation and description of the discipline. If a lawyer is admonished, there will be a notation for at least five years.

Because of the importance of the operation of our discipline system to the public
and lawyers, I asked the lawyer in charge of WSBA’s Office of Disciplinary Counsel, Chief Disciplinary Counsel Douglas Ende, to answer a few questions about the department he oversees and the discipline process.

Mark: Tell us a little bit about yourself, Doug.

Doug: I am a Washington lawyer. I graduated from the University of Washington School of Law and was admitted to practice here in 1987. I have practiced in a variety of contexts, including a large law firm, a small law firm, and a public-defense agency. I taught for several years at the University of Washington School of Law and I was a law clerk at Division I of the Court of Appeals. When not practicing law I can often be found attending my kids’ youth football, basketball, or lacrosse games, reading science fiction and poetry, or playing board games.

Mark: Why did you take the job of WSBA Chief Disciplinary Counsel? What interested you about it?

Doug: I tend to be a rule-oriented person, and in law school I became particularly interested in the way that rules of ethics influence lawyer behavior. It is a rare thing to actually practice the law of legal ethics, and I had the good fortune to be afforded the opportunity to do that in 1998 when I started work as a disciplinary counsel at the WSBA. Over the years, I became acutely aware of the critical role that our system of regulation plays in protecting the public and assuring society that the legal profession abides by its ethical standards. Nearly 10 years later, the WSBA was searching for a new chief disciplinary counsel, and I believed that the insight I had gained both at the WSBA and as a practicing lawyer would serve the profession well. I had also been privileged to work for two outstanding predecessors, Barrie Althoff and Joy McLean, and I was determined to maintain their standards of fairness and excellence.

Mark: Approximately how many grievances are received by the WSBA each year? How many result in some form of discipline?

Doug: For the years 2006 through 2008, the WSBA received information leading to the opening of about 1,900 written grievances per year. Roughly half of those grievances were filed by clients or former clients. Bear in mind that this is only a fraction of the number of inquiries received by the Office of Disciplinary Counsel on a wide variety of topics relating to lawyer conduct. Our Consumer Affairs unit processes an average of 10,000 calls and visits every year, and many situations that might have resulted in the filing of a grievance are resolved informally.

Comparing those numbers with the cases that result in some form of discipline, there were 80 disciplinary actions in 2008, including 15 disbarments and 26 suspensions. To give you a further sense of scope, currently there are more than 33,000 lawyers admitted in Washington.

Mark: How many staff members are there in the Office of Disciplinary Counsel?

Doug: There are 37 staff members in the department, including me. That’s 19 lawyers (although some are part-time), an office administrator, four investigators, five paralegals, five administrative assistants, two consumer affairs assistants, and a file clerk.

Mark: Describe the discipline process from the time a grievance is received and the possible resolutions.

Doug: Grievances in Washington are confidential and generally remain confidential unless and until there is an order making the matter public. Every written grievance is individually reviewed by an intake disciplinary counsel, and an initial decision is made to dismiss the grievance without further inquiry or to request a response. If a response is requested, after the response is received, intake disciplinary counsel reviews the file again and decides whether to dismiss the file or assign the file for further investigation. Approximately 60 percent of all grievance files are dismissed at the intake stage. Both the lawyer and the grievant receive notification of the dismissal.

If the file is assigned for further investigation, it will be directed to disciplinary counsel on one of the department’s investigation/prosecution teams. The scope of the investigation will vary depending on the circumstances of the case, but once sufficient information has been obtained, disciplinary

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counsel will make a determination as to whether the allegations of the grievance have sufficient merit to justify a recommendation of some form of discipline or not. If not, the grievance is dismissed. About 30 percent of all grievances are dismissed after some investigation. So if you're doing the math, you will have surmised that about 90 percent of all grievances are dismissed.

It is important to note that when a grievance is dismissed, the grievant may request review of the disciplinary counsel's decision. That review is conducted by a three-member subcommittee of the Disciplinary Board, known as a Review Committee. Typically, the Review Committee will either affirm the disciplinary counsel's decision or return the file to the Office of Disciplinary Counsel for further investigation. There is no appeal from the Review Committee’s decision.

If the file is not dismissed, disciplinary counsel may recommend that a Review Committee issue a non-public advisory letter or a public admonition, or that a Review Committee order a public hearing based on the alleged misconduct.

Of course, this is just a very general overview of the process. There are many other possible paths a grievance might take, including deferral of the investigation pending resolution of related criminal or civil litigation, settlement by stipulation to discipline, or diversion.

Mark: Tell us about diversion. What types of circumstances allow a lawyer to seek diversion of a discipline matter? What does diversion usually entail?

Doug: Diversion is an alternative to disciplinary action for certain matters where education, counseling, therapy, monitoring, alternative dispute resolution, or other forms of assistance are likely adequate to address the lawyer's behavior and prevent recurrence of the misconduct. This program was initiated by rule in 2001 and it operates similarly to a deferred prosecution in the criminal justice system. Disciplinary counsel has discretion to offer diversion if, after investigation, it appears the lawyer committed “less serious misconduct” as defined by rule and the lawyer is otherwise eligible and appropriate for diversion.

After screening with the WSBA diversion administrator, a diversion contract is developed that may include training in office management or time management, trust-account education, auditing, alternative dispute resolution, or CLE attendance. In matters involving mental health or addiction issues, psychological or behavioral counseling may be included in the recommended diversion terms. The typical diversion period is two years.

If the lawyer elects to participate in the offered diversion, the department and lawyer sign a diversion contract, and the lawyer signs a statement stipulating to misconduct. Unless the grievance was previously ordered to public hearing by a Review Committee of the Disciplinary Board, the diversion is non-public and the fact of diversion and its terms are kept confidential.

The diversion administrator then monitors the progress of the lawyer in diversion. If the lawyer successfully completes the diversion, the matter is dismissed and eventually deleted from the lawyer’s record. If the lawyer breaches the diversion contract, the disciplinary process resumes and the stipulation to misconduct is admissible in a later disciplinary proceeding.

Between 2006 and 2008, the Office of Disciplinary Counsel diverted an average of about 60 grievances per year.

Mark: What should a lawyer do if he or she is presented with an ethical dilemma? What should a lawyer not do?

Doug: The best thing to do is stop, think, and review the Rules of Professional Conduct and the ethics opinions accessible through the WSBA website, www.wsba.org. If an internal red flag is waving, there is probably a reason for that. Don't ignore it. In my view, the great majority of lawyers will make good, ethically correct decisions if they are mindful of the nature of the ethical dilemma, include their clients, and request a second opinion from the Rules of Professional Conduct Committee.

Mark: What should a lawyer do if he or she is asked to respond to a grievance? What should a lawyer not do?

Doug: The thing to do is very simple: respond. I would elaborate by saying respond promptly and truthfully. And I guess the thing not to do is ignore the problem and hope it goes away. Lawyers have an affirmative duty to promptly respond to inquiries and requests for information under the Rules for Enforcement of Lawyer Conduct. The failure to cooperate with an investigation as required by the rules can result in the lawyer’s deposition being taken and, in some cases, suspension from the practice of law. And failure to cooperate fully and promptly is, in itself, grounds for discipline. Sometimes good things happen following submission of a response to a grievance. By that, I mean dismissal of the grievance. But
nothing good comes from stonewalling the Office of Disciplinary Counsel.

**Mark:** What should a lawyer do if a disciplinary complaint is filed? What should a lawyer not do?

**Doug:** By the time a formal complaint is filed, an adversarial process has been commenced. The way that the case proceeds is defined largely by the procedural rules set forth in the Rules for Enforcement of Lawyer Conduct. Because strategic decision-making can be complex and context-dependent, it is difficult for me to identify a particular “to do” or “not to do.” As any civil or criminal litigator knows, there are many possible ways of handling and resolving a case within the rules, and familiarity with what is possible and an understanding of the system are important to evaluating the case and making decisions about appropriate resolutions. Disciplinary proceedings are no exception. Certainly at the point a complaint is filed, if not before, a lawyer should consider hiring counsel to represent him or her in the matter. While some lawyers do represent themselves in disciplinary proceedings, these are cases that may have an impact on the lawyer’s license to practice law, and the decision to obtain the services of objective counsel is often a prudent one.

**Mark:** Describe how ODC makes the decision to file a complaint.

**Doug:** As I mentioned earlier, the Office of Disciplinary Counsel does not make that decision, it makes a recommendation. Under the Rules for Enforcement of Lawyer Conduct, only a Review Committee of the Disciplinary Board has the authority to order a public hearing on alleged misconduct. Once a matter is ordered to hearing, disciplinary counsel files a formal complaint as a matter of course. A matter will not be recommended for hearing unless it has been adequately investigated by assigned disciplinary counsel and the decision to make that recommendation has been circulated to the chief disciplinary counsel and all senior disciplinary counsel in the office for review, comment, and approval. Many factors influence a decision to recommend that the Review Committee order a hearing, including whether the evidence would prove the allegations of a violation of the Rules of Professional Conduct by a clear preponderance; whether the American Bar Association Standards for Imposing Lawyer Sanctions would justify imposition of a sanction of reprimand or above; and whether relevant Disciplinary Board and Supreme Court precedent support imposing a disciplinary sanction for the violation alleged.

**Mark:** What rights does a grievant have in the discipline process? What rights do lawyers have?

**Doug:** Much like a complaining witness or victim in a criminal proceeding, a grievant is not technically a party to a disciplinary matter, but a grievant does have certain rights spelled out in the Rules for Enforcement of Lawyer Conduct, including the right to be advised of receipt of the grievance; the right, with certain exceptions, to receive a copy of any response submitted by the lawyer; the right to attend any hearing conducted into the grievance; the right to provide relevant testimony at the hearing; and the right to be advised of the disposition of the grievance.
As I have emphasized, no one individual in the Office of Disciplinary Counsel has the authority without considerable supervision and review to recommend discipline against a lawyer, and the Office of Disciplinary Counsel as a whole is answerable directly to the Disciplinary Board, which serves both as a gatekeeper in terms of evaluating initial recommendations and as an intermediate appellate body after a matter has been decided by a hearing officer. Finally, the Supreme Court is the ultimate authority over the system, as the arbiter in matters that come before it on appeal and by discretionary review, and as a result of its inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline. Although the Supreme Court delegates many of its disciplinary functions to the Office of Disciplinary Counsel, we at the WSBA are very aware that it is the Court’s disciplinary system and that we are acting under its authority.

Mark: Thank you, Doug.

Doug: It has been a pleasure chatting with you.

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A look at British Columbia’s legal system provides insight into our own

Smart casual? As I reviewed the materials sent by the Law Society of British Columbia for their upcoming retreat in Whistler, I was reminded that while British Columbia is close geographically, in some ways it seems worlds apart. The Law Society had invited representatives from WSBA to attend their upcoming retreat, and President-elect Salvador Mungia and I had the pleasure of traveling north to attend. As Sal and I finished breakfast the morning of the retreat, we hoped aloud that we had interpreted the day’s attire correctly as “business casual.”

The retreat was focused on the issue of regulatory oversight and involved not only a stimulating discussion about the limits and advantages of self-governance for the legal profession, but also a fascinating comparison of regulatory systems. As always, seeing one’s system reflected against another brings greater appreciation and new insights to one’s own frame of reference.

Unlike Washington, the regulatory and voluntary functions of the bar association in B.C. are separate: The Law Society is the regulatory entity in B.C., while the Canadian Bar Association B.C. Branch is the voluntary trade association. The members of the governing body of the Law Society are known as the "Benchers" and there are 31 total — 26 lawyers and 5 non-lawyers.

Those attending the retreat included the Benchers, staff, and several guests like us who had been asked to discuss various aspects of issues related to regulatory oversight. In particular, they had invited people from different regulatory systems wherein the regulating body is overseen, to some degree, by another body. So, as compared to the B.C. system, some would argue that lawyers in Washington are not self-regulated, since the delegation of authority over admissions and discipline is only partial: the Supreme Court retains the ultimate authority to suspend or disbar an attorney and to change or create any of the rules governing the lawyer discipline system (i.e., the Rules for Professional Conduct and the Rules for Enforcement of Lawyer Conduct). By comparison to WSBA, the Benchers have ultimate authority over the discipline system, including suspending and disbaring members and setting the rules that govern the system.

The first speaker of the day was a government relations consultant, who pointed out that in Canada there are several self-regulated professions aside from lawyers, including accountants, optometrists, pharmacists, and real estate agents. This speaker discussed the social license given to the self-regulated professions and the significance of the delegation by the government to these professions to protect the public interest.

We learned from this presentation that very recently the British Columbian government had passed legislation to limit the self-regulation of various health professionals. It seems that this legislation moved quickly and came on the heels of some high-profile stories in the media regarding poor services given by the healthcare professionals involved. The presenter highlighted for the audience the important considerations a self-governing profession should pay attention to as it ensures it is upholding the government’s delegation of responsibility to protect the public interest.

By day’s end, we had reviewed a variety of systems: one overseen by a legislatively created entity (Quebec), one whose ultimate authority rests with the highest court (Washington), and the self-governing system of British Columbia. Is one system better than another? No one ventured a conclusion, but the consistent theme throughout the day was the overriding importance of the mission of each system: to protect the public.

I think the biggest take-away for me from the experience was an enhanced appreciation for the social contract lawyers have with society to protect the public interest. As the only peer-reviewed profession whose members control a whole branch of government, this delegation of responsibility by the government to our profession should be highlighted and always in the forefront of our professional consciousness. The WSBA mission statement reinforces this concept in its call to serve the public.

It turned out that “smart casual” was indeed “business casual.” Comparing this subtle difference in terminology leads me to wonder if changing “serve the public” to “delegated responsibility to protect the public” might lead to greater appreciation of the social contract we are privileged to have.

Paula Littlewood is the WSBA executive director and can be reached at paulal@wsba.org.
At the age of 101, Northwesterner Francis LeSourd reflects on a 60-year legal career, recalls his civic accomplishments in Seattle, and shares his outlook on the future of law.

by Victoria Rowlett
Francis "Fran" LeSourd begins his 102nd year with a sharp mind; a continued interest in politics, current events, and history; and sober words for the profession he entered in 1932. "When I first started practicing, even attorneys on opposing sides were friends," he recalls. "It was a buddy system. Lawyers should keep competitiveness out of their relations with other lawyers. The respect of other lawyers is important for the legal profession and for happiness."

Seven decades ago, in difficult political times that have been compared to these, LeSourd graduated from law school at the University of Washington and headed off to work in the Washington, D.C., of Franklin Roosevelt’s New Deal. It was 1933 and President Roosevelt faced challenges to the constitutionality of his social legislation. LeSourd’s luck placed him at the Department of Justice in time to draft the brief that persuaded an ultra-conservative Supreme Court to allow the Social Security Act of 1935 to live. But LeSourd was a Northwesterner at heart, and before the demise of the decade he rebounded to Seattle, where he became a leading practitioner of tax law, a pioneer for civil rights, and the “godfather” of Crystal Mountain. He also served as mentor and model to a host of lawyers who now sing his praises.

Former partner Larry Hard remembers his first meeting with LeSourd in 1969. “I’d passed the bar exam and clerked for six months when I came to interview for a job. He was the embodiment of what a lawyer should be: gracious and courteous to this very, very young thing. He was the kind of lawyer I always wanted to be.”

Rodney Waldbaum, also a former partner, benefited from LeSourd’s tutelage and friendship for 30 years. “He’s phenomenal — a great, great individual, a great tax attorney, and truly a gentleman. He wrote briefs out longhand with pencil and paper. With his remarkable intellect, acumen as a logical thinker, and unparalleled brief-writing ability, he could have practiced anywhere; but Fran said he was a man of the Northwest and had no desire to be back East.”

This man who has referred to himself as a “rebel” continues to live in the Laurelhurst home he purchased 60 years ago. The modest white clapboard house sits at the bottom of a hill, tucked back from the street behind a white picket fence and a swath of lush lawn that runs up to the front porch. The interior of the home is as unpretentious and comfortable as LeSourd himself. He greets me in his living room, with grace, a smile, and a proffered hand. He would have stood up, but a fall shortly before his 100th birthday last year slows his ability to rise from a chair and curtails his ballroom dancing.

Just before his 101st birthday, Fran LeSourd seems frail but vigorous of mind, dignified, and thoughtful. His perfect eyesight has just begun to diminish and he complains of having had to order his first-ever pair of eyeglasses. Meanwhile, as he waits for the spectacles to arrive, he continues to consume information, study history, and keep abreast of affairs. The table beside his reading chair holds copies of the Seattle Times, Atlantic, Forbes, National Geographic, and Smithsonian, and books entitled Churchill’s Triumph and Legacy of Ashes: The History of the CIA. Though less physically vigorous, he remains a quiet, powerful presence that hints of the youth captured in his early photographs. Tall, stalwart, nearly swaggering, face front to the camera, with a full grin, feet spread wide apart, and hands on his hips, he looks like a youth who knows his mind and intends to follow its lead.

LeSourd graduated from law school with honors (Phi Beta Kappa and Order of the Coif) in 1932. He had joined the Chadwick firm at a salary of $75 a month when President Roosevelt’s Public Works Administration beckoned. Colleagues and his father urged him to decline. “So, being a rebel, I went,” he says. As luck would have it, the job was as bad as predicted, but it propelled him to the Tax Division of the Department of Justice and the work that was both pivotal to his career and laid the foundation for the remainder of his law practice.

The first few years he learned tax law and honed his trial skills while prosecuting the government’s case against tax evaders. Eventually, LeSourd also began to write briefs in Supreme Court cases involving taxation and New Deal social legislation and, among them, the case that determined the future of the Social Security Act. He labored two months, virtually around the clock, on a brief to the Supreme Court supporting the constitutionality of the Social Security Act. “The final draft was written by attorneys higher up, but I think my draft prevailed pretty much,” LeSourd says. “The Supreme Court at that time was a bunch of old fogies who were against the taking of money from one and giving to another. We had to prove it didn’t.” They succeeded, with the court in essence confirming the power of government to promote the welfare of its citizens.

Marriage and the birth of his first son brought LeSourd to a crossroads. He could take the road to wealth, high-profile work, and the prestige promised by law practiced in the East; or he could return to the wilds and the more measured life offered by the Northwest. He apparently did not hesitate.

LeSourd explores the frontier in Klawock, Alaska. Alaska became LeSourd’s "second home" when he extended his tax law practice to the north. "The most important thing for me was the enjoyment of life. I loved the outdoors, the mountains, and the water, and Seattle was the place for that. Also, it was a better place to raise children. As long as one made enough money to live a comfortable life, I saw little advantage in accumulating a lot of wealth." He accepted a job with the Department of Justice Lands Division and returned to Seattle, where he became involved in the brouhaha surrounding government ownership of power-production facilities. He also joined Little & Leader and worked on farm matters when he had time. For a short time, he returned to Washington, D.C., to defend Bank of America in a dispute with the government over interpretation of banking regulations. The comptroller of the currency had obtained an order that directed the bank to produce in Washington, D.C., the books of account from each of the bank’s branches in...
the West. LeSourd drafted and filed a complaint that captured headlines and generated such public outrage against government overreaching that the comptroller desisted, allowing LeSourd to win a permanent injunction and Bank of America to remain in business.

Back in Seattle, LeSourd’s law-firm work dealt with other facets of the law such as corporate representation and anti-trust litigation. Eventually, he abandoned the government work to focus on the more lucrative private clients and, in 1941, became partner of Little, LeSourd, Palmer & Scott. His reputation as a practitioner in tax law continued to grow and, within a decade, had extended to the Northern frontier.

In the early 1950s, Alaskans, in LeSourd’s words, “viewed the U.S. income tax as something that applied only to the lower 48 states.” He developed a rapport with an Anchorage attorney with a wide practice but limited expertise in tax law and began a pattern of commuting that made Alaska his “second home.” He recalls the character of the place half a century ago. “Anchorage in the early 1950s was still a pioneer town. The hotel still had the ethics of a bush roadhouse, which was that no one would be left for the night out in the cold. If there were two beds in your room and they had no other room for some chap, they would move him in with you in the middle of the night…. There was one main street in town, and every other door in town was a bar.”

LeSourd thrived on trial work and was, according to his partner Waldbaum, “an excellent trial attorney.” He described LeSourd’s in-court demeanor during a three-month trial that involved LeSourd and his future partner Woolvin Patten. “They had completely opposite trial styles. Fran was an aristocrat .... No one questioned him. His air of complete confidence and right convinced others he was right. Patten, on the other hand, had the demeanor of a comfortable, well-worn shoe. He would appear in the courtroom looking disheveled, with a torn sleeve in a jacket that looked as if it had come from the Goodwill, a befuddled old man who would, with his lazy cross-examination, lead the witness unsuspectingly down a rosy path, then turn and cut the witness off when they reached the point Patten intended to make.” In 1960, this odd couple came together with future Congressman and U.S. Senator Brock Adams to form LeSourd Patten & Adams.

Fledgling lawyers either thrived under LeSourd’s tutelage or chafed over his exacting standards. Hard and Waldbaum feel privileged to have worked with this man they both call a “great mentor.” Waldbaum recalls LeSourd as “a critical thinker who carefully reviewed his attorneys’ drafts and made appropriate changes. It was fascinating to watch the work product go back and forth until the document finally passed muster. Some associates thought he was overly critical, but he was a nice man and the back-and-forth always improved the product.” Hard elaborates: “Whatever I prepared, if I gave it to Fran to review, it always, always came back with his comments, always improved. He was a meticulous lawyer, a meticulous writer, a great man” who believed the client deserved the best work product possible.

LeSourd’s high principles, and his belief that humans should be treated as individuals, not as members of a stereotyped group, colored the civic work that may remain his greatest legacy. In the 1940s, as a commissioner with Seattle Housing Authority and later its attorney, LeSourd was instrumental in transforming Profanity Hill, the red-light slum district on First Hill, to Yesler Terrace, the first deliberately racially integrated public-housing project in the nation. The Yesler Terrace Community Center is named in his honor.

Just as early life experiences shape us all, so LeSourd’s childhood and youth helped to form the man. Francis Ancil LeSourd was born June 22, 1908, in Seattle, grandson of namesake Frances Asbury LeSourd, representative to the Washington Territorial and State Legislatures, and Mary LeSourd, state chair of the Women’s Christian Temperance Union. In the first decade of the last century, horse-drawn carts delivered milk and ice to the door; LeSourd’s mother churned her own butter and washed clothes using a scrub-board and wringer; and his father often walked from their Ravenna home to work at Dexter Horton’s small bank in Pioneer Square. The outdoors served as a young boy’s entertainment and his school of character-building. LeSourd nurtured a lifelong connection to nature while roaming the wild areas in North Seattle. He hiked Ravenna Park, fished for trout in the creek that ran into Green Lake, and biked out to Lake Forest Park where “we’d strip off naked and swim in the lake...
near the railroad tracks and, when we heard the passenger train coming, all line up and stand naked on a log until it came alongside, then we'd dive in."

As a child, he was mischievous, rebellious, and perpetually curious. His mother forbade his climbing on the house under construction next door, so he went directly to explore and fell two stories onto his face. The freedom to roam gave him physical and intellectual independence at an early age. He developed principles and opinions, never doubted their soundness, and possessed the self-confidence to act on his convictions. ''One year, the school instituted a compulsory savings plan. I was always a rebel, and so I refused. Teachers needed 100 percent participation for credit — I went to the bank and closed my account, and my teacher kicked me out of her class. I was sent to another teacher, who sent me from her class. I finally ended up in the gym — the gym teacher didn't care about the credit. I was in favor of savings, but felt that the students should not be forced to put their money in a bank dictated by the school."

He attended the newly opened Roosevelt High School, then matriculated to the University of Washington, intending to major in international trade. An enterprising lad who paid for his own schooling, he sold the Saturday Evening Post and Ladies' Home Journal door-to-door, trapped skunks in Lake Forest Park and sold their skins, collected and sold stamps, solicited subscriptions for the Post Intelligencer, and worked for two community newspapers. Summers he worked outdoors, at his grandparents' farm during threshing season, logging on the Olympic Peninsula, and setting chokers at a logging camp in the Cascades. This last job helped him to define his future career. ''Hard work, and every night I'd go back with my legs all beat up to the bunkhouse, where there was this old chap who had originally been a high climber — the highest paid guy in the whole logging operation — until age forced him down from the lines to making beds. I thought then I would find some occupation where the older I got, the more valuable I would become."

He changed his major to law.

In summer of 1929, LeSourd took a sabbatical and further developed his character and codes of living. During work in a Tlingit Indian village, he learned to take vacations early in life from "a couple who had worked all their lives to save for a vacation, and by the time they could take it they were too old to enjoy it." He traveled to New York City, where he witnessed the Great Crash. "Wall Street was jammed with people, just standing around and not a sound. They were stunned — all of their savings gone." Working as a seaman on a freighter headed around the world, he scraped cockroaches off his food, witnessed knifings in the fo'c'sle, and experienced the arbitrary demonstration of rank firsthand when a first mate ordered him out on deck under the blazing tropic sun to clean grease fried under the winches. This journey sent him reeling from his father's Republican politics to a more liberal stance and back to complete law school.

LeSourd remained good on his resolve to become a Democrat. His progressive opinions on domestic issues, opposition to discrimination, and beliefs in the rights of common citizens made his choice a good, though not necessarily exclusive, fit. He has voted for the candidate over the party on occasion. He has served as education director of the Democratic State Central Committee and as its finance director, and on the Finance Committees of U.S. Senators Henry "Scoop" Jackson and Warren Magnuson. His respect for Jackson that never wavered though their association became strained as Jackson became more hawkish on international affairs. LeSourd was against the Vietnam War and opposes our intervention in Iraq. "One of the great tragedies of post-World War II in this country was that so many of our citizens and leaders were so emotionally gripped with anti-Communism, the domino theory.
and the belief that the U.S. could control the world by force that they led the country into wars and expenditures that threaten the solvency and social structure of the country, all to no real end." LeSourd’s service as Senator Jackson’s appointment to the National Advisory Board Council for Public Lands swayed LeSourd’s opinion on the public’s use of public land. As a dedicated outdoorsman, he strongly supports national parks, the forest service and preservation of a certain portion of our land resources in its natural state for future generations, but came to disagree with what he calls “far-out environmentalists’ efforts to lock up vast reaches of the public domain for a single use.”

Just as he advocated for balance in political and environmental issues, so LeSourd believed in balance in the conduct of one’s own life. Waldbaum remembers, "He paced himself, always made time for vacations and, though his number of billable hours might be fewer than most, he always made time for his family. This was true of his firm. Weekend and weeknight work was the exception, not the rule."

Son Peter LeSourd recalls that weekends and time off were devoted to outdoor activities: skiing, sailing, backpacking. "Dad would announce that we were going sailing next weekend and leave it up to Mother to have everything ready to go." Father and son raced their sailboat and Peter describes his father as "very competitive and a very, very good racer." They backpacked all over the Cascades. Peter remembers that on his 16th birthday, his father took him on a week-long trip — just the two of them hiking, climbing, and bushwhacking their way south from Stevens Pass Highway to the mid-fork of the Snoqualmie River.

LeSourd directed his independent spirit and ingenuity toward blazing new trails in the mountains and on the water. In 1954, he shared with two friends an idea he had for financing a ski resort through contributions of skiing families rather than corporate donors. Eight years later, with the help of LeSourd’s political contacts, Governor Rosellini, Senator Magnuson, and 850 families who contributed $1,000 each in return for ticket privileges, Crystal Mountain Ski Resort opened. "He was the leader of the project from day one ... the godfather of Crystal Mountain," says Founders’ Club Board member Dave Gossard. In the mid 1970s, LeSourd participated in the creation of the Seattle Sailing Foundation, a nonprofit organization that funded the campaign of a 12-meter sailboat, Intrepid, to become America’s contender in the America’s Cup. Intrepid lost to Courageous in the last pre-cup race.

His professional, political, and civic activities appear to have been carefully calibrated to exist in harmony with his family and sporting life, none trumping the others in their importance. LeSourd describes his philosophy of living: "A happy life was the ultimate. People who devote their lives to making money are making a mistake. You should be happy, and doing things for other people brings happiness."

LeSourd retired from full-time practice in 1986. He continued "of counsel," working four days a week, until 1990. Waldbaum says it was not unusual to see LeSourd in the office into his 99th year, doing private research or on the floor on his knees going through documents.

The business of lawyering has not changed for the better over the last 80 years, in LeSourd’s opinion. Lawyers are less civil to one another, less willing to cooperate, too competitive, and too specialized, all of which serve to detract from the quality of the representation provided to clients. He offers no solution; merely the concern of a wise man of great experience who holds the respect of his peers.

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JUDICIAL DISPUTE RESOLUTION
The Case of the Golden Apple, Part II

The Supreme Court’s decision in *Thorndike v. Hesperian Orchards* corrects a 65-year detour in Washington law and becomes the most-cited case in Washington jurisprudence

by Robert J. Henry

Fifty years ago this month, our Supreme Court decided Thorndike v. Hesperian Orchards, Inc.1 The opinion, written by Justice Harry Ellsworth Foster, is almost certainly the most-cited opinion in the history of Washington’s Supreme Court, and it continues to appear with regularity. Just two months ago, Thorndike was cited in an unpublished opinion in Division One.

The Thorndike holding is typically explained in a single sentence, usually this: “We will not substitute our judgment for that of the trial court on disputed issues of fact.” Another version of the Thorndike holding states: “An appellate court does not review de novo disputes of fact even if all the evidence is before it.” This proposition now seems indisputable, even intuitive, after 50 years of constant repetition by the Supreme Court, and more recently by the Court of Appeals. But it was not always so.

Only two years before Thorndike, the Supreme Court decided in Croton Chemical Corp. v. Birkenwald2 to defer to the trial court’s factual determinations in a case involving barrels of salt that arrived in Seattle caked “like cement.” Justice Schwellenbach wrote a fierce dissent, which proclaimed the Court’s “duty to review the claimed errors of the trial court, whether of law or of fact.”

But where did this purported duty to review errors of fact come from? The answer can be found 65 years earlier, in the election of 1892, when Washington was a very new state and its voters were enjoying their first presidential election. Only three years earlier, Washington had entered the Union as a safe state for the dominant Republican party. But in that same year, the first Grange chapters were founded, and soon the Populist movement was sweeping the new state. By 1892, the People’s (or Populist) Party was strongly challenging the two established parties. In July 1892, the Populists held their state convention in Ellensburg, where they nominated candidates for all statewide offices and many local candidates for the Legislature and judiciary. The Republicans, in particular, were spooked by the sudden emergence of a feisty third party. The Seattle Post-Intelligencer, at the time little more than a propaganda broadsheet for the Republican party, viciously attacked the Populists, calling them “Weaverites.” The disrespect was mutual. A reporter sent by the P-I to attend the “queer convention” in Ellensburg reported a motion from the floor to declare a quarantine against the P-I because “it has proved itself worse than the smallpox or the black plague.”3

The People’s Party found its support primarily in agricultural areas and with organized labor. It opposed Chinese immigration and favored public education. But the Populists’ greatest passion was directed against the railroads, which were hated for the generous land grants they received and for their monopolistic rates and practices. The Populist platform demanded the seizure of all lands owned by the Northern Pacific between Kalama and Tacoma, as well as the mandatory reduction of freight rates, and other measures to curb “corporate oppression” by the railroads.

In the November election, the Populists were not yet able to dislodge the Republicans, but they did elect 10 representatives to the Legislature. When the new session convened in Olympia in January 1893, the Legislature resumed creating the infrastructure of a new state. On January 16, a detailed Act Relating to Appeals to the Supreme Court was introduced and referred to the Judiciary Committee. The Act comprised 38 paragraphs of densely worded procedures for the new state Supreme Court. When the bill was reported back from committee five weeks later, it contained a significant amendment to Section 21 — a requirement of de novo review of trial-court factual decisions whenever the appellant furnished the Supreme Court with a complete record of the trial proceedings:

... and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence or facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court de novo, so far as the findings of fact or refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal including such exceptions or statement.4

With the passage of so many years, it is not possible to be sure of the purpose behind this amendment, but it was clearly designed to rein in the discretion of trial judges across the state, and it may have been intended to protect the railroads. Certainly lobbyists for the railroads were known at the time to hand out free travel passes liberally to legislators,5 and the railroads had reason to fear the election of Populist judges in rural counties. When the bill as amended reached the House floor for a final vote, only two representatives voted against it: F.R. Baker and John Edwards, both newly elected from Pierce County by the railroad-hating People’s Party.

Whether or not the amendment contained in the new statute in 1893 was
intended by the Republican majority to protect the railroads, certainly de novo factual review by the Supreme Court from time to time aided the railroads over the next two decades. The best example occurred during the spate of wrongful death claims against the Great Northern Railway after the tragic Wellington disaster in 1910. An avalanche near Stevens Pass killed at least 96 passengers and railroad employees when it tumbled two stranded passenger trains down the mountainside. The first of many wrongful-death cases was tried in King County in 1913, and resulted in a $20,000 jury verdict for negligence against the Great Northern.

A year later, the Supreme Court reviewed the evidence de novo and concluded that it was “too plain for argument that no negligence of the [railroad] was shown.” Therefore, the trial judge should have directed a verdict for the Great Northern. The judgment was reversed, and this decision ended all the litigation arising out of the avalanche.

Gradually, however, as the years passed, the need for de novo review of trial court factual decisions seemed less important. With the establishment of a law school at the University of Washington in 1899, the legal training of lawyers and eventually of judges became more uniform. The Populist movement waned, to be replaced by the Progressives, who were not so radical. When judicial elections became non-partisan in 1911, the likelihood of electing radical or political judges decreased.

As time passed, the justices began to consider de novo review as a burden, rather than an opportunity, as the caseload of the Court increased. For example, in a 1921 case, the Supreme Court was asked by an appellant to review the evidence de novo and decide a single factual question: what was the actual value of a parcel of real property in Spokane? The trial judge had noted that the expert testimony was “hopelessly in conflict” so as to “afford little assistance to the court.” Nonetheless, because it was a factual appeal, the Supreme Court was required to review all the testimony and retry the case. The Court’s opinion, by Justice Tolman, complained of the burden:

. . . in the nature of things this is more difficult for us than for the trial court, who saw and heard the witnesses. We are asked, since this is a trial de novo, to disregard the findings of the trial court entirely and arrive at a conclusion from the evidence in the case without reference thereto.

Notwithstanding the difficulty, the Supreme Court grudgingly waded through the record and modified the trial court decision.

This was the situation when the Thorndike case reached the Supreme Court. For over 60 years, the Court had followed the mandate of the Legislature to review the facts whenever an appellant presented the complete record and asked it to do so. But in recent years, the Court’s reluctance had become more apparent, and more frequently it expressed its preference to defer to the judge who heard the testimony.

Earl Foster, the attorney for Hesperian Orchards, filed a notice of appeal in the Chelan County Superior Court on May 26, 1958. He wanted the Supreme Court to reverse a $10,271 money judgment against his client for breach of a written contract to pay an apple grower a specified pooled price for Golden Delicious apples. Court reporter Elizabeth Walters began typing the trial transcript, and a month later it was finished. Foster posted a supersedeas bond and sent the 731 pages of transcript to Olympia.

The opening brief assigned error to several of the trial court’s findings of fact and evidentiary rulings, but asserted no errors of law. Thus, the question of whether the Supreme Court would review the factual determinations de novo was unavoidably presented.
The responding brief, written by A.J. O’Connor for the Thorndike family, made passing reference to the Croton case and others, but O’Connor had practiced law in Washington for 47 years, and he undoubtedly knew the Supreme Court had to retry the facts for itself if presented with the full record, so, like his opponent, he concentrated on the facts. In turn, Earl Foster’s reply brief was unapologetic, stating: “This is plainly a factual appeal.”

The opportunity to write the court’s opinion fell to Justice Harry Ellsworth Foster, no relation to Wenatchee attorney Earl Foster, who argued for appellant. Justice Foster had been appointed to the Supreme Court in July 1956 by Governor Langlie, after many years of private practice in Olympia. In November of that year, he was elected to a full term. Judge Foster was later remembered by his colleagues as a scholar and a gifted researcher, one who loved to trace the development of an idea or legal concept back to the English common law. A colleague on the bench, Justice Matthew Hill, offered this tribute to Justice Foster’s love of research: “Poring through the digests was, to him, like panning for gold, and finding the nuggets he wanted — a never-ending thrill!”

Two years earlier, Justice Foster had written an opinion showing he was not in favor of de novo review. In the Thorndike case, Foster’s research led him to a surprising nugget, one that both the lawyers missed. The 1892 statute which required the Supreme Court to give the facts a de novo review had been expressly repealed by the Legislature just two years earlier!
facts a *de novo* review had been expressly repealed by the Legislature just two years earlier! That being the case, the decision in the *Thorndike* case was easy and did not require that anyone read 731 pages of trial transcript:

The findings are amply sustained by the proofs. If we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its finding for that of the trial court. The judgment must be affirmed.

Donald Horowitz, now a retired judge himself, had just graduated from law school in 1959, and he took a position as Justice Foster’s law clerk in July 1959, one month before the *Thorndike* decision was released. He did not help in its research or drafting, but Horowitz recalls that Justice Foster spoke of the decision frequently. Foster was proud of the decision, not because it reduced the Court’s workload, but because it represented the Court’s willingness to exercise self-discipline, to refrain from toying with the factual decisions of trial judges. With the *Thorndike* decision, the question was settled, and after 65 years, *de novo* factual review in the Supreme Court ended. Frequent reminders for the past 50 years have cemented the *Thorndike* holding in the collective understanding of the legal profession.

**But the question remains:** How could two experienced and well-educated lawyers have failed to discover the repeal of the statute that Justice Foster unearthed? Certainly, they were not alone. The University of Washington Law Review published a detailed analysis of the laws of 1957 and made no mention of this repeal. In fact, it appears that even the Legislature was not fully aware of what it had done. The legislative history is scanty, but it contains no sign of awareness that a significant statute was included in the wholesale purge of out-of-date provisions. Retired Seattle lawyer Rocky Lindell was a freshman representative that year, just elected from the 45th District a few months after graduating from law school. Lindell recalls that Fred Dore, who later sat on the Court of Appeals and the Supreme Court, was the ranking Democrat on the House Judiciary Committee, and Newman “Zeke” Clark was his Republican counterpart. Lindell remembers that they co-sponsored a bill intended to “clean up” a lot of obsolete provisions in the statutes. That bill was undoubtedly House Bill 13, sponsored by Dore and Clark, which was introduced on the second day of the legislative session. It contained dozens of changes, including section-by-section repeal of virtually the entire 1893 Act Relating to Appeals. After a first reading, the bill was sent to the Judiciary Committee. Six days later,
the bill was reported back without comment and with a recommendation that it pass. A few days later, the bill was passed unanimously.

Within the month, House Bill 13 cleared the Senate, and it was signed by Governor Rosellini in February 1957. At no point in this progression was there any indication that the Legislature intended to reduce the powers of the Supreme Court. But when the Thorndike case reached the Court two years later, the repeal was waiting quietly in the statute books for the careful research skills of Justice Foster.

The Supreme Court’s decision in Thorndike was filed on August 20, 1959. The decision of the trial judge, Lawrence Leahy, was affirmed. The mandate was returned to Chelan County and the case ended. Ms. Walters’ 731 beautifully typed pages of transcript found their way to the State Archives, where they still can be read today. Two years later, Justice Foster was re-elected to a second term on the Supreme Court, but a few weeks later, on December 5, 1962, he died of a heart attack.

In a final postscript to this historic case, nine years later, in 1968, someone at the Supreme Court discovered in the files a Hesperian Orchards apple crate which the appellant had sent along with the record as a demonstrative exhibit. A letter was sent promptly to both counsel seeking their consent to dispose of the crate. Jack O’Connor, 79 years old and still practicing, promptly gave his permission. So did his former opponent, Earl Foster, who was now a trust officer with Seattle First National Bank. Their letters went into the file and the apple crate went to the landfill.

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NOTES
1. Reported at 54 Wn.2d 570 (1959).
2. Reported at 50 Wn.2d 684 (1957).
3. Seattle Post-Intelligencer, July 26, 1892, p. 3.
6. Topping v. Great Northern Rwy, 81 Wash. 166 (1914).
8. 62 Wn.2d xxx (1963)
Helping Clients Make Informed Decisions

Examining the psychological factors involved when providing information to your clients

BY DAVID A. SUMMERS
t’s bad enough when a client rejects a settlement offer that subsequent events prove should have been accepted. It’s even worse when the client asserts the offer would have been accepted had you explained the risks that lay ahead. Scenarios of this kind are dreaded not only because you now have a dissatisfied client, but also because you may be facing a grievance for failing to ensure your client had sufficient information to make an informed decision.\(^1\)

Let’s assume you had been careful to provide information about the risks and benefits of all the available options whenever your client had to make a decision. Is your client now avoiding responsibility for making a poor decision and blaming you instead? It’s tempting to adopt this explanation, yet there is an equally plausible one: that psychological factors prevented the client from using effectively the information you so diligently provided. To understand how attorneys and clients find themselves in this uncomfortable situation, three psychological factors are of particular interest.

**Fallibility of Memory**

Do our clients remember the information we provide about the risks and benefits associated with the available options? If they soon forget much of what we tell them, we can’t expect them to make well-reasoned decisions based on the information given to them.

I have found no scientific study regarding clients’ recall of attorneys’ advice. However, several studies have been carried out involving a somewhat analogous situation: patients’ recall of what their doctors told them regarding the risks and potential complications of proposed medical procedures. If the findings are any indication of what occurs when we provide clients with comparable information, we have much to be concerned about.

In one of the earliest studies on this subject, 100 prospective plastic-surgery patients were told about the risk of pain, infection, bleeding, scarring, and failure of the surgery to achieve its objectives. They were also given at least five warnings of long- or short-term potential problems specific to each participant’s surgery.\(^2\)

One week after receiving the information, patients were asked to recall what they had been told. On average, patients were able to recall approximately 35 percent of the information, with more highly educated patients showing somewhat better recall (41 percent) than those with a high school education or less (32 percent).

Equally instructive is a study of patients preparing to undergo a cardiac procedure who first participated in a recorded informed-consent interview.\(^3\) Patients were told the risks and benefits of the procedure as well as the risks and benefits of other treatment options. Patients were repeatedly asked if they understood, and questions were answered as they arose.

After the cardiac procedure was performed, 20 patients were randomly selected from those who were convalescing normally and asked what they were told in the informed-consent interview. On average, they recalled approximately 29 percent of the information. When prompted with questions about specific items, average recall improved to 41 percent. All patients failed to recall major parts of the interview, and 16 “positively denied that certain major items had been discussed at all.” The authors note that aside from failure to recall and denial, the next most common error was fabrication, which was present to a significant degree in 13 of the 20 patients in the sample. It was also common for patients to attribute to the interview information obtained from other sources.

These findings remind us that people can and often do soon forget even the most important information. Memory is imperfect; people often distort what they have been told, if they remember it at all.\(^4\)

Will clients do as we hope, or will their decisions still be influenced by the earlier information we had meant to supersede? Unfortunately, whether the effects of outdated information are likely to persist has not been studied in the context of attorney-client communications. In the absence of evidence on this point, it is prudent to assume a phenomenon known as the “primacy effect” will be at work. The “primacy effect” means this: The first communication in a series of communications is likely to be more influential than the same communication if presented last in the series. Although the “primacy effect” does not always emerge, it has been observed in many situations in which people make judgments or form impressions after receiving successive communications.\(^5\)

Research on the primacy effect tells us we cannot assume our clients will fully adjust their thinking based on new information we provide. Even if we are diligent in communicating updated in-
formation about the risks and benefits of a particular course of action, the client’s decision is likely to be colored to some degree by the information we provided earlier, particularly if the earlier information was more favorable to the client.

There is evidence the primacy effect can be minimized if the person receiving information is forewarned about the persistence of first impressions, and about the importance of remaining open to new information as it is received.8 Forewarning might reasonably include explaining to our clients, well in advance, that the risks and benefits of various options may change during the course of litigation, and that as difficult as it may be to set aside what they were previously told, it is essential to do so. The sooner such forewarning is provided, the more effective it is likely to be.

**Effects of Stress**

Many studies have shown that a high level of stress ordinarily has adverse effects on decisions, e.g., by causing the decision-maker to use an oversimplified approach that fails to take into account factors that would otherwise be considered, such as long-term consequences. When the stress associated with making a high-stakes decision is combined with pressure to decide quickly, the adverse effects of stress are even more pronounced.9

Common sense tells us our clients often find it stressful to make decisions that will affect the course or outcome of litigation. There is evidence, however, suggesting we can help them make better decisions under stress if we provide them preparatory information about what lies ahead.10 Appropriate preparatory information for our clients could reasonably be given along the following lines:

A. You may have to make decisions about your case under stressful conditions, for example, whether to make or accept a settlement offer when time is running out. If your reactions to stress are typical, at those times you may experience feelings of confusion, frustration, or even fear.

B. Stress can adversely affect your ability to make good decisions, for example, by causing you to overlook some of the factors you would ordinarily consider.

C. Being forewarned can help you because you are now in a position to develop a plan for coping with the stress if and when it arises.

A discussion of these points with the client at the outset cannot hurt, and will probably be well-received.

**Conclusion**

When clients are faced with making a decision during the course of litigation, it may be sufficient under the Rules of Professional Conduct to provide a full explanation of the available options and the advantages and disadvantages of each. The Rules do not expressly say we must take pains to help clients remember what they are told, or to help them use new information without being influenced by outdated information, or to help them use the information effectively when under stress. However, we are in a position to provide such help to our clients, if we choose to do so. Assuming we want clients to make well-reasoned decisions based on the information we provide, there is nothing to lose and much to be gained from making this choice.6

Common sense tells us our clients often find it stressful to make decisions that will affect the course or outcome of litigation. There is evidence, however, suggesting we can help them make better decisions under stress if we provide them preparatory information about what lies ahead.

David A. Summers holds a doctorate in psychology from the University of Colorado and is a 1979 graduate of the University of Washington School of Law. He has taught psychology at the University of Illinois and the University of Kansas, and has practiced law in Seattle since 1980.

**NOTES**

1. RPC 1.4(b), which states: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Ensuring your client has information adequate to make an informed decision ordinarily requires an explanation of the options and their “advantages and disadvantages.” See Comment 6 to RPC 1.0(e).


Mothering as a Young Lawyer Is a Far Cry from Law School

From the time my son was born until he finished the first grade, he had a mother who was a slave to the educational system. He knew Mommy spent too much time reading heavy books. He knew when to tell me that I had highlighter on my forehead or red pen marks on my elbow. He was accustomed to an educational-institution-mandated routine that changed by quarter and the concept of silence for my studying.

He was fully compliant with this system.

This compliance was on overdrive by the bar exam, but there were a few rebellious moments. My clever child would frequently say things like, “If my mommy fails the bar exam, she won’t get to be a lawyer, to guests, grocery store clerks, our Blockbuster guy, and the homeless man by the movie theater. Then he would laugh, realizing his new form of torturing Mommy was making Mommy look like she had eaten bad shrimp or had taken a nice ride on the sinking Titanic. This taunting lasted until a month after I passed the bar, when, after multiple tries to invoke fear, he was quite disappointed to learn it no longer turned my face a shade of green or forced my eye to twitch uncontrollably. Go figure.

The system changed when I started practicing law. He was terribly disappointed to learn that lawyers did not carry guns and wear blue or black uniforms. I admit that was completely my fault. I never bothered to fully explain the legal profession, and in his mind, lawyers were policemen — policemen highly educated and physically fit from benching civil procedure books. He thought suits looked silly on me — we sometimes agreed on that one — and was quite confused as to why I had to wake up so early.

When you are a mother in law school, or rather, when you are a parent generally, you become an amazing multitasker. You hold abilities that seem cosmic in nature to child-free onlookers, who often marvel at your capacity to do laundry while playing soccer with one foot and reading Hawkins v. McGee. When you enter private practice and meet the billable hour, an amazing and confusing thing happens: You are no longer allowed to multitask.

Never would you bill a client for a case read while drawing in sidewalk chalk with your son and listening to a podcast of last weekend’s “This American Life.” Your billable time is sacred, and dedicated completely to your client. For those rates, it had better be. If there is one thing that nearly two years of practicing law as a mother has taught me, it is that the greatest parenting skill of multitasking is tremendously under-utilized by the billable-hour system. But since I love my job, billable hour be damned, I have had to learn a series of equally important skills to survive practice and keep “Mommy” from turning to a huffy “Mo-o-m.

You make alterations. When I started working, I would try to beat the earliest morning event and a balance has been struck. And in the evening, if needed, I can take work home to do afterward.

You appreciate the time you do have. My son and I watch stupid movies from the early ‘90s together, with giant tubs of popcorn, or have pinecone fights at the park (limited by a dislike for getting dirty, but sufficient for his purposes). These are the times he will remember when he is older, and there is no amount of working time that can prevent parents from making these moments happen.

You explain your day. I learned my lesson when my son and I had the “No, honey, lawyers don’t carry guns as part of their job. No, we don’t have billy clubs, either,” talk. It is important to explain why you are away from home on business. It is also important to be able to explain why you come home late, or why you are home early. Explaining my day (in big-picture concepts) helps both of us deal with the unpredictability that comes with life as a litigator.

Being the child of a lawyer is not easy: We are argumentative and sometimes absent. But in the last two years, my son and I have managed to settle into new routines. We’ve found new ways to do things, and new ways to connect. Sometimes I still fall asleep with a highlighter or a red ink pen, but he tells me he is glad I am a lawyer and not a student anymore. That said, he still says he’d like it better if I’d gone to police school.

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Legislation Lineup for Lawyers

A recap of the Washington State Legislature’s bills of interest to lawyers and their practices in 2009

by Senator Adam Kline and Representative Jamie Pedersen
The 2009 session of the Legislature was dominated by resolving the budget crisis facing the state. As chairs of the House and Senate Judiciary committees, we worked hard to preserve funding for Justice in Jeopardy initiatives and were largely successful, despite big cuts in other parts of the budget. Although many policy committees were quieter this session because of a lack of money, the House and Senate Judiciary committees had a very busy docket. House Judiciary was referred 173 measures, held hearings on 104 measures, and reported out 86 measures with a do-pass recommendation. Of those, 62 passed the Legislature and were signed into law by Governor Gregoire. Senate Judiciary was referred 131 measures, heard 96 measures, and reported out 84 measures with a do-pass recommendation. Of those, 49 were signed into law by Governor Gregoire. In addition, Senate Judiciary was referred 10 gubernatorial appointments, of which nine were heard and ultimately confirmed by the Senate.

The Judiciary committees both have broad jurisdiction, although there are differences between the subjects each committee handles. Both committees address legislation concerning: corporations and other business entities; nonprofits and other legal entities; real property; tort law; probate, trusts, and estates; judicial-branch agencies and the court system; civil and criminal procedure; and guardianship. Principal differences in committee jurisdiction are that family law issues are handled by House Judiciary, but not Senate Judiciary; and criminal law issues are handled by Senate Judiciary, but not House Judiciary, with some exceptions.

This article provides summaries of the main bills of interest to attorneys that were considered by the House and Senate Judiciary committees. For information about other legislation enacted this session, you can use the legislative website, www.leg.wa.gov, which provides a listing of all 2009 legislation signed into law. More detailed information about a bill, including bill reports and bill history, can be found through the “bill information” link. In addition, a brief summary of all legislation passed, arranged by committee, may be found on the House and Senate websites: www.leg.wa.gov/house/committees and www.leg.wa.gov/senate/committees. House Judiciary Committee staff may be contacted at 360-786-7180, and Senate Judiciary Committee staff may be contacted at 360-786-7491.

BUSINESSES AND OTHER LEGAL ENTITIES

**SHB 1067 — Adopting the Washington Uniform Limited Partnership Act**

*Prime Sponsor: Representative Jamie Pedersen*

The Washington Uniform Limited Partnership Act (WULPA) is adopted and replaces the Washington Revised Uniform Limited Partnership Act. The WULPA contains changes to many aspects of limited partnership law to update and modernize the statute and to conform its provisions more closely to statutes governing other business entities in Washington. The WULPA is a stand-alone act that is no longer linked to and dependent on the Revised Uniform Partnership Act. The WULPA allows for the creation of limited liability limited partnership (LLLP) status, creates a process for a limited partnership to convert to or from another form of business entity, and modifies the rights and duties of general and limited partners and the liability of limited partners. Other changes made by the act include provisions regarding: access to information by a partner; dissociation of partners; process and requirements for filing and amending records with the Secretary of State; improper distributions of the limited partnership’s assets; and the process and obligations relating to dissolution of a limited partnership. The act applies to limited partnerships formed on or after January 1, 2010. Limited partnerships formed prior to January 1, 2010, may elect to be governed by the act as of January 1, 2010. On July 1, 2010, all limited partnerships are subject to the new act.

**HB 1068 — Revising the Washington Business Corporation Act**

*Prime Sponsor: Representative Jamie Pedersen*

HB 1068 changes the notice requirements for shareholder actions taken without a shareholders’ meeting or vote. Notice that shareholder consent is being sought may be given either by the corporation or by another person soliciting shareholder consents. In addition, a second notice stating that sufficient shareholder consents have been executed must be given by the corporation promptly after delivery to the corporation of shareholder consents sufficient to approve the action.

**SHB 1592 — Registering business entities and associations with the Secretary of State**

*Prime Sponsor: Representative Jamie Pedersen*

The Office of the Secretary of State (OSOS) requested this legislation to change provisions related to various business entities and associations registered with the OSOS. The Limited Liability Companies Act is amended to change the requirements for the reinstatement of administratively or voluntarily dissolved limited liability companies. Provisions are added to the charter governing limited liability partnerships (LLPs) to establish requirements for designating a registered agent and making changes to an LLP’s registered office or agent. These requirements also apply to foreign LLPs. Existing corporations sole registered with the OSOS are required to file an annual report with a $10 filing fee. A corporation sole that fails to file an annual report may be administratively dissolved or have its certificate of authority revoked. Effective August 1, 2009, a corporation sole may not be formed.

**COURTS**

**SHB 1919 — Operating and administering a drug court program**

*Prime Sponsor: Representative Ruth Kagi*

The purposes for which funds in the Criminal Justice Treatment Account (CJTA) may be used are expanded to allow use of the funds for drug court program operating and administrative costs. Not more than 10 percent of the funds received by a county or group of counties participating in a regional agreement may be spent on operating and administrative costs associated with the drug court program. No local match or maintenance of effort is required on the CJTA funding that is used for operating and administrative costs. The authorization to expend funds for drug court program operating and administrative costs expires June 30, 2013.

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SHB 2362 — Providing support for judicial branch agencies

Prime Sponsor: Representative Lynn Kessler

Temporary surcharges are imposed on certain superior, district, and small claims court fees. A surcharge of $30 applies to various fees collected by superior courts, including the initial filing fee, petition for judicial review, and notice of appeal or discretionary review. A surcharge of $20 applies to the district court civil filing fee; fee for counterclaims, cross-claims, or third-party claims; and fee for the initial paper filed in an appeal from a court of limited jurisdiction. A $10 surcharge applies to the small claims court filing fee. These surcharges will be deposited in the newly created Judicial Stabilization Trust Account to be used for the support of judicial branch agencies. The surcharges expire on July 1, 2011.

ESB 5013 — Fees collected by county clerks

Prime Sponsor: Senator James Hargrove

The fee for issuance of a certificate of qualification and certified copies of letters of administration, testamentary, or guardianship is raised from $2 to $5. The cap on the fee for clerk services such as performing historical searches and compiling statistical reports is raised from $20 to $30. The fee for processing ex parte orders is changed from an hourly fee to a flat fee of $30. The service fee for receipt of the first page of a faxed document is raised from $3 to $5. The assessment county clerks currently collect for legal financial obligations is codified in the statute that governs clerk service fees and is set at $100 per year.

SSB 5151 — Authorizing the appointment of criminal court commissioners

Prime Sponsor: Senator Adam Kline

At the option of the district court, clerks may collect fees for the following services: (1) preparing a certified copy of an instrument on file or of record in the clerk’s office — $5 for the first page or a portion of the first page and $1 for each additional page; (2) authenticating or exemplifying an instrument — $2 for each additional seal affixed; (3) preparing a copy of an instrument on file or of record without a seal — 50 cents per page; (4) copying a document without a seal or that is in an electronic format — 25 cents per page; (5) copies made on a CD — $20 per CD; (6) receiving faxed documents authorized by court rules — up to $3 for the first page and $1 for each additional page; and (7) services such as processing ex parte orders, performing historical searches, compiling statistical reports, and conducting exceptional record searches — up to $20 per hour or portion of an hour.

DOMESTIC VIOLENCE

HB 1148 — Protection of animals from domestic-violence perpetrators

Prime Sponsor: Representative Brendan Williams

HB 1148 specifies that when a court issues a domestic-violence protection order, it may order that the petitioner be granted exclusive custody or control of the family pet. The court may prohibit the respondent from interfering with the petitioner’s efforts to remove the pet and from knowingly coming within a specified distance of specified locations where the pet is regularly found. It is a gross misdemeanor if the respondent violates a provision that prohibits interference with the petitioner’s efforts to remove the pet.

FAMILY LAW

SHB 1170 — Parenting plan modification based on the military service of a parent

Prime Sponsor: Representative John McCoy

Procedures are created to ensure that a parent’s military deployment will not, by itself, be considered a substantial change in circumstances justifying a permanent modification of the parties’ parenting plan. Any temporary custody order the court enters for the child during the military parent’s absence must end no later than 10 days after the returning parent gives notice to the temporary custodian. The court may, at the request of the military parent, delegate that parent’s time to a family member or another person, other than a parent, with a close and substantial relationship to the child. The delegation does not create separate rights to residential time or visitation for the person to whom time is delegated.

ESHB 1794 — Calculating child support
Prime Sponsor: Representative Jim Moeller

ESHB 1794 changes the economic table in the child-support schedule. The table starts at a combined monthly net income of $1,000, and the presumptive minimum amount of basic support is $50. The table is expanded to $12,000 of combined monthly net income and made entirely presumptive. In addition, ordinary healthcare costs are no longer considered part of the basic support obligation amount in the economic table. Instead, all healthcare costs must be shared by the parents in the same proportion as the basic support obligation. The support obligation may not reduce a parent’s income below 125 percent of the federal poverty guideline. The legislation increases the amount parents may deduct from gross monthly income for retirement contributions and changes how income from overtime and second jobs are considered and how a court must impute income to a parent.

SHB 1845 — Medical support obligations

Prime Sponsor: Representative Jay Rodne

The Department of Social and Health Services (DSHS) requested this legislation to bring the state into compliance with federal law that requires states to address health insurance for children in child-support orders. Courts must order both parents to provide medical support for any child named in the child-support order by providing health-insurance coverage or contributing cash medical support. Cash medical support consists of a parent’s monthly payment toward the premium paid for coverage by either the other parent or the state. In addition, both parents are responsible for paying their proportionate share of any uninsured medical expenses. When cash medical support is collected and the child is covered through Medicaid, the DSHS may retain the funds as reimbursement or pass the funds through to the parent to be used for medical costs.

SSB 5166 — Failure to pay child support

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Prime Sponsor: Senator Debbie Regala

The statute governing procedures for license suspensions for failure to pay child support is restructured for clarity, and new provisions are added to account for a parent’s good-faith effort to comply with an order. An administrative law judge may find the parent has made a good-faith effort to pay, even if the parent is not technically in compliance with the support order, and may formulate a payment schedule for the parent. The payments in a payment schedule may be for less than current support for a reasonable time and need not include a payment towards the parent’s arrears.

SSB 5285 — Guardians ad litem

Prime Sponsor: Senator Debbie Regala

Changes are made to the guardian ad litem (GAL) statutes for dependency and family law proceedings. The court in family law and dependency cases must attempt to match a child who has special needs to a GAL who has specific training or education related to the child’s needs. Volunteer and compensated GALs must provide additional information in their background information record and, upon appointment, provide the background information to the court and the parties. The legislation also requires GALs to report child abuse or neglect under the mandatory reporting of child abuse and neglect statute.

E2SSB 5688 — Expanding the rights and responsibilities of state-registered domestic partners

Prime Sponsor: Senator Ed Murray

For all purposes under state law, state-registered domestic partners must be treated the same as married persons. Agencies must amend their rules to reflect the intent of the Legislature. Numerous chapters of the RCW are amended to include language stating that the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family are interpreted as applying equally to state-registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage apply equally to state-registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law.

LANDLORD-TENANT

SHB 1856 — Providing protections for tenants who are victims

Prime Sponsor: Representative Lynn Kessler

This legislation permits a tenant or household member who is a victim of sexual assault, stalking, or unlawful harassment by a landlord to terminate a rental or lease agreement without any further obligation under the agreement if certain conditions are met. A tenant or household member who is a victim of sexual assault, stalking, or unlawful harassment by a landlord may also change or add locks to his or her dwelling unit at the tenant’s expense. Landlord is defined to include a landlord’s employees.

PROBATE, TRUSTS, ESTATES

SHB 1103 — Vulnerable adults’ estates

Prime Sponsor: Representative Jim Moeller

SHB 1103 prevents an abuser from inheriting property or receiving any benefit from
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REAL PROPERTY

HB 1826 — Surplus proceeds of mortgage-foreclosure sales

Prime Sponsor: Representative Jay Rodne

Surplus proceeds of a mortgage-foreclosure sale that remain after the mortgage obligation has been paid must be applied to all other interests in, or liens or claims against, the property in the order of priority that the interest, lien, or claim attached to the property. Any remaining surplus must be paid to the mortgage debtor.

ESB 5810 — Deeds of trust foreclosures

Prime Sponsor: Senator Claudia Kuffman

ESB 5810 changes the procedures governing foreclosures of deeds of trust securing residential real property. These changes affect beneficiaries, trustees, purchasers, and tenants of property subject to a trustee sale. A notice of default may not be issued to the borrower until 30 days after the beneficiary contacts, or exercises due diligence to contact, the borrower by phone and by mail to explore options for the borrower to avoid foreclosure. The contact requirement does not apply to certain deeds of trust entered into between specified dates, and does not apply to commercial loans or when the beneficiary is a homeowners’ or condominium association. The contact requirement expires on December 31, 2012. Tenants of foreclosed property are provided more notice and must be given a 60-day notice to vacate in certain circumstances. The failure of a borrower or grantor to enjoin a foreclosure sale does not constitute a waiver of certain claims for damages if brought within a certain time.

CRIMINAL LAW

SHB 1036 — Washington Code of Military Justice

Prime Sponsor: Representative Troy Kelley

Various changes are made to the Washington Code of Military Justice (WCMJ), which governs the organization, administration, and duties of the Washington State Guard and the Washington National Guard. All guard members who commit military offenses, whether or not the member is on duty status, are now subject to the WCMJ. Drug-related offenses and assault of one guard member against another member are added as military offenses (except assault in the first degree, which remains under the jurisdiction of civilian courts). The legislation also changes procedures for the different courts-martial and the types of punishment each may impose, and makes a variety of changes regarding pre-trial and post-trial criminal procedures.

HB 1498 — Firearms possession by persons who have been involuntarily committed

Prime Sponsor: Representative Ross Hunter

The crime of unlawful possession of a fire-
arm in the second degree is amended to include persons who have been involuntarily committed for mental-health treatment, either as an adult or juvenile, under the 14-day commitment procedures. Courts are required to send a record of a person involuntarily committed for mental-health treatment to the federal National Instant Criminal Background Check System. The legislation also revises the standards and processes that apply to the restoration of firearm rights for a person who was involuntarily committed for mental-health treatment and imposes new notice requirements regarding loss of firearm rights in involuntary commitment proceedings.

SSB 5380 — Statutes of limitation for certain crimes

Prime Sponsor: Senator Bob McCaslin

A felony violation of the laws pertaining to the crimes of money laundering and identity theft may not be prosecuted more than six years after their commission or their discovery, whichever occurs later. The same statute of limitation applies to the crimes of theft in the first or second degree when accomplished by color or aid of deception.

SB 5832 — Statutes of limitation for certain sex offenses

Prime Sponsor: Senator Jeanne Kohl-Welles

Rape in the first and second degree may be prosecuted up to the victim’s 28th birthday if the victim is under 14 years of age at the time of the rape and the rape is reported to a law-enforcement agency within one year of its commission. Rape of a child in the first, second, and third degree; child molestation in the first, second, and third degree; and incest may be prosecuted up to the victim’s 28th birthday.

SB 5952 — Definition of sexual orientation for malicious-harassment prosecution

Prime Sponsor: Senator Joe McDermott

The definition of “sexual orientation” in the malicious-harassment statute is changed to mirror the definition included in the Law Against Discrimination (chapter 49.60 RCW). As a result, the definition of “sexual orientation” is expanded to include “gender expression or identity,” which means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

SB 6167 — Concerning crimes against property

Prime Sponsor: Senator Adam Kline

The monetary thresholds are increased for the property crimes of theft, possession of stolen property, and malicious mischief as follows: first degree applies if the property is valued at greater than $5,000; second degree if the property is valued over $750 but under $5,000; and third degree applies if the property is valued at up to $750. The legislation also increases the dollar threshold values and some fines related to the property crimes of unlawful issuance of checks or drafts; theft of rental, leased, or loaned property; and organized retail theft. An organized-crime task force is created to monitor
the effects of raising these monetary threshold amounts, and the Sentencing Guidelines Commission is directed to review the monetary threshold amounts to determine whether such amounts should be modified.

OTHER CIVIL LAW

SHB 1022 — Modifying statutory cost provisions

Prime Sponsor: Representative Brendan Williams

In an action for the recovery of money only, a plaintiff is the prevailing party and entitled to costs if the defendant offers and the plaintiff accepts full or partial payment of the amount sued for, and the plaintiff had given the defendant prior written notice that the defendant could still be liable for costs, regardless of full or partial payment.

SHB 1119 — Uniform Prudent Management of Institutional Funds Act

Prime Sponsor: Representative Jamie Pedersen

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) replaces the current Uniform Management of Institutional Funds Act. UPMIFA updates the standards that apply to managing, investing, and spending funds of charitable institutions. The UPMIFA retains a prudence standard for the management, investment, and spending of institutional funds, but provides more specific standards for evaluating management and investment decisions and decisions regarding the expenditure or accumulation of endowment funds. The act also modifies the circumstances under which a restriction in a gift instrument may be modified or released.

ESHB 1138 — Concerning access to restrooms in retail stores

Prime Sponsor: Representative Marko Liias

Retail establishments over a certain size are required to allow customers to use an employee-only restroom if certain conditions are met. The conditions differ for customers who can prove they have an “eligible medical condition,” such as Crohn’s disease or irritable bowel syndrome, and other customers. A retail establishment is not required to make any physical changes to the restroom and may require that an employee accompany the customer to the restroom. Retail establishments face civil infractions for violating the law. The bill provides retail establishments with limited immunity from civil liability for any act or omission where a customer has been permitted to use a restroom that is ordinarily reserved for employees.

SHB 1261 — Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Prime Sponsor: Representative Roger Goodman

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Act) establishes procedures for addressing interstate jurisdictional, transfer, and enforcement issues relating to adult guardianship and protective proceedings. The Act provides standards for determining the state court with primary jurisdiction over guardianship and protective proceedings. In addition...
to jurisdictional provisions, the Act establishes procedures for communication and cooperation between state courts concerning guardianship and protective proceedings, methods for transferring jurisdiction over guardianship and protective proceedings between states, and rules for the recognition and enforcement of out-of-state guardianship or protection orders.

HB 1426 — Regarding the use of certified mail

Prime Sponsor: Representative Sam Hunt

Whenever a statute allows or requires the use of certified mail with a return receipt requested, an electronic return-receipt delivery confirmation provided by the U.S. Postal Service may be used.

ESHB 1553 — Damages claims against state and local government

Prime Sponsor: Representative Dean Takko

Changes are made to how tort claims against the state and local governments must be presented, who may sign the claim, and when a claim is considered presented in order to satisfy the procedural requirements of the statute. The amount of damages stated on the claim form is not admissible at trial. The procedures established under the medical malpractice statutes apply to the claims based on injuries from health care. The claim filing statutes are to be liberally construed with respect to the procedural requirements of the statute and substantial compliance will be deemed satisfactory.

SB 5153 — Uniform Foreign-Country Money Judgments Recognition Act

Prime Sponsor: Senator Adam Kline

The Uniform Foreign-Country Money Judgments Recognition Act (UFCMJ) updates the current Uniform Foreign Money-Judgment Recognition Act. The act clarifies when the UFCMJ applies and sets forth which party has the burden of establishing whether or not the act applies. The grounds for not recognizing a judgment are modified and a time period in which to commence an action to recognize a foreign money judgment is established.

SSB 5531 — Modifying provisions relating to Consumer Protection Act violations

Prime Sponsor: Senator Debbie Regala

In a lawsuit for a Consumer Protection Act (CPA) violation, the district and superior courts have the discretion to award up to $25,000 in treble damages. In a private action claiming a CPA violation, a claimant may establish that the act or practice is injurious to the public because it violates a statute that incorporates the CPA; violates a statute that contains a specific legislative declaration of public-interest impact; or has injured or will injure other persons. The changes made to the CPA apply to all causes of action that accrue on or after the effective date of the act (July 26, 2009).

ESSB 5651 — Concerning requirements for dog-breeding practices

Prime Sponsor: Senator Jeanne Kohl-Welles

A person is prohibited from having more than 50 unaltered dogs that are over six months old at any time. Regulations are established for persons who keep more than 10 unaltered dogs over six months old in an enclosure most of the day. The regulations mainly address housing, exercise, sanitation, and breeding standards. Only dogs between the ages of 12 months and eight years may be used for breeding, and a violation of this restriction is a gross misdemeanor. Retail pet stores, certain facilities, organizations, and other entities are exempted.

SSB 5732 — Relicensing diversion programs for driving with license suspended in the third degree

Prime Sponsor: Senator Adam Kline

The superior courts and courts of limited jurisdiction are authorized to participate or provide relicensing diversion programs to persons who commit the offense driving while license suspended in the third degree (DWLA 3) due to failure to respond to a notice of traffic infraction, failure to appear at a requested hearing, violation of a promise to appear in court, or failure to comply with the terms of a notice of traffic infraction or citation. In jurisdictions that do not have a relicensing diversion program, a person who commits DWL 3 due to failure to appear at a hearing or failure to respond or pay a traffic infraction will be given an abstract of his or her driving record by the court or the prosecuting attorney, a list of the person’s unpaid traffic offense-related fines, and contact information for each jurisdiction or collection agency to which the money is owed. Subject to available funds, counties and cities must provide information regarding their relicensing diversion programs to the Administrative Office of the Courts for analysis and
development of a best-practices model.

**SSB 5931 — Mental-health practitioner privilege**

*Prime Sponsor: Senator Ed Murray*

Licensed mental-health counselors, independent clinical social workers, and marriage and family therapists may not disclose or be compelled to testify about any information acquired from persons consulting the individual in a professional capacity when the information was necessary for the individual to provide treatment. Certain exceptions to the privilege are provided.

**ESSB 5967 — Prohibiting discrimination on the basis of sex in public community athletics programs**

*Prime Sponsor: Senator Jeanne Kohl-Welles*

Cities, towns, counties, and park districts are prohibited from discriminating against any person on the basis of sex in a community athletics program. Each entity operating or issuing permission to operate such a program must adopt and publish a nondiscrimination policy by January 1, 2010. School districts operating community athletics programs must adhere to these requirements, but may use and modify existing school policies to the extent possible. School districts are not required to monitor compliance, investigate complaints, or enforce school district policies as to third parties using school facilities.

*Senator Adam Kline has served for 12 years as the senator for the 37th District of Washington. Before entering law school, he worked as a merchant seaman and as a newspaper reporter. He practiced law for 32 years before retiring in 2004 to work for the Laborers Union. Representative Jamie Pedersen has represented the 43rd Legislative District (central Seattle) since 2006 and became the chair of the House Judiciary Committee this session. Since 1995, he has practiced corporate law and worked on civil rights issues at K&L Gates LLP in Seattle. Senator Kline and Representative Pedersen would like to thank House and Senate Judiciary committee staff for their assistance with this article.*
Home Foreclosure Legal Aid Project Update

Helping homeowners keep their homes in times of financial crisis

On June 17, 2009, the WSBA launched the Home Foreclosure Legal Aid Project at a press conference held at the Urban League of Metropolitan Seattle. Speakers talked compellingly about the need for legal assistance to help the thousands of Washington residents facing foreclosure, and of the WSBA’s exciting new project to recruit and train an “army” of volunteer lawyers. The WSBA is very pleased to be partnering with the Northwest Justice Project in these efforts, and to have the support of the Governor, Chief Justice, and Attorney General.

The project provides an opportunity for lawyers to provide much-needed assistance to homeowners in need. Participating lawyers receive free MCLE-accredited online training and support from fellow members of the Bar experienced in housing and foreclosure matters. As of mid-July, more than 350 Washington lawyers have signed up to volunteer. Lawyers interested in learning more about the project or in volunteering, please see www.mywsba.org. Homeowners in need of assistance are directed to call 1-877-894-HOME.

“I want to express my heartfelt thanks to the Washington State Bar Association and its members for stepping up to help in these difficult times. As your governor and as an attorney, I feel strongly we must all do what we can to help homeowners in need, and I’m confident the Home Foreclosure Legal Aid Project will help prevent hundreds of families and individuals from losing their homes.” — Governor Chris Gregoire

“Many of our fellow citizens who are our friends and neighbors are in danger of foreclosure, and this project will help level the legal playing field. As proud as I am of the Washington State Bar Association for developing this project — and I consider it one of the Bar’s finest hours — I’m not at all surprised. The legal profession has a long tradition of helping those who are without the means to afford a lawyer.” — Chief Justice Gerry Alexander

“The threat of losing one’s home is one of the most frightening crises a family can face. While state attorneys general have come together to negotiate settlements with major lenders requiring loan modification programs and other remedies, many homeowners still find themselves in need of legal assistance when it comes to saving their homes. That’s why the Home Foreclosure Legal Aid Project is so important — and that’s why I’m proud to encourage the attorneys in my office to serve their communities through this project.” — Attorney General Rob McKenna

“In times of trouble, lawyers are there to help, stepping up to provide assistance to those in need and tangibly demonstrating generosity, kindness, and concern for the welfare of others. I am proud that lawyers across the state are volunteering their services through the Home Foreclosure Legal Aid Project.” — WSBA President Mark Johnson

At the press conference, Governor Chris Gregoire thanks the WSBA for stepping up to help. Chief Justice Gerry Alexander, Urban League President James Kelly, and WSBA President Mark Johnson look on.

WSBA President Mark Johnson, Chief Justice Gerry Alexander, and Urban League President James Kelly take questions from reporters.

Governor Gregoire greets Eva Buck, a homeowner affected by the crisis and who was invited to tell her story.
**Lawyers and Buyers Beware**

*Avoiding ethical pitfalls with loan modification scams*

**BY BOB LIPSON AND DAVID HUEY, Consumer Protection Division, Washington State Attorney General’s Office**

This article is to alert you to serious, potential ethical pitfalls if you are considering working with a loan modification company in conjunction with your practice.

It should not come as news to Washington lawyers that the national financial crisis precipitated by the collapse of the subprime lending market is now hitting our state with full force. Mortgage delinquencies are rising. Real estate values are falling. Foreclosures are up. So are consumer bankruptcies. People are out of work. Distressed borrowers need your legal help, and sometimes that might include a mortgage loan modification or other type of work-out arrangement.

Innumerable companies and organizations, some for-profit and some nonprofit, advertise to consumers that they can help. “Lower your debt.” “We will get your loan modified.” “We can stop your foreclosure and work with your lender.” “We guarantee it.” Just turn on mid-day or late-night TV, listen to the radio, or surf the Internet. Some of these, especially those with nonprofit or government affiliation, can and do help consumers in work-out situations and often work for free or a small charge. But other companies may be less honorable. Some may be simply rip-off artists. One hallmark of these less-than-reputable companies is a large up-front fee. Frequently, little or nothing is done of benefit to the borrower.

Governmental agencies, including the State Attorney General’s Office, the State Department of Financial Institutions, and the Federal Trade Commission, are bringing pressure to clean up the marketplace and protect citizens. The private bar is helping, too, through programs like the recently announced Home Foreclosure Legal Aid Project. Several state laws support this effort. Depending on the type of loan and how the modification entity does business, look at the Washington Debt Adjusting Act (RCW 18.28), the Credit Services Organization Act (RCW 19.134), the Mortgage Broker Procedures Act (RCW 19.146), the Distressed Property Conveyance Act (RCW 61.34), and the Consumer Protection Act (RCW 19.86).

Some of these laws exempt attorneys “while performing services solely incidental to the practice of their profession,” or when “not principally engaged in the business of negotiating residential mortgage loans when such attorney renders services in the course and scope of his or her practice as an attorney,” or for issues relating to substantive quality as opposed to the entrepreneurial aspect of the business. See, RCW 18.28.010(2)(a) and RCW 19.146.020(1)(c). For this reason, some for-profit loan modification companies are attempting an end-run around state consumer-protection laws by associating lawyers into their operation.

The effort by some loan modification companies to associate themselves with lawyers can be fraught with problems, as exemplified in *Cincinnati Bar Assn. v. Mullaney*, 119 Ohio St. 3d 412 (2008), a recent disciplinary case decided by the Ohio Supreme Court. There, a law firm agreed with a loan modification company to represent the company’s customers in foreclosure proceedings. For its services, the law firm received part of the fee that the customer paid to the loan modification company. The law firm followed a plan of the loan modification company, delaying foreclosure proceedings while the client followed a savings plan developed by the company and the company tried to renegotiate the loan. When the company’s loan modification attempt on behalf of the customer was unsuccessful, the law firm sent a standard letter advising the client of the date of the foreclosure sale, and recommending that the client contact a bankruptcy lawyer. The Ohio Supreme Court held that the lawyers had violated professional conduct rules by aiding non-lawyers in the unauthorized practice of law, sharing fees with non-lawyers, forming a partnership with non-lawyers that involved the practice of law, accepting impermissible case referrals, and failing to assess the individual legal needs of their clients. The case is instructive and should be taken as a word to the wise.

There are obviously multiple variations in how a loan modification company might seek to associate itself with a lawyer and how it might go about its business. Nevertheless, whatever the model used by the loan modification company, for the licensed Washington attorney, caution is warranted. Make sure that the loan modification company is operating in compliance with all substantive laws that apply to loan modification companies and that the company is properly licensed. For example, the state Department of Financial Institutions requires that all mortgage loan modifiers be licensed under the Mortgage Brokers Procedures Act and abide by it. Additionally, the Attorney General’s Office has brought several successful actions against loan modification companies because of their systematic use of unfair and deceptive acts and practices.

Equally important, make sure that you don’t violate the Rules of Professional Conduct. In all circumstances, be mindful of these basic ethics rules:

- You may not share or divide legal fees with a non-lawyer, including a loan modification company (RPC 5.4);
- You may not pay a referral fee to the loan modification company (RPC 7.2);
- You may not aid in the unauthorized practice of law (RPC 5.5);
- You may not form a partnership or joint business with the loan modification company if any of its activities involve the practice of law (RPC 5.4);
- Where a third party recommends or pays for your services as a lawyer, your obligation as a lawyer is still to your client, and your professional judgment may not be directed or regulated by the third party (RPC 5.4); and
- You must provide competent representation to your client, including appropriate consideration of the client’s individual circumstances, regardless of the expectations of the loan modification company (RPC 1.1).
WSBA Board of Governors Meeting
May 29, 2009 — Yakima

BY MICHAEL HEATHERLY

At its May 29, 2009, meeting in Yakima, the Board of Governors voted to contribute $1.5 million of WSBA funds to support financially strapped civil legal aid programs, but to do so without imposing a surcharge on member license fees. The vote came after lengthy testimony and debate at the April and May BOG meetings. Meanwhile, the BOG elected Bellevue attorney Steven Toole to serve as the next WSBA president-elect and take over as president for the 2010-2011 fiscal year.

The BOG took up the topic of civil legal aid funding after WSBA President Mark Johnson reported in the April Bar News that civil legal aid programs across the state were in jeopardy, largely because of a severe downturn in IOLTA (Interest on Lawyers’ Trust Accounts) revenues. He proposed adding a mandatory $70 surcharge to the license fee for all active WSBA members, a measure he acknowledged would be unpopular. In response to Johnson’s recommendation, BOG members crafted proposals of their own, most involving alternatives to a mandatory fee surcharge.

At its April and May meetings, the BOG took testimony from numerous stakeholders in the issue, reflecting widely differing interests. Members of pro bono civil legal aid organizations testified as to the great need for their services and the loss of resources they face under the funding shortfall (IOLTA revenues in 2008 were $4.69 million, down from $9.18 million in 2007). Some brought former clients, who described for the BOG how their rights had been protected by the programs at a time when they could not have afforded to pay for legal services.

Meanwhile, some Bar members and others expressed opposition to the WSBA supporting such programs, given that WSBA membership is mandatory and members have no control over how such funds are used. Some questioned whether all pro bono clients are truly in need of such services. For example, Dan Fazio, director of employer services for the Washington Farm Bureau, said members of his organization find themselves in litigation against individuals — farm employees, for instance — who are represented pro bono by civil legal aid organizations. Those individuals are sometimes better able to afford legal representation than the farm owners, who do not qualify for the legal aid programs, he claimed. Fazio also complained that some legal aid organizations use a portion of their funds for political lobbying and that their positions on issues may be contrary to the views of some Bar members.

BOG members themselves expressed concern about increasing membership fees through a mandatory assessment during an economic recession and about using mandatorily collected funds to support external programs. During debate on the issue at the May 29 meeting, Governor David Heller argued that it is the duty of society as a whole, not just of the Bar, to support civil legal aid and other access to justice programs. However, Governor Brian Comstock pointed out that General Rule 12.1, the court rule of general application that sets out the purposes of WSBA, requires that the Bar promote an effective legal system accessible to all and that it support programs providing legal services for those in need.

The proposal that ultimately went to a vote at the May meeting, promoted largely by Governors Carla Lee and Catherine Moore, had four parts.

First was a one-time transfer of $1.5 million of WSBA money to LAW Fund (the Legal Aid for Washington Fund, which — along with the affiliated Legal Foundation of Washington — distributes the IOLTA funds to legal aid programs statewide). The WSBA funds could be used at any time during the 2009–2010 fiscal year as a “lifeline” for civil legal aid programs. The Budget and Audit Committee would oversee disbursement of the funds from the WSBA budget.

Proponents of the proposal anticipated that a large portion of the funds would come from the WSBA facilities reserve fund. The fund, which is meant to provide for such things as expected future relocation or remodeling of WSBA headquarters, would be re-capitalized in coming years under budget measures already in place. However, some BOG members and others questioned whether it is realistic to expect the recapitalization to take place and for current WSBA programs to remain intact, given the poor economic climate.

In other business, the BOG elected Steven Toole to serve as WSBA president-elect for the September 2009 to September 2010 fiscal year and as president for the following year.

Doug Lawrence, who was a BOG member and WSBA treasurer when the current budget reserve system was set up, warned that while the proposal would avoid the proposed special fee surcharge for 2010, the BOG might still be forced to increase membership fees in future years to recoup the funds being allocated to LAW Fund. The planned replenishment of the funds rests partly on increased revenues from a previously proposed membership fee increase of $35 per year for active members, awaiting approval by the Washington State Supreme Court. Governor Heller and others expressed concern that the $35 increase, while approved by the BOG before the BOG began addressing the legal aid crisis, might now be seen as a de facto legal aid surcharge on members. Although proponents of the measure said they believed the funds could be allocated as proposed without painful measures such as program and staff reductions, others questioned whether that is possible. Ultimately, a motion to approve the $1.5 million transfer was approved on a 7–6 vote.

A second part of the proposal was to include the option for members to voluntarily contribute $70 to the Campaign for Equal Justice on the annual WSBA membership licensing form beginning in 2010. The contribution would be charged to members unless they checked a box to opt out. At the suggestion of Governor Anthony Gipe, a motion to enact the proposal was amended to delete the reference to $70 and instead direct that the amount of the contribution be recommended by leadership of the LAW Fund, so as to maximize donation efforts and not impair existing fundraising. The motion passed 12–1.

The BOG unanimously passed a third related motion, which directs the Budget
and Audit Committee, in cooperation with the Access to Justice/Washington Young Lawyers Division GAAP (Greater Access and Assistance Project) Committee, to create a proposal for a WSBA-sponsored pilot project to provide statewide “low-bono” (low-cost) legal services. The proposed project is to be considered by the BOG for the 2010 budget.

In the fourth related motion, the BOG unanimously approved a plan for WSBA and LAW Fund to work jointly on a project to increase voluntary financial contributions to legal aid programs by WSBA members. A committee is to be formed, consisting of the executive directors of WSBA, Legal Foundation of Washington, and LAW Fund, as well as a representative of the LAW Fund Board of Directors, three WSBA BOG members, and the WSBA general counsel. The committee is to present a proposal to the BOG by the end of July.

In other business, the BOG elected Steven Toole to serve as WSBA president-elect for the October 2009 to September 2010 fiscal year and as president for the following year. In a secret ballot, the Board selected Toole over another candidate, Randolph Gordon of Bellevue. Toole, who practices mainly in plaintiffs’ personal injury work, was admitted to WSBA in 1976. Beginning 15 years ago, when he was elected to the BOG, he has been involved in numerous WSBA projects. He was president of the Washington State Trial Lawyers Association (now the Washington State Association for Justice) in 2002–2003 and has participated in several other professional and community activities.

Also at the May 29 meeting, the Board re-elected Carla Lee as the governor-at-large representing the Washington Young Lawyers Division for the October 2009 to September 2012 term. For the past year, Governor Lee had been serving out the unexpired term of a predecessor.

Michael Heatherly is the Bar News editor and can be reached at barnewseditor@wsba.org or 360-312-5156. For more information on the Board of Governors and Board meetings, see www.wsba.org/info/bog. For more information on issues addressed by the Board, visit the WSBA website at www.wsba.org and click on “News Flash” under “WSBA News and Information.”
You are cordially invited to attend

The Washington State Bar Association's Annual Awards Dinner and Business Meeting

Please join us for an evening of inspiration as we celebrate the accomplishments of the 2009 WSBA award recipients. All members of the legal community are invited to attend.

Name ___________________________________    WSBA No. __________________

Address ________________________________________________________________________

Phone __________________________________    E-mail _________________________

Affiliation/Organization _______________________________________________________

Registration is $95 per person (table of 10 = $950). To make your reservation, please return this form (or a photocopy) with your credit-card information or check payable to WSBA. Space is limited, so please make your reservations early. Reservations and payment must be received no later than September 17, 2009 (refunds cannot be made after September 17). Seating will be assigned. To register online, go to www.mywsba.org/default.aspx?tabid=90&action=mtgproductdetails&args=5083.

- [ ] MasterCard    - [ ] Visa    No. __________________    Exp. date __________ 

Name as it appears on card _____________________________________________________

Signature ______________________________________________________________________

______ (no. of persons)    X    $ _______ (price per person)   =  $  ____________ TOTAL

Please list the names of all attendees and indicate meal choices. Be sure to include yourself.

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All those listed on the same registration form (up to 10) will be seated at the same table.

Send to: Washington State Bar Association
Annual Awards Dinner
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539
Phone: 800-945-WSBA • 206-443-WSBA • Fax: 206-727-8319

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You are cordially invited to attend

The Washington State Bar Association’s
50-Year Member Tribute Luncheon

Please join us as we honor the 2009 WSBA 50-year members.
All members of the legal community are invited.

Name ___________________________________________ WSBA No. __________________
Address _________________________________________________________________________
Phone __________________________________ E-mail _________________________________
Affiliation/organization ___________________________________________________________

Registration is $45 per person (table of 10 = $450). To make your reservation, please return
this form (or a photocopy) with your credit-card information or check payable to WSBA. Space
is limited, so please make your reservations early. Reservations and payment must be received
by October 27, 2009 (refunds cannot be made after October 27).

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Please list the names of all attendees and indicate meal choices. Be sure to include yourself.

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Opportunities for Service

The Washington State Bar Foundation Board of Trustees
Application deadline: August 31, 2009
The WSBA Board of Governors is seeking to fill three positions to serve a three-year term on the Washington State Bar Foundation Board of Trustees. Applicants must be WSBA members. There is also one position available for a non-lawyer, and members are encouraged to make this opportunity known to persons who may be interested in serving. The Washington State Bar Foundation is a nonprofit organization whose mission is to foster leadership to further social justice. The Foundation currently operates the Presidents’ and Governors’ Diversity Scholarship Fund to assist students in underserved communities attend law school, and administers grants and donations in support of WSBA programs and services. Board members are eligible to serve up to two terms, and those whose terms are expiring must apply if interested in being reappointed. Please submit letters of interest and résumés to: WSBA Bar Leaders Division, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; or e-mail barleaders@wsba.org.

Northwest Justice Project Board of Directors
Application deadline: August 31, 2009
The WSBA Board of Governors is accepting letters of interest and résumés from members interested in serving a three-year term on the Northwest Justice Project Board of Directors (two positions). The three-year terms will commence January 1, 2010. Incumbents are eligible for reappointment, and a written expression of interest and résumé are required for incumbents seeking reappointment.
The Northwest Justice Project is a statewide not-for-profit law firm funded by the State of Washington and the federal Legal Services Corporation to provide free civil legal services to low-income people throughout Washington. Board members play an active role in setting program policy and assuring adequate oversight of program operations and must have a demonstrated interest in, and knowledge of, the delivery of high-quality civil legal services to low-income people. For more information, e-mail cesart@nwjustice.org or lisag@nwjustice.org. Please submit letters of interest and résumés to: WSBA Bar Leaders Division, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; or e-mail barleaders@wsba.org.

Civil Legal Aid Oversight Committee
Application deadline: August 31, 2009
The WSBA Board of Governors is seeking to fill one position to serve a term beginning on appointment and expiring June 30, 2012, on the bipartisan Civil Legal Aid Oversight Committee. Established in 2005, the Committee oversees the activities of the Office of Civil Legal Aid; reviews the performance of the director of the Office of Civil Legal Aid; and makes recommendations on matters relating to state civil legal aid services and funding. The Committee consists of 11 members, one of whom is appointed by the WSBA. The incumbent is eligible for reappointment and must apply if interested in reappointment. For additional information, see www.oca1.wa.gov.
Please submit a letter of interest and résumé to: WSBA Bar Leaders Division, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; or e-mail barleaders@wsba.org.

Judicial Information Systems Committee
Application deadline: September 7, 2009
The WSBA Board of Governors is seeking a member interested in being nominated to represent the WSBA on the Washington State Supreme Court’s Judicial Information System Committee (JISC) for a three-year term. The JISC is the policy-level steering committee for the Court’s automation system. The Committee is composed of four members from the appellate court level; five members from the superior court level; four members from the courts of limited jurisdiction level; and three at-large members, one each from the WSBA, the Washington Association of Sheriffs and Police Chiefs, and the Washington Association of Prosecuting Attorneys. The incumbent is eligible for reappointment and must apply if interested in being reappointed. Please submit a letter of interest and résumé to: WSBA Bar Leaders Division, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; or e-mail barleaders@wsba.org.

Limited Practice Board
Application deadline: October 2, 2009
The WSBA Board of Governors seeks a candidate for appointment to the Limited Practice Board, which oversees administration of, and compliance with, the Limited Practice Rule (APR 12) authorizing certain lay persons to select, prepare, and complete legal documents pertaining to the closing of real estate and personal-property transactions. The nominee’s name will be submitted to the Washington State Supreme Court for appointment, and the appointee will serve a four-year term commencing January 1, 2010. In keeping with the member requirements of APR 12, the position must be filled by a representative of the title insurance industry. LPOs in the title industry are encouraged to apply. The Board generally meets every other month. Please submit a letter of interest and résumé to: WSBA Bar Leaders Division, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539; or e-mail barleaders@wsba.org.

Board for Judicial Administration Best Practices Committee
Application deadline: September 7, 2009
The WSBA Board of Governors will be nominating one member who is appointed by the Supreme Court to serve a two-year term on the Board for Judicial Administration Best Practices Committee. The committee’s activity is narrowly focused on creating, testing, and evaluating court performance audit measures. Each measure is designed to evaluate a court’s performance based on standards that can be reasonably met by courts at all levels. Approximately 15 measures will ultimately be integrated into a comprehensive court performance audit plan. The incumbent is eligible for reappointment and must apply if interested in being reappointed. Please submit a letter of interest and résumé to: WSBA Bar Leaders Division, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101, or e-mail barleaders@wsba.org.
Seeking Questionnaires from Candidates for Judicial Appointments


The WSBA Judicial Recommendation Committee (JRC) is accepting questionnaires from attorneys and judges seeking consideration for appointment to fill potential Washington State Supreme Court and Court of Appeals vacancies. Interested individuals will be interviewed by the Committee on the dates listed above. The JRC’s recommendations are reviewed by the WSBA Board of Governors and referred to the Governor for consideration when making judicial appointments. Materials must be received at the WSBA office by the deadline listed above. To obtain a questionnaire, visit the WSBA website at www.wsba.org/lawyers/groups/judicial-recommendation or contact the WSBA at 206-727-8212 or 800-945-9722, ext. 8212; or e-mail judithb@wsba.org.

WSBA Civil Rights Law Section — Special Offer for New Members

The WSBA Civil Rights Law Section has a special offer for individuals who have not yet joined this newest section of the Washington State Bar Association for the 2008–2009 membership year. When you join by August 15, your $30 dues payment will be applied to membership for the remainder of the current year ending in September 2009, as well as for 2009–2010 (October 1, 2009, through September 30, 2010). To take advantage of this offer, please see www.wsba.org/lawyers/groups/civilrightslaw.htm.

Washington First Responder Will Clinic in Seattle

Your legal skills can support the firefighters and police officers who protect our communities. The Washington First Responder Will Clinic, a program of the Washington Young Lawyers Division (WYLD) Public Service Committee, aims to provide basic estate-planning documents — wills, powers of attorney, and healthcare directives — for Washington first responders and their spouses/domestic partners at no cost. The clinic will be held on Saturday, September 12, at the Starbucks Support Center in downtown Seattle. To volunteer, contact Sarah Ondrak at sondraks@gmail.com. More information is available at www.wsba.org/lawyers/groups/wyld/frwc2009.htm.

Legal Foundation of Washington Notice of Public Meeting

The trustees of the Legal Foundation of Washington will meet on September 24, 2009, at the Legal Foundation of Washington offices in Seattle. The public may appear in order to comment on the Foundation’s activities between 9:00–9:30 a.m. This opportunity is made pursuant to Article I, Section 1.7 of the Bylaws of the Legal Foundation of Washington. For more information, contact Caitlin Davis Carlson, executive director, at 206-624-2536 or caitlindc@legalfoundation.org.

Change in Court Fees

Superior court fees. Effective July 1, 2009, Chapter 572, Laws of 2009 mandates the addition of a surcharge to many superior court filing fees in this state. RCW 36.18.020 is amended to add a $30 surcharge to most civil filing fees in Superior Court. RCW 36.18.018 is amended to add a $30 surcharge to the filing fee for appellate reviews brought pursuant to RAP 5.1(b). Most appeals from courts of limited jurisdiction will be subject to a surcharge of $20, in addition to the prescribed filing fee. The surcharges expire on July 1, 2011. This legislation was passed to produce revenue for the state judicial budget, including civil legal aid, public defense, and the Administrative Office of the Courts.

Superior court clerk fees. Effective July 26, 2009, Chapter 417, Laws of 2009 incorporates further revisions to fee schedules in superior court. Section 2 revises RCW 36.18.016 (11) by increasing the hourly rate clerks may charge for services to $30 per hour. This law re-codifies other fees and clarifies that fees pertain to relevant filings whether filed in hard copy (paper) or electronically.

District court clerk fees. Effective July 26, 2009, Chapter 372, Laws of 2009 revises the fee schedule in district court. Fee increases include charges for certified copies, fees for services such as ex parte orders and historical searches, and fees for receiving faxed documents, in addition to increased filing fees.

Free Podcast for Those Seeking Employment

The American Law Institute-American Bar Association (ALI-ABA) and NALP — The Association for Legal Career Professionals® have co-produced a new video podcast entitled “Managing a Legal Career Transition in Tough Times,” available for free at www.ali-aba.org/career. The 75-minute presentation features Marcia Pennington Shannon and Susan G. Manch, of Shannon and Manch LLP, who generously donated their time and talent to this public-service video for lawyers and third-year law students who are currently seeking employment. The presentation can be viewed directly from the website or can be downloaded as a Windows Media File or an MP3 audio file. A free PDF of materials that complement the video can also be obtained by filling out a quick and simple form at www.ali-aba.org/career.

As an additional resource, ALI-ABA provides full and partial scholarships to unemployed lawyers; lawyers licensed less than five years; lawyers working for government agencies, nonprofit organizations, or legal service organizations; judges; judicial law clerks; law professors, students, and librarians; and lawyers in private practice. To learn more, contact Caitlin Davis Carlson, executive director, at 206-624-2536 or caitlindc@legalfoundation.org.

“Foundations of American Democracy” Civics Pamphlet Available

The WSBA offers a pamphlet for the public called “Foundations of American Democracy” that describes the basics of American government: the rule of law, the separation of powers, checks and balances, and a fair and impartial judiciary. It also includes a short quiz and a list of useful websites. Lawyers and judges are encouraged to bring the pamphlet with them when they speak to students or the public in schools, courtrooms, and the community. Teachers may also request the pamphlet for classroom use. The WSBA can provide reasonable numbers of copies at no
charge, or the pamphlet may be downloaded from the WSBA website at www.wsba.org/foad.htm. Requests for copies should be directed to Pam Inglesby, WSBA public legal education manager, at pam@wsba.org.

Monthly Lawyer Discussion Roundtable
Get ideas and support from new colleagues and WSBA Lawyer Services Department staff who will answer questions on ethics, practice, and substantive law. The discussion group meets the second Tuesday of the month from noon to 1:30 p.m. August 11 is the next scheduled meeting date. Walk-ins are welcome! The roundtable is held at the WSBA office.

Casemaker Online Research
Casemaker is a powerful online research library provided free to WSBA members. To access Casemaker, go to the WSBA website at www.wsba.org and click on the Casemaker logo on the right sidebar. Click on the Casemaker button to begin. For help using Casemaker, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, juliesa@wsba.org, or call the WSBA Service Center at 800-443-WSBA (9722) or 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

Search WSBA Ethics Opinions Online
Formal and informal WSBA ethics opinions are available online at http://pro.wsba.org/io/search.asp, or from a link on the WSBA homepage, www.wsba.org. You can search opinions by number, year issued, ethical rule, subject matter, or keyword. Ethics opinions are issued by the WSBA to assist members in interpreting their ethical obligations in specific circumstances. The opinions are the result of study and analysis in response to requests from WSBA members. For assistance, call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

LOMAP Rate Changes
The Board of Governors has approved changes to the billing rates for law office management consultation for the first time in 11 years. Effective August 1, 2009, the schedule is:
• Up to two years from date of your WSBA admittance: $40 per hour
• More than two years from date of your WSBA admittance: $95 per hour
• Services to firms of six or more lawyers: $150 per hour
• Software demonstrations/support in the LOMAP Computer Lab: $20 per hour
• Free estimates of total fees are gladly provided
• Assistance by e-mail or telephone remains free of charge
See www.lomap.org for many free downloads and links to resources.

LOMAP and Ethics Traveling Seminars
Join us in Friday Harbor on August 19; Vancouver, Washington, on August 25; Olympia on August 26; Pullman on September 22; Walla Walla on September 23; or Richland on September 24. The cost is $99. Four credits are available, including some ethics credits. To register, call or e-mail Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

LAP Solution of the Month:
Addicted?
We became addicted when we repeatedly engage in a behavior to obtain escape, relief, or pleasure, even when the behavior itself becomes counter-productive. We can become addicted to just about anything: work, sex, alcohol, drugs, pornography, gambling, even relationships. If addiction is getting in your way, call the Lawyers Assistance Program at 206-727-8268, or 800-945-9722, ext. 8268.

Computer Clinic
The WSBA offers a hands-on computer clinic for members. Learn what programs such as Outlook, PowerPoint, Excel, Word, and Adobe Acrobat can do for a lawyer. Are you a total beginner? No problem. The clinic teaches helpful tips you can use immediately. Computers are provided, and seating is limited to 15 members. There is no charge, and no CLE credits are offered. The August 10 clinic will be held from 10:00 a.m. to noon at the WSBA office and will focus on using Adobe Acrobat Professional Versions 8 and 9 (not the Reader). The August 13 clinic will meet from 1:00 to 4:00 p.m. and will focus on using Word. For more information or to RSVP, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

Monthly Job Search Session
Join us August 12 to hear guest speaker David Fuller, who will address blogging and branding your identity through your website. These meetings take place the second Wednesday of each month from noon to 1:30 p.m. at the WSBA sixth floor conference center. Come as you are — no charge, or the pamphlet may be downloaded from the WSBA website at www.wsba.org/foad.htm. Requests for copies should be directed to Pam Inglesby, WSBA public legal education manager, at pam@wsba.org.

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Weekly Job Finders Strategy and Support Group
Unemployed? Discouraged — or trying not to be? We’re taking names of lawyers interested in being on the wait list for a weekly meeting of lawyers looking for work. The focus of this group is on setting goals, accountability, and maintaining motivation. This is an opportunity to trade job-search advice and offer each other support in this difficult process. The group meets on Monday or Tuesday mornings from 10:30 to 11:45. Contact Dan Crystal, Psy.D., at 206-727-8267, 800-945-9722, ext. 8267, or danc@wsba.org if you are interested in this group or in other groups forming for senior lawyers and lawyers in transition.

Facing an Ethical Dilemma?
Members facing ethical dilemmas can talk with WSBA’s professional responsibility counsel for informal guidance on analyzing a situation involving their own prospective ethical conduct under the RPCs. All calls are confidential. Any advice given is intended for the education of the inquirer and does not represent an official position of the WSBA. Every effort is made to return calls within two business days. Call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

Speakers Available
The WSBA Lawyers Assistance Program offers speakers for engagements at county, minority, and specialty bar associations, and other law-related organizations. Topics include stress management, life/work balance, and recognizing and handling problem-personality clients. Contact Barbara Harper at 206-727-8265, 800-945-9722, ext. 8265, or barbarah@wsba.org.

Assistance for Law Students
The Lawyers Assistance Program offers counseling to third-year law students attending Washington schools. Sessions are held in person or by phone. Treatment is confidential and available for depression, addiction, family and relationship issues, health problems, and emotional distress. A sliding-fee scale is offered ranging from $0–30, depending on ability to pay. Call 206-727-8268, 800-945-9722, ext. 8268, or visit www.wsba.org/lawyers/services/lap.htm.

Help for Judges
The WSBA Judges Assistance Services Program provides confidential assistance to judges experiencing personal or professional difficulties. Telephone or in-person sessions are available on a sliding-scale basis. For more information, call the program coordinator at 206-727-8268 or 800-945-9722, ext. 8268.

Learn More About Case-Management Software
The WSBA Law Office Management Assistance Program (LOMAP) maintains a computer for members to review software tools designed to maximize office efficiency. The LOMAP staff is available to provide materials, answer questions, and make recommendations. To make an appointment, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

Upcoming Board of Governors Meetings
September 24–25, Seattle • October 23–24, Pullman • December 4–5, Tacoma
With the exception of the executive session, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Contact Margaret Shane at 206-727-8244, 800-945-9722, ext. 8244, or margarets@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/info/bog/schedule.htm.

Usury Rate
The average coupon equivalent yield from the first auction of 26-week treasury bills in June 2009 was 0.355 percent. Therefore, the maximum allowable usury rate for August is 12 percent. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.
These notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 3.5(d) of the Washington State Supreme Court Rules for Enforcement of Lawyer Conduct, and pursuant to the February 18, 1995, policy statement of the WSBA Board of Governors. For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board at 206-733-5926, leaving the case name, and your name and address.

NOTE: Approximately 30,000 persons are eligible to practice law in Washington state. Some of them share the same or similar names. Bar News strives to include a clarification whenever an attorney listed in the Disciplinary Notices has the same name as another WSBA member; however, all discipline reports should be read carefully for names, cities, and bar numbers.

Resignation in lieu of disbarment

Dennis G. Ott (WSBA No. 12172, admitted 1981), of Kelso, resigned in lieu of disbarment, effective June 5, 2009. This resignation was based on his conduct in at least nine different matters involving failure to act with reasonable diligence, failure to communicate, charging unreasonable fees, failure to protect clients' interests, making false statements, destroying documents having potential evidentiary value, violating the rules of professional conduct, engaging in conduct prejudicial to the administration of justice, and violating duties imposed by the Rules for Enforcement of Lawyer Conduct.

Beginning as early as 1996 and continuing into 2007, Mr. Ott engaged in the following conduct:

- Mr. Ott directed his legal assistant to prepare a false declaration, and Mr. Ott drafted and filed a memorandum of law, stating that his office had never received a faxed document from opposing counsel in a support modification matter. His office had, in fact, received the faxed document.
- In a second matter, Mr. Ott instructed his legal assistant to shred a fax from opposing counsel after telling counsel that he had not received the fax.
- Mr. Ott billed a client for the preparation of a letter that did not exist. After the client questioned the existence of the letter and filed a grievance, Mr. Ott provided the Bar Association with a copy of a backdated letter and declaration that he directed his staff to prepare to conceal his wrongdoing.
- After failing to keep several appointments with a client in a probate matter, Mr. Ott avoided talking to the client by hiding in his office or skipping out the back door and instructed his staff to lie about his availability.
- In two family law matters, Mr. Ott failed to act diligently by doing no work on either matter. One of the two clients called Mr. Ott's office on several occasions, but he refused to take or return the client's phone calls.
- In a claim against an estate, Mr. Ott failed to communicate to his clients that a scheduled meeting was to be a settlement conference with opposing counsel. Based on Mr. Ott's advice, the clients decided to wait for a larger settlement offer. Later, during a Bar Association investigation, Mr. Ott denied that he suggested to the clients that they wait and instead stated that it was the clients who told him to “put things on hold.” To support his position, Mr. Ott provided the Bar Association with a letter he fabricated and backdated.
- In the previous matter, Mr. Ott's failure to act diligently resulted in the dismissal of the clients' case. Mr. Ott neither informed the clients about the dismissal nor returned the phone messages left by the clients requesting case status updates. When Mr. Ott returned one of the clients' many messages, the clients requested that Mr. Ott return their client file. Mr. Ott failed to do so.
- In response to a Bar Association grievance filed by the clients in the previous matter, Mr. Ott provided the Bar Association with a letter he fabricated, purportedly informing the clients that the matter would be dismissed if no further action was taken.
- Mr. Ott failed to act diligently in a probate and guardianship matter involving three disabled adults. Over the course of two years, Mr. Ott failed to return the phone calls of the individual who was named in the will as the personal representative to decedent's estate and as the temporary guardian of the disabled adults.
- In a probate matter, Mr. Ott did not follow the clear directives of the decedent's will in the preparation of a discretionary trust for decedent's granddaughter.
- On several occasions, Mr. Ott had his legal assistants notarize documents when they did not witness the party signing the documents.

Mr. Ott's conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; former RPC 1.4, requiring a lawyer to keep a client reasonably informed of the status of a matter, promptly comply with reasonable requests for information, and explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation; former RPC 1.5(a), requiring a lawyer's fee to be reasonable; RPC 1.16(d), requiring a lawyer, upon termination of representation, to take steps to the extent reasonably practicable to protect a client's interests, such as surrendering papers and property to which the client is entitled; former RPC 3.3(a), prohibiting a lawyer from making a false statement of material fact or law to a tribunal; former RPC 3.4(a), prohibiting a lawyer from unlawfully obstructing another party's access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value; RPC 3.4(b), prohibiting a lawyer from falsifying evidence; RPC 5.3(c), with respect to a non-lawyer employed or retained by or associated with a lawyer, a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; RPC 8.1, prohibiting a lawyer in connection with a disciplinary matter from knowingly making a false statement of material fact, failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in a matter, or knowingly failing to respond to a lawful demand for information from a disciplinary authority; RPC 8.4(a), prohibiting a lawyer from violating or attempting to violate the Rules of Professional Conduct; RPC 8.4(b), prohibiting a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects (here, by violating RCW 9A.72.040 (false swearing)); RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; and RPC 8.4(l), prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter.

Sachia Stonefeld Powell represented the Bar Association, Joseph J. Ganz represented Mr. Ott. Peter A. Matty was the hearing officer.

Suspended

John G. Gissberg (WSBA No. 19677, admitted 1990), of Seattle, was suspended for nine months, effective April 30, 2009, by order of the Washington State Supreme Court following a default hearing. This discipline is based on conduct involving failure to adequately safeguard client property in his possession, trust-account irregularities, and non-cooperation in a Bar Association investigation.

In 2005, the Bar Association investigated an overdraft on Mr. Gissberg’s trust account. In that investigation, Mr. Gissberg failed to respond to two letters from the Association requesting his response. Consequently, the Association was required to take Mr. Gissberg’s
In 2007, Mr. Gissberg represented clients B and C. Mr. Gissberg held the funds given to him for legal services by clients B and C in his trust account. In April 2007, Mr. Gissberg removed the money from trust because he believed he had earned the fees. Mr. Gissberg did not provide clients B or C with a bill showing that he had earned the money they paid him prior to removing the money from the trust account.

Mr. Gissberg’s conduct violated former RPC 1.14 and current RPC 1.15A and RPC 1.15B, requiring all funds of clients paid to a lawyer or law firm to be deposited into one or more identifiable interest-bearing trust accounts maintained as set for in the rules and that no funds belonging to the lawyer or law firm be deposited therein; and RPC 8.4(l)}, prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules of Lawyer Conduct in connection with a disciplinary matter (here, ELC 5.3(f) and ELC 14.3).

Sachia Stonefeld Powell represented the Bar Association. Mr. Gissberg represented himself. William S. Bailey was the hearing officer.

**Suspended**

Jerry J. Yu (WSBA No. 29164, admitted 1999), of San Jose, California, was suspended for 90 days, effective May 26, 2009, by order of the Washington State Supreme Court following the approval of a stipulation. This discipline is based on conduct involving the commission of a criminal act.

From 2004 onwards, Mr. Yu has worked as an accountant at an accounting firm in California. Mr. Yu is not licensed to practice law in California and has never practiced law in California. Around December 2004, Mr. Yu became involved in an extra-marital affair with a married woman in California. In May 2005, Mr. Yu sent an e-mail with sexual content to an e-mail address belonging to the woman’s 15-year-old daughter. The woman reported the e-mail to California authorities. Her daughter did not receive the e-mail. In May 2005, Mr. Yu was arrested and charged with violation of California Penal Code Section 664/288.2B (attempted distribution via electronic mail of harmful material to a minor). On February 3, 2006, Mr. Yu pled nolo contendere to violating California Penal Code Section 664/288.2B and was sentenced to 90 days in custody with credit for two days he had already served. Mr. Yu was also granted the opportunity to serve his time through the sheriff’s work-release program and was given five years’ probation. At his sentencing hearing, the court ruled that if Mr. Yu complied with the conditions of his probation, he could bring a motion to reduce the conviction from a felony to a misdemeanor. Mr. Yu self-reported the conviction to the Association shortly after he was sentenced and stipulated to interim suspension from the practice of law in Washington state, pursuant to ELC 7.4. On October 12, 2006, the Washington State Supreme Court ordered Mr. Yu suspended pending the outcome of this disciplinary matter. On October 10, 2008, Mr. Yu completed the conditions of his probation and filed a motion to reduce his conviction to a misdemeanor under section 17b and section 1203.4 of the California Penal Code. The court granted his motion, reduced his conviction to a misdemeanor, and terminated his probation.

Mr. Yu’s conduct violated Washington's RPC 8.4(b), prohibiting a lawyer from committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.

Fuchsia Dulan represented the Bar Association. Mr. Yu represented himself.

**Admonished**

John A. Bardelli (WSBA No. 5498, admitted 1974), of Spokane, was admonished on March 20, 2009, following an order by a review committee of the Disciplinary Board. This discipline is based on conduct involving failure to timely surrender clients’ papers upon termination of representation and failure to promptly provide clients with a written accounting of their settlement funds upon request.

Mr. Bardelli represented clients who received compensation from the Crime Victims Compensation Program (Program). In December 2000, the case settled and Mr. Bardelli withheld $48,406.69 to pay the Program’s lien. In January or February 2006, Mr. Bardelli asked his bookkeeper to pay the lien. In October 2006, after a call from the clients, Mr. Bardelli discovered that the lien had not been paid. He paid the lien and disbursed the remaining funds to his clients.

The clients retained new counsel to investigate why the lien had not been paid in 2001. New counsel asked Mr. Bardelli to provide copies of documents and records from his clients’ file. Mr. Bardelli declined to provide copies. He indicated that new counsel could travel to his office to view the clients’ file and pay for copies. Mr. Bardelli did not have a fee agreement permitting him to charge the clients for copies of their file. New counsel asked Mr. Bardelli to provide an accounting of the clients’ settlement funds from 2001 through 2006. Mr. Bardelli did not provide the accounting.

Mr. Bardelli’s conduct violated RPC 1.16(d), requiring a lawyer, upon termination of representation, to take steps to the extent reasonably practicable to protect a client’s interests, such as surrendering papers and property to which the client is entitled; and RPC 1.15A(e), requiring a lawyer to promptly provide a written accounting to a client or third person after distribution of property or upon request.

Sachia Stonefeld Powell represented the Bar Association. Mr. Bardelli represented himself.
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**Emmelyn Hart-Biberfeld**, Former Law Clerk, Washington State Supreme Court; Invited Member, The Order of Barristers

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Please check with providers to verify approved CLE credits. To announce a seminar, please send information to:

WSBA Bar News CLE Calendar
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E-mail: comm@wsba.org

Information must be received by the first day of the month for placement in the following month's calendar.

Administrative Law

Public Records Act Deskbook
September 17 — Seattle. 6 CLE credits, including 1 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Animal Law

Dog Bite Institute
September 23 — Seattle. 8.25 CLE credits, including .75 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Business Law

Avoiding the High Cost of Franchising
August 4 — Webinar. 1 CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Business Law Institute: Drafting Key Documents
September 25 — Seattle/live webcast. 6 CLE credits, including 1 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Criminal Law

16th Annual Criminal Justice Institute
September 10–11 — Seattle. 15.25 CLE credits, including 1 ethics pending. By the WSBA Criminal Law Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Elder Law

Fall Elder Law Conference
September 18 — Seattle. 6.5 CLE credits, including .5 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Ethics

Ethics, Professionalism, and Civility
September 15 — Seattle/live webcast. 6.0 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Lincoln on Professionalism
September 22 — Seattle. 2.75 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Family Law and Ethics
September 22 — Seattle. 3.75 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Family Law

Final Friday Brown-Bag Lunch Series: Valuation and Division of Retirement Assets
August 28 — Tele-CLE. 1 CLE credit pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Family Law and Ethics
September 22 — Seattle. 3.75 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

General

Lincoln on Professionalism
September 22 — Seattle. 2.75 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Introducing WSAJ’s New Employment Law Handbook

Health Law

Understanding Medicaid and Medicare Rules
August 25 — Webinar. 1 CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Indian Law

5th Annual Emerging Northwest Tribal Economies Conference

22nd Annual University of Washington Indian Law Symposium

Intellectual Property

Intellectual Property for the Non-IP Attorney
September 24 — Seattle/live webcast. 6.5 CLE credits pending. By the WSBA Intellectual Property Law Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Labor and Employment Law

Employment Law Institute
August 5 — Seattle. 6 CLE credits, including .75 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

12th Annual Labor and Employment Law Conference

Law Practice Management

Records Management
August 18 — Webinar. 1 CLE credit. By
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**Monthly Job Group**
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Final Friday Brown-Bag Lunch Series: Hot Topics in Law Practice Management
September 25 — Tele-CLE. 1 CLE credit pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Litigation**
Electronic Discovery and Computer Forensics
August 11 — Webinar. 1 CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Litigation Boot Camp
August 20 — Vancouver. 6 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Advanced Negotiation Strategies for Lawyers featuring Martin E. Latz
September 16 — Seattle. 6 CLE credits, including .75 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

**Mediation**
Two-Day Advanced Mediator Training Program
September 16–17 — Seattle. 15 CLE credits, including 1.5 ethics. By Alhadeff & Forbes Mediation Services; 206-281-9950; www.mediationservices.net

Real Property, Probate, and Trust
Probate Boot Camp
August 6 — Vancouver. 6 CLE credits, including .75 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Water Law
September 22 — Tele-CLE. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Taxation Law
Updates on Tax Laws and Regulations Impacting Trusts and Estates
August 27 — Seattle. 3 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Tele-CLEs/Webinars/Webcasts
Avoiding the High Cost of Franchising
August 4 — Webinar. 1 CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Electronic Discovery and Computer Forensics
August 11 — Webinar. 1 CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Records Management
August 18 — Webinar. 1 CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Understanding Medicaid and Medicare Rules
August 25 — Webinar. 1 CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Final Friday Brown-Bag Lunch Series: Valuation and Division of Retirement Assets
August 28 — Tele-CLE. 1 CLE credit pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Ethics, Professionalism, and Civility
September 15 — Seattle/live webcast. 6.0 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Water Law
September 22 — Tele-CLE. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

Intellectual Property for the Non-IP Attorney
September 24 — Seattle/live webcast. 6.5 CLE credits pending. By the WSBA Intellectual Property Law Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbalap.org.

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Ahlers & Cressman PLLC, an 11-lawyer, construction law firm in downtown Seattle, is seeking an experienced construction law attorney with at least three years’ experience to perform construction contract review and drafting, litigation, arbitration, and dispute resolution. Ahlers & Cressman PLLC is a group of motivated, hard-working attorneys. Its lawyers believe that high-quality work result in satisfied clients and a prosperous firm. The firm is closely knit with a strong sense of camaraderie. Compensation is negotiable based upon qualifications and experience. All inquiries will remain confidential. If interested, please send résumé and cover letter to: Chris Achman, Administrator, Ahlers & Cressman PLLC, 999 Third Ave., Ste. 3100, Seattle, WA 98104–4088. Fax: 206-287-9902; website: www.ac-lawyers.com; e-mail: cachman@ac-lawyers.com.

Alternative resolution administrator: The Washington State Liquor Control Board is seeking an ethical, strategic, and tactful legal professional for the position of alternative resolution administrator (hearing examiner 2). This position independently manages and conducts the Alternative Dispute Resolutions process for the Enforcement and Education Division. Please visit our website at www.liq.wa.gov to learn more about this position. For more information, please contact us at WSLCBjobs@liq.wa.gov.

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The Department of Financial Institutions, Division of Securities, is currently recruiting for two financial legal examiner 1 positions. These positions are based out of Tumwater, Washington, but may require travel, evening or weekend work, and working flexible hours. Minimum qualifications for these positions include membership in the Washington State Bar Association. These entry-level positions perform professional legal work in the Department of Financial Institutions under the laws regulating financial institutions, financial services companies, and issuers. Responsibilities include investigation and preparation of administrative enforcement actions and the preparation of referrals for civil or criminal actions. To learn more about these positions and to apply, please visit http://dfi.wa.gov/about/careerlisting.htm. For questions about these positions, please contact DFI’s recruitment team at RecruitmentTeam@dfi.wa.gov. DFI is an Equal Opportunity Employer.

Associate — complex commercial litigation. Danielson Harrigan Levy & Tolleson, AV-rated, 13-lawyer, complex commercial litigation firm seeks associate with a minimum of four years of commercial litigation experience. This is an excellent opportunity for a motivated individual who desires a challenging and rewarding practice. Candidates should possess excellent interpersonal, writing, and research skills, and strong academic credentials. Send résumé to Randall Thomsen, 999 Third Ave., Ste. 4400, Seattle, WA 98104. All inquiries kept confidential.


Résumé/career consultations for Washington attorneys: In response to recent demand, Lynda Jonas, Esq., owner of Kirkland-based Legal Ease L.L.C., Washington’s Attorney Placement Specialists since 1996, is now offering limited time each week to attorneys seeking résumé and/or career advice. Her counsel is focused strictly within our niche, which is the local market and attorneys only. Ms. Jonas has unparalleled experience working with and placing attorneys in Washington’s best law firms and corporate legal departments. It is her opinion that more than 75 percent of attorney résumés are in immediate, obvious need of improvement. Often these are quick, but major, fixes. Ms. Jonas is also uniquely qualified to offer advice and support on best steps to achieve your individual attorney career goals here in Washington state. A 30-minute résumé/career consultation is designed to cost-effectively and efficiently provide you a jump-up in this competitive market. Ms. Jonas remains personally committed to truly helping attorneys achieve their individual career goals and land the position they seek most (assuming, of course, they are qualified). All 30-minute sessions are $65 and are conveniently offered by phone. Please contact Solea Kennedy at skennedy@LEGALLEASE.com to schedule.

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North Seattle offices: Congenial immigration law firm with one ($600) or two ($1,100) office spaces available for sublease. Rent includes utilities, restroom, kitchenette, conference, lobby. Additional features negotiable. Contact Ron at 206-262-0561, ron@usborderlaw.com.


Laurelhurst (Seattle), 2,000 sq. ft. professional office suite in premiere NE 45th location. Beautiful tenant improvements. Very favorable lease rate of $18.57/sq. ft. available for up to nine years. Six offices, library, conference room, reception area, and clerical support area. Great parking. Call 206-523-6337 for more information.

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Pioneer Square/Maynard Building (Seattle): Congenial offices available for up to four attorneys. Two at $600 or two at $1,000/month. Includes receptionist, conference room, library, DSL, fax, copier with e-mail scanner, kitchenette. Steve, 206-447-1560.


Rent this office now — only $1,000 gives you a 14’ 8” x 11’ 9” office (with a view of downtown Seattle facing east), reception, use of law library, two conference rooms (via schedule), kitchen, copy room, etc. Small additional fees provide Internet, unlimited faxing, high-speed copier/scanner, and monthly parking. Perfect office for any solo practitioner attorney or other like field. Contact Stacy at 206-621-0600 to view, and you can move in immediately!

Kent office space: Elegant, fully furnished office(s) in newly constructed small law building. All amenities included. Possible referrals. Gated entrance with own parking lot. Highly visible location close to RJC. 206-227-8831.

Pioneer Square (Seattle) firm offering sublease for two professional offices and one staff office. For details, see Craigslist ad titled “3 Offices Available (Pioneer Square).” Contact Griff Flaherty at 206-682-2616.

Turn-key — new offices available for immediate occupancy and use in downtown Seattle, expansive view from 47th floor of the Columbia Center. Office facilities included in rent (reception, kitchen, and conference rooms). Other administrative support available if needed. DSL/VPN access, collegial environment. Please call Jeannie, Badgley Mullins Law Group, 206-621-6566.

West Seattle space: perfect for solo practitioner — you have a choice of two class A offices in shared office suite with other professionals to network with. 284 and 265 square feet, respectively, with lots of natural light from large wall of windows. Secured parking, conference room with smart board, kitchenette, and rooftop deck available. $1,200 or $1,125 with phone and Internet included, respectively. Available immediately. Contact Sean at 206-227-1224 or sean@catalystcpafirm.com.

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Rates: WSBA members: $40/first 25 words; $0.50 each additional word. Nonmembers: $50/first 25 words; $1 each additional word. Blind-box number service: $12 (responses will be forwarded). Advance payment required; we regret that we are unable to bill for classified ads. Payment may be made by check (payable to WSBA), MasterCard, or Visa.

Deadline: Text and payment must be received (not postmarked) by the first day of each month for the issue following, e.g., September 1 for the October issue. No cancellations after the deadline.

Mail to: WSBA Bar News Classifieds, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539.

Qualifying experience for positions available: State and federal law allow minimum, but prohibit maximum, qualifying experience. No ranges (e.g., “5-10 years”). If you have questions, please call 206-727-8213 or e-mail classifieds@wsba.org.

Will Search

Will search for James Harvey Navarre within King or Grant counties, Washington, who died June 3, 2009. Please e-mail classifieds@wsba.org, with “Reference Code #717” in the subject line.


Will search for Glenn Allen Hoffman, age 54, DOB 7-18-54, current resident of Port Townsend area. Contact Barbara Hoffman 360-461-4149.
Letters from the Editor

The bar association is an antic boar oasis and why not? The disciplinary chief is a danged louse, the executive director is a walled autopilot and the general counsel is a treble downer. While the past president abstains neatly, the current president is a major annals honk. In fairness, though, the president-elect has salad man vigour, for whatever that’s worth.

These are not my opinions, nor accurate descriptions of the people or organization involved. These are the results of my stumbling onto the Wordsmith.org Internet Anagram Server, a marvelous contraption that disassembles and randomly reassembles words and phrases into other words and phrases using exactly the same letters.

In this sense only is Douglas Ende, director of the Office of Disciplinary Counsel, a danged louse, which I suspect is a positively benign label compared with others he has heard, considering his job. He also is a doused angel, which is better or worse depending on what he is doused with, I suppose. His name also rearranges to danged ole us, which is how we all feel when reviewing the ever-growing RPCs, and unsaddle ego, which is probably good general advice for everyone.

Besides walled autopilot (exactly how I would feel if I had to run an organization of 33,000 lawyers), WSBA Executive Director Paula Littlewood rearranges to palate would toil (appropriate considering the amount of both talking and rubber-chicken consuming she must do in the course of her employment), ideal outlaw plot, altitude law pool, and law toilet upload. Again, these are nonsense phrases generated by some computer, but the last three probably capture the atmosphere of office meetings at any law-related organization.

President Mark Johnson’s name has too few vowels to make many anagrams, even when adding his middle name of Alan.

Besides major annals honk, though, the computer came up with lank oarsman John (which sounds like a Herman Melville character) and salmon jar on Hank, words that might be found in an industrial accident report from a cannery. By contrast, the anagram generator feasted on the names of our last and next WSBA presidents. Immediate Past President Stanley Bastian is nasality absent (true, he has a fine speaking voice), banality as sent (which should be a cautionary flag you could add when forwarding trite e-mail), abate salty inns (sounds more like a job for the health department or the vice squad rather than WSBA), and analyse ant bits, which is what British entomologists do.

President-Elect Salvador Mungia’s name produced so many anagrams I barely knew where to start. They ranged from the bold (marauding salvo), to the culinary (the aforementioned salad man vigour, avid granola sum, salami van gourd, guava dram loins, and saliva gourmand — eww), to the romantic (armada loving us, gala divas mourn), to the philosophical (avian dogma slur), to the barely safe-for-work (amoral visa dung) and the not-safe-for-work (which you’ll have to look up for yourself).

As noted, General Counsel Robert Welden rearranges as treble downer, but that makes him treble wonder as well, which might explain how he emerged as a bold tree wren after having been born wetted. Paradoxically, he maintains a low beer trend while at the same time being brew redolent, perhaps from sitting too close to those of us with the higher beer trends.

WSBA CLE Director Mark Sideman is an adventurer in real life. Whether he is a madman skier, as the anagram generator suggests, I don’t know. But given his enthusiasm for scuba diving, mermaid sank, misnamed ark, me sink drama and drain me mask seem entirely appropriate. I don’t know whether Mark is a dessert aficionado, but if so, he might have a stash of mad ramkins in the kitchen. In any case, I assume that on casual Fridays you would find him comfortably attired in his karma denims.

The anagram generator rearranges Gail Stone, director of Justice and Diversity Initiatives, to alien togs, possibly because of her slogan tie and toga (actually, it was toga liens, which are presumably what costume shops file when a customer fails to return a rental outfit after a Roman-themed party). She also eats lingo, but you should take that with a grain of salt because we all know tangos tie. By the way, if you have something you need to jam celery on, or if you would simply like to enjoy calmer, see Jean McElroy, director of Regulatory Services.

This column was brought to you by Michael Heatherly, aka him really cheetah (hey, I was pretty fast in eighth-grade track), hairy hell machete, healthy camel hire, mythical hare heel (similar to a lucky rabbit’s foot?) and hi lachrymal tee he (meaning this has made you laugh so hard it brought tears to your eyes, right?).
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