SELECTING EXPERT WITNESSES

County Budgets and the Crisis in Our Courts

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Courts and Bar not pro se

The authors failed to or overlooked the fact that pro se litigants are rarely if ever compensated for the time they spent on a winning claim, unlike Bar-licensed attorneys who reap hundreds of dollars an hour in litigation fees and penalties (“The Pro Se Dilemma: Washington Courts and Vexatious Pro Se Litigation — January 2009 Bar News). There is a cost for being Bar certified and it’s called the RPCs. It should be pointed out that many attorneys who violate the RPCs are never reported to the Bar and those that are often take years to be poorly investigated and disciplined after they have wrecked more havoc in the meanwhile.

I would have wished that they had emphasized that the Courts are for all citizens, not just attorneys and that the dizzying Court rules, outrageous filing fees, RCWs, and paperwork mazes are already in place to discourage citizens from seeking the right of redress. All of which should be simplified so that citizens do not have to be dependent upon a member of the Bar to represent themselves as per our Constitution provides.

They also fail to address the vexatious non-pro se litigation perpetrated by their fellow attorneys, which are by far the more prevalent abuse of the legal system we all subscribe to and is what probably is providing the authors employment.

Marshall Smith, Lt. Col., USMCR (Ret.)
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On November 18, important amendments to RPC 1.5 (Fees), and RPC 1.15A (Safeguarding Property), took effect. The amendments permit a lawyer to charge flat fees for specified work and to place those fees, upon receipt, into the lawyer’s operating account — assuming certain written disclosure requirements. See RPC 1.5 (f) (2). The new rules also permit a lawyer to charge a “retainer,” defined and described as “a fee that a client pays to a lawyer to be available to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed.” RPC 1.5 (f) (1). Amended RPC 1.15A clarifies the general rule that advance deposits towards fees and costs must be placed into trust and withdrawn only as the fees are earned or the costs incurred, absent a fee arrangement which qualifies as a retainer or flat fee. See RPC 1.15A (c) (2).

The word retainer has been used, interchangeably and incorrectly, with advance fee deposits, as well as many other fee structures, and the amendments seek to correct that misusage. The fee arrangement described in (f) (1) is an “availability,” “true,” “general,” or “classic” retainer. See new Comment 13 to RPC 1.5. An advance fee deposit is a payment towards future services and costs and unless the fee arrangement complies with the terms of 1.5 (f) (1) or (2), the fee is an advance fee deposit and must be held in the lawyer’s trust account until the fee is earned or the cost incurred. See new Comment 12 to RPC 1.5 and RPC 1.15A(c) (2). A retainer, which must be in writing and agreed to by the client, is permissible only if the true nature of the arrangement is to ensure the lawyer’s availability for a certain time or matter. It is not intended to be used as a substitute for what is, in reality, an advance fee deposit or to circumvent the trust account obligations for advance fee deposits.

New RPC 1.5 (f) (2) permits a lawyer to charge a “flat fee” for specified services and to place that fee into the lawyer’s operating account, if there is a written fee agreement containing certain disclosure requirements. See RPC 1.5(f) (2).

The new flat-fee rules require a written fee agreement which sets out the scope of the services, the amount of the fee and terms of payment, a statement that the fee becomes the lawyer’s property upon receipt, that the fee arrangement does not alter the client’s right to discharge the lawyer and that the client may be entitled to a refund if the agreed-upon services are not performed. See RPC 1.5 (f) (2). The lawyer is also required to take reasonable and prompt steps to resolve any disputes over the fee. See RPC 1.5(f) (3).

Although the use of retainers will probably be limited, the “piecework” portion of the rule changes, permitting a client to retain a lawyer for a specific piece of work at an agreed-upon price, should gain wide acceptance. That the use of retainers will probably be limited, the “piecework” portion of the rule changes, permitting a client to retain a lawyer for a specific piece of work at an agreed-upon price, should gain wide acceptance. Clients will have the security of a writing describing the material terms of the agreement and will know, up front, the cost of the legal services. Lawyers will know that they will be paid and will have immediate use of the money. The flat-fee rule should increase the availability of unbundled legal services, reduce the cost of some services, and help the financial viability of small firms and sole practitioners.

WSBA President Mark Johnson can be reached at 206-386-5566 or mark@johnsonflora.com.
Selecting Expert Witnesses: What You Should Know

by G. Kent Thorsted

The author’s quest for an expert on ramp design led him to Professor John Templer (pictured) and a successful personal-injury case.
any years ago, I repre-
sented an injured wom-
an who had suffered a
brain injury when she fell and struck her head while walking in a mall. She had been walking
down a relatively steep ramp inside the mall when she slipped on the linoleum floor and literally pitched for-
ward and landed on her head. She did not see anything on the floor, but she described the sensation as slipping on something
very slippery. She suffered a brain injury and lost her job. Her personal losses were
devastating.

I set out to understand why she had fallen. Prior to filing her case, I had gathered
some basic information about the design of the ramp from the building-permit docu-
ments. These documents showed that the ramp had been designed at the technical
limit of steepness under the building codes. It was apparent when I walked down
the slope myself that the ramp was uneven in grade. I had worked with concrete many
years earlier as a construction worker for my uncle, and I knew that the type of
cement installation had resulted in the unevenness of the slope of the ramp. This
meant to me that there was a good possibility that where my client fell, the ramp
violated the building code.

I next hired Conrad Kraft, Ph.D., an excellent human-factors expert, to help
me understand the factors involved in her fall. I had used Dr. Kraft several times
before in slip-and-fall cases. Dr. Kraft and I proceeded to the mall to view the area.
Dr. Kraft brought a couple of bubble levels with him, and using the bubble levels, he
found that the ramp area where my client had fallen did indeed exceed the code limit.
There were many questions at this point:
(1) What role, if any, did the excess ramp steepness play in her fall and injuries? (2)
What significance did the linoleum surface play in her fall and injuries? (3) Why did she
describe her shoe as slipping before she fell, even though she did not see any material
on the linoleum? (4) How did her slip cause her to be launched forward down the ramp?
Dr. Kraft told me that the answers to these questions were beyond his ken.

I decided then to look for the best ramp expert I could find. On a Saturday, I went
to the Architecture Department at the University of Washington. It housed its own
library. It took about an hour or so to get a lead on a ramp expert. After I had plowed
through several design books, I had a name: Professor John Templer. John Templer was
the Regents’ Professor of Architecture at Georgia Institute of Technology (Georgia
Tech). I followed through by reading all of
the research and book-chapter articles he
had written on stairway and ramp design.
I discovered that he had transformed the
little-studied stairway and ramp design into
a rigorous field of study. He developed labor-
atory tests to measure and induce falls on
stairs and ramps in a variety of conditions.
He traveled throughout the world to pho-
tograph and study stairways and ramps. He
did research on the safety records of various
stairway and ramp designs. In short, he was
the pioneer and world’s foremost expert in
stairway and ramp safety design. His book,
The Staircase,1 is the definitive work related
to stairway and ramp design. Professor Templer
is now happily retired.

I arranged for him to come to Seattle to
to see the ramp and perform measurements
and tests on it. Before he arrived, I found
out through discovery that the mall owners
had allowed the restaurant located close to where my client had fallen to use
the same linoleum-covered ramp to drag
their greasy plastic garbage bags up to a
garbage room that opened onto the ramp.
In fact, my client had fallen just outside
that garbage room. Professor Templer
viewed the site and performed several
tests, including measuring the coefficient
of friction of the linoleum-covered ramp using
the Brungraber device. Professor Templer
concluded that the coefficient of friction
on the linoleum was inadequate even for
a flat surface. For a ramp surface of that
steepness, the published research required
approximately 20 percent higher coefficient
of friction than the standard for flat sur-
faces. With the presence of grease mixed
into the waxed linoleum surface, as my
client would have encountered, Dr. Templer
concluded that the linoleum-covered ramp
would have been “very slippery” — just as
she described. Next, he could describe the
precise mechanism that led to her headfirst
dive onto the concrete ramp. He described
her slippage on the floor, initial attempt to
shift her weight backward, and, finally, how
she was propelled by gravity and the steep-
ness of the ramp onto the ramp headfirst.
It was something he had seen, tested, and
filmed in slow motion scores of times at
his laboratory. To Professor Templer, my
client’s brain injury was the kind of event
and injury he had devoted his professional
life to study and prevent.

Set against his example, I offer my advice
from lessons that I took from him and my
other experiences with experts.

1. “The pursuit of truth will set you free — even if you never catch up
with it.” — Clarence Darrow

Your proper mindset in this process should be
to pursue the truth and pursue it hard.
Finding an expert who will agree simply to bolster your client’s case is rarely a good
idea. Sooner or later, the truth usually prevails, and the only real question is whether
we want the truth at the beginning of our
case or at the end. This is where a Professor
Templer comes in. My goal was, and your
goal should be, to find the best expert you
can. The truest test of expertise, I believe, is
an expert who knows what the limit of his
knowledge is. For every issue related to the
ramp, Professor Templer could tell you pre-
cisely what he knew, what he did not know,
and what was possible to know at that time
concerning stairway and ramp design and
safety. This is a mean trick, since it requires
the expert to know literally everything about his area of expertise. Professor
Templer’s lifelong pursuit of the truth and
the scientific method he used enabled him
to be totally convincing about the opinions
he held. Just as he would not overstate his opinions, he would not be bullied from them. This was his life’s work. Where other experts had more knowledge on an issue, he encouraged me to retain them. Yes, he knew names. I ended up retaining the top expert on designing anti-grease flooring for restaurants such as McDonalds. That expert, too, was great.

2. First — be your own expert.
You should first acquire knowledge about the expert’s discipline, and you should do this when you are in the process of finding the best expert. Your understanding of an expert’s knowledge will be critical at every phase of your case, but no more so than in the beginning, when you are making critical decisions whether and how you will proceed. Before you select your experts, do some basic research yourself. Go online, go to the library, and call other attorneys — do not stop until you have developed some understanding of the issues involved. This will help direct you to a John Templer. It will also help you hire a John Templer to review your case.

The best expert’s motivation is not, foremost, money. Although many of the John Templers have extensive forensic experience, they are choosy about the cases they take. If you approach them in a manner that shows you have some understanding of their work and the issues in your case, your chances of getting them to review your case are much higher. I try, prior to contacting a top expert, to read several of that expert’s research papers and other available written materials, including those that deal with my specific issue. Usually, I have at that point a good idea about my issue and perhaps some idea about the expert personally. Then, when I contact that expert, I mention that my question is related to his research paper or article and I ask a specific question. This allows me to gauge how friendly and communicative he is and even measure his expertise. Quite often, they will take time to explain their research and answer my question. These are busy people, but they are passionate about their area of expertise. If the conversation goes more than about 15 minutes, I offer to pay them; mostly, they decline. If I need their further expertise, I offer to retain them and send them the file. However, after my initial call, I probably know their preliminary opinion and I know whether that person is the kind of expert that I want for my case.

3. The early bird catches the worm.
Think of your process of finding experts as a race. It is a race to hire the best expert you can find. Sometimes, there is one leading expert in the world or in the nation on the critical issue in the case. If the other side finds that expert first, you lose. My cousin, Jack Helgesen, an excellent trial attorney in Utah, once had the opposing expert witness drop out of the case on the spot when he learned who Jack’s expert was. Jack had retained the preeminent expert in the country on emergency medicine, Dr. Peter Rosen.

If you value your integrity and believe that it is essential at trial, having the best expert is paramount. A true expert is one who has become recognized by his peers as not only superbly knowledgeable, but also a person of integrity.

4. Be cheap.
Retaining the best expert is cost-effective. Surprisingly, their hourly rate is usually no higher than lesser experts charge. If you consider that their superior knowledge and experience allow them to get to the heart of any issue quickly, their total fees are usually much less than a lesser expert would charge. It is quite common for them to request your documents for review, first with a relatively small retainer before anything more official is agreed. This quick, relatively inexpensive method is their way of assuring that they will agree formally to appear in your case only if they can wholeheartedly support your client. I have had some top experts review my file and send it back with my retainer check. One expert explained to me when we were going through his findings over the telephone that he did not feel right about accepting money I had sent as a retainer. He explained that he would rather not be paid because my client had lost her husband in the incident. Professor Templer’s value to this case was far beyond his pay.

5. Money can’t buy love.
If you value your integrity and believe that it is essential at trial, having the best expert is paramount. A true expert is one who has become recognized by his peers as not only superbly knowledgeable, but also a person of integrity. Professor Templer approached his discipline as a person of science. He published his findings in research papers, books, and public presentations. Openness and transparency are hallmarks of both true experts and scientists. True experts usually are also involved and active within their own professional associations. Many of them rise to leadership positions within those associations. True experts find a calling to promote their discipline and associate with their peers. Integrity in their pursuit of knowledge and their association with others is an important natural part of what makes a true expert.

6. Scientists are cool.
The old and conventional wisdom is that scientists are disorganized, odd, forgetful, and, most of all, poor communicators. Conventional wisdom, like common sense, is mostly nonsense. The very best experts are uniformly good communicators. First, they are very smart. Second, they have a profound command of their field, which the lesser expert lacks. Put simply, lesser experts cannot explain in simple terms to others what they do not fully understand. Whether through teaching, research, writing, or oral presentations, true experts devote a significant part of their lives to sharing their expertise with others. This means that almost invariably, true experts are effective communicators.

7. Where to find them.
Look online. For medical experts, use PubMed (www.pubmedcentral.nih.gov) and do keyword searches on the medical issues you have developed. The abstracts that you can access on PubMed allow you to screen for relevant research, but you will probably have to go to a medical library to read the full research articles. If the articles fit, those articles normally give you contact information for the researchers. Contact them. If they are not interested or their expertise does not match, ask for a referral to some of their peers. Professional associations are also a fruitful source of names and contacts. Almost every field of expertise has one or more professional associations that serve and promote that field. Leaders of these associations are generally very helpful.

I am not suggesting by my choice of Professor Templer that only the top expert in the world or nation or region will do. The number of true experts suitable to you will vary enormously depending on the field of expertise and the requirements of your case.
2. Deaths and injuries from such falls still cause major suffering today. In the United States in 2006, there were 21,200 accidental deaths from falls, with a high percentage of those coming from stairway and ramp falls (National Safety Council 2006). Millions more were injured that year, including approximately two million people who were hospitalized as a result of injuries from falls.

8. **Humanity over science.**

Dr. Templer’s quest to learn about stairs and ramp safety and design started when his sister-in-law was injured in a fall at the Metropolitan Museum of Art in New York City. As he explains it, there was very little research or written material at that time concerning stairway and ramp design. This was despite the fact that, at that time, there were thousands of deaths each year and millions of injuries from stairway and ramp falls. Dr. Templer decided to do something about this. His research and work in creating and promoting the science of stairway and ramp design has saved thousands of lives and countless serious injuries. In addition, Professor Templer led Georgia Tech to create a doctoral program in architecture. His influence and leadership was instrumental in causing Georgia Tech to establish several interdisciplinary research centers in the Department of Architecture. Dr. Templer’s approach in promoting his students and architecture towards the rigor of science to solve human problems is the same approach he used to address the tragedy of stairway and ramp falls. This commitment to humanity is at the heart of all attributes of true experts.

**Yoda knows best**

As Yoda might say: “Truth you shall seek, true expert shall you find, success shall find you.” Thank you, Professor Templer, and all the other experts who hunger for the truth and have a passion for humanity.

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**NOTES**

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Peeves Beget Peeves

Irked readers respond with their own grammar gripes

by Robert C. Cumbow
ne good peeve deserves another. My last column, listing a few of my pet peeves in English usage, drew more mail than any other in the nearly six years I’ve been writing on language for the Bar News. It’s amazing — and encouraging — how many people out there are eager (not anxious) to adopt a curmudgeonly insistence upon clear and correct use of the English language, to reaffirm (or question) some of my peeves, and to share their own. Here’s a quick grab bag of some I found especially worth passing along:

Other People’s Peeves

“10 items or less”: Those signs in the quick-checkout line should say “10 items or fewer” — and I once saw one that actually got it right. When we are enumerating individual items, the opposite of “more” is “fewer”; only when we are speaking of indivisible substances or qualities is “less” the correct term.

“Myself”: This pronoun should be used more rarely than it is. Its correct uses are relatively few. “Speaking for myself” is a correct construction, as are “I built it myself” (reflexive) and “I myself built it” (intensive). Common misuses include substituting “myself” for “me” (“The firm threw a party for my wife and myself”) and substituting it for “I” (“My partner and myself want to welcome you”).

The objective “I”: Even worse than using “myself” for “me” is using “I” for “me.” It’s distressingly common to hear something like “He brought the most beautiful gift for my husband and I.” This happens when people don’t think about what they are saying. Whether you’ve learned the difference between the subjective (or nominative) and the objective (or accusative), you should certainly know that you’d never say “he brought a gift for I” or “he gave I a gift”—so why on earth would you use “my husband and I” instead of “my husband and me” in the same construction?

Advice v. advise: You rarely hear anyone saying “let me advice you.” But it’s very common to hear (and see in writing) “let me give you some advise.” The noun is “advice,” the verb “advise.”

Historic v. historical: I confess to some inconsistency in the way I use these words myself. The rule (which always confuses me) is that “historical” means simply “in the past,” while “historic” means “history-making” or “important.”

“Equally as”: You can say “She runs as fast as he does,” or “She and he run equally fast,” but to say “equally as” is redundant. Use “equally” or “as,” not both.

“The hoi polloi”: It’s common for Americans to lace their conversation with foreign words and phrases. Unfortunately, it’s equally common for them not to know the meaning of the terms they’re using. In trying to sound clever, we often risk sounding ignorant. The phrase “hoi polloi” is Greek for “the people” (often used condescendingly in the sense of “the masses” or “the great unwashed”). “Hoi” means “the” and “polloi” means “people.” So if you’re going to use the phrase “hoi polloi” correctly, don’t precede it with the word “the.” lest someone who knows a little Greek recognize that you do not.

“Your welcome”: The pronoun “your” is the possessive form of “you”; the contraction “you’re” is a short form of “you are.” An astonishing number of people today don’t seem to know the difference.

“Alot” and “alright”: Say “a lot,” not “alot.” “All right” is all right; “alright” is not. The misconception that “alright” is a word may be based on “already,” which is a word, but has an entirely different meaning from “all ready.” By contrast, “alright” is simply a misspelling of “all right.”

“Con’t”: The word “continued” is long and annoying, so we often like to abbreviate it. “Cont.” is one such abbreviation; another is “cont’d.” In “cont’d,” the apostrophe stands in for the string of letters we’ve removed to shorten the word. But in recent years the misconception “cont” has begun to appear — an attempt to abbreviate “continued” confounded by a faulty recollection of where the apostrophe goes and what its purpose is.

Adverbs: Hopefully, happily, and thankfully are frequently misused adverbs. An adverb describes the way in which something is done. “The child looked up hopefully” means that the child looked up with hope in his eyes or his heart, looked up in a hopeful manner, looked up in a way that suggested he was hoping for something. The person who says “Hopefully, next quarter will be better” misuses the adverb. He should say “I hope” or “let’s hope,” not “hopefully.” Use “hopefully,” “thankfully,” or “happily” to modify a verb when you want to indicate that the action was done with hope, gratitude, or joy, not as a substitute for “I hope,” “I’m thankful,” or “I’m happy to say…”

“Literally”: Another commonly misused adverb, “literally” is often used to mean exactly its opposite (which is “metaphorically”). The comment that “people were literally rolling in the aisles” is an incorrect use of the adverb, unless audience members actually rose from their seats and tumbled around in the aisles. Generally people misuse “literally” when they wish to intensify or emphasize a word or phrase that is in fact a metaphor or an exaggeration and not “literally” true at all. However, in the aftermath of Hurricane Katrina, I was pleased to see this rare example of a correct use of “literally” as an intensifier: “Social Security cards, driver’s licenses, credit cards, and other personal documents are literally floating around New Orleans, raising the prospect that some hurricane survivors could be victimized again, this time by identity thieves.”

“Grille”: A lot of new restaurants are calling themselves “grilles” these days, apparently in the belief that putting an “e” on the end of “grill” makes a diner into a fancy steakhouse. In fact, a grill is what you use to broil a steak; a grille is what’s on the front end of your car — though, to be fair, both terms ultimately come from the same root word meaning a criss-cross pattern.

Rules That Don’t Exist

Some of the peeve-sharing correspondence also revealed widespread belief in a few imagined rules of English that are not actually rules at all. Some of these are familiar with: the “rule” against ending a sentence with a preposition was never a rule of English grammar, though it was repeatedly by several generations of schoolmarm who wanted English to behave as if it were Latin, until people who cared about the language finally had enough. Today, it’s widely recognized that ending a sentence with a preposition does not violate any rule of English. Nevertheless, it’s good policy to scour your writing for sentences ending with prepositions, since that kind of construction often signals a sentence that might have been more effectively composed.

Similarly, there is nothing wrong in starting a sentence with a conjunction. But that’s also something you shouldn’t do lightly or
often. It can provide an effective transition to your next sentence. But too much of it can make your writing sound breathless. And fragmented.

There’s also nothing wrong with using “since” or “as” to mean “because.” The sentence “I missed the meeting as I was sick in bed” is grammatically sound. Using “since” or “as” for “because” is, however, conversational. In formal persuasive writing, “because” is preferred. Still, you don’t want to make your writing dull with repetitious “because” constructions, so “since” and “as” can sometimes be your friends.

Finally, there is no formal rule against using the passive voice. Most sentences that express an action whose subject and object are both known are more effective in the active voice, so it’s good policy to limit your use of the passive; too much of it makes your writing dull, wordy, and cumbersome. But the passive is not automatically wrong, and sometimes it’s necessary or simply more effective.

**Most Common Errors That Make Us Look/Sound Stupid**

The whole peeves exercise has heightened my awareness of the speaking and writing mannerisms that most often harm lawyers’ ability to communicate effectively, and sometimes make us look like windbags or just downright stupid. Here’s the current list of top offenders:

**Redundancy:** Don’t talk about “adding additional terms” to a contract, or refer to “a whole panoply,” or insist on “preventing harm before it occurs.” Read your own writing critically, and rewrite ruthlessly, before unleashing your words on an unsuspecting world.

**Misusing ordinary English words:** Lawyers and judges seem to feel that it is their privilege to twist ordinary English words to uses that are improper, misleading, or downright wrong. We use “negative” as a verb, instead of calling on “negate” or “deny” or “obviate.” We speak of a court’s having “implied” a meaning in a contract term when in fact what the court did was to infer such a meaning, or find that the parties to the contract had implied it. We think “anticipate” means the same thing as “expect,” and that the past tense of “plead” is spelled “pleaded.” We confuse “i.e. with “e.g.” We’ve forgotten what “enormity” means, turning it into just one more word for “something big” (of which we have too many already, even without such jocular coinages as “humongous” and “ginormous”). In a recent announcement of rulemaking, the Federal Communications Commission quoted the Washington Legal Foundation as having argued that a proposed rule would “so greatly interfere with [television] programming that it would be paramount to a governmental ban.” It wasn’t clear whether it was the FCC or the WLF or both that didn’t know the difference between “paramount” and “tantamount.”

**Misusing legal terminology:** If anything is less forgivable than what lawyers do to the ordinary English language, it’s our too-frequent failure to use correctly even the arcane, specialized terms of our own profession. We claim that an unreasonable offer is “blackmail” when the right word is “extortion.” We misuse the term “monopoly” as if it referred to any kind of exclusive right. We can’t seem to figure out that “dictum” is singular and “dicta” is plural, or that “de minimis” is not spelled “de minimus.” Having a special language of one’s own confers responsibility as well as honor. Get it right.

**Agreement:** Many of us still insist on using the word “their” to form the possessive of a singular pronoun. “Someone forgot their briefcase” means that one person left behind a briefcase that belonged to two or more people.

**Comma errors:** The Society for the Promotion of Good Grammar (do a Web search for these folk and start reading them regularly) recently noted a startling example of what a difference a comma can make: “The state Board of Elections decided today to adopt a ban on clothing, including buttons and hats that directly endorse a candidate or issue.” Without a comma after “hats,” the Board is not banning the wearing of things that promote political causes but is banning apparel altogether.

**Forming the possessive:** We all need to read Strunk and White’s Rule #1 in *The Elements of Style* repeatedly until we have it clear in our heads that it’s James’s car and the Joneses’ house, not “James’ car” and “the Jones’ house.”

**Which-that:** Many lawyers still have no idea there’s a difference between “which” and “that”; many more seem to know there’s a difference, but get it wrong.

There are no agreements currently in effect, which significantly limit the company’s rights to use or license the use of the Trademarks in any material manner.

This contractual representation, which says the opposite of what it means, might have come from following a recommendation in a grammar-checking software, or from trying to follow the rule in a place where it didn’t apply, causing the writer to get it exactly backwards (much like the curious phenomenon in some regional British and Massachusetts pronunciation whereby the speaker drops an “r” where it is needed and carefully adds one where it is not, as in “Dianer is a good tea”). The sentence was intended to say:

There are no agreements currently in effect that significantly limit the Company’s rights to use or license the use of the Trademarks in any material manner.

Likely the writer mistakenly used “which” instead of that, and then dimly remembered the rule that a “which” clause needs to be set off with a comma, thus compounding the problem by creating the doubly false impression that there are no agreements of any kind currently in effect, and that the company is therefore materially limited in the way it uses its trademarks.

As an aside, this may be an example of a case in which the passive voice would have been helpful to the emphasis and clarity of the sentence:

The Company’s rights to use or license the Trademarks is not materially limited by any agreements currently in effect.

And still in First Place, the undisputed champion of grammatical errors that make everyone look stupid, including a shocking number of members of the legal profession:

**The grocer’s apostrophe:** No, the plural of tort is not “tort’s.”

Robert C. Cumbow is a shareholder at the Seattle firm of Graham & Dunn PC. He teaches at Seattle University School of Law and writes on law, language, and movies. He gratefully acknowledges the thoughtful contributions and generous encouragement of Doug Berry, John Bitting, Tim Borchers, David Byers, James Dickens, Ninamaria Fuller, Judge Elaine Houghton, Judge Robin Hunt, Philip Jones, Sean Lewis, Derek Linke, John Moffat, Patrick Judd Murray, Jim Pidduck, Cheryl Rife, Ray Siderius, and Bob Welden.
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But when individuals need help from the judicial branch of our government, they must file a lawsuit. In superior court, they must pay $250 to simply file their paperwork.¹

Despite our constitutional protections against depriving individuals of life, liberty, or property without due process of law, we expect individuals to bear the expense of hiring an attorney to help them navigate their way to obtain a just result from our judicial branch (Marriage of King, 162 Wn.2d 378 (2007)) or, even worse, represent themselves.²

As a former trial attorney, I recall the many times I was unable to advise my clients how much it would cost them to litigate a civil dispute. Whether they were plaintiff or defendant, my answer would be the same: “It depends.” It depended on who

An expedited trial is a method of resolving disputes involving less than $50,000 in a manner that reduces the legal expense to the litigants, but allows them access to the courts. In other words, it allows the superior courts to offer a Ford to resolve a Ford dispute, rather than offering a BMW to resolve a Ford dispute.

the attorney for the other party was, how complex the litigation was, and probably most importantly, it depended upon how much discovery would cost.

Mandatory arbitration was originally intended to provide a quick, low-cost alternative for superior courts to offer civil litigants to resolve their disputes. In most counties, cases subject to mandatory arbitration involve disputes as high as $50,000. For whatever reason, the use of arbitration in superior court may actually prolong litigation, rather than shortening the time to resolution, and may involve assuming the risk of not only paying your own attorney’s fees, but those of the opposing party, too.³

From this judge’s perspective, mandatory arbitration also contributes to the erosion of the public’s trust and confidence in our judiciary.⁴ After all, we are telling members of the public that their cases aren’t important enough to even get into the courtroom. Instead, they are relegated to an attorney/arbitrator’s conference room.⁵

Despite the increasing availability of district courts to resolve these matters,⁶ there are still discouraging venue issues involved in the use of district courts, and practitioners still seem to shy away from the use of district courts in civil matters.

Finally, most recently, outgoing WSBA President Stan Bastian issued a challenge to the Bar to propose rule changes that lower the cost of litigation.⁷

Consequently, perhaps the stars are now aligned to permit serious consideration of mandatory expedited trials in lieu of mandatory arbitration.

What Is an Expedited Trial?
An expedited trial is a method of resolv-
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ing disputes involving less than $50,000 in a manner that reduces the legal expense to the litigants, but allows them access to the courts. In other words, it allows the superior courts to offer a Ford to resolve a Ford dispute, rather than offering a BMW to resolve a Ford dispute.8

As proposed, an expedited trial includes the limitations on discovery now in district court, the limitation on presenting evidence not previously disclosed, and the allowance of expert testimony by declaration, as currently allowed in mandatory arbitration cases. Expedited trials may be tried before the bench or a jury.

Expedited trials eliminate the two-step process now involved in appeals of arbitration awards. They eliminate the venue problems inherent in cases before courts of limited jurisdiction. They give litigants “their day in court” in a manner that is still fair, but not unduly burdensome.

At the end of this article are my proposed Expedited Trial Rules (ETR).

**Pros and Cons**

Many courts may oppose offering expedited trials in their jurisdiction, fearing an onslaught of civil trials to their already backlogged civil docket. While I believe the solution to such a situation is not to deny a litigant an economical court hearing, but rather engage the Legislature in a discussion to provide more judges and courtrooms, for the time being we could fashion expedited trials in the same manner as mandatory arbitration is today: local option.

Furthermore, we could limit mandatory arbitration to only those civil cases involving trials expected to take more than two weeks. By doing so, we may free up the court time needed to handle the potential onslaught of expedited trials. Besides, I submit many of those larger cases end up in private mediation anyway.

Attorneys skilled in discovery who face attorneys not so skilled may object to a leveling of the playing field that expedited trials involve by requiring disclosure of any evidence sought to be introduced at trial. MAR 5.2 has been in effect for years, and, to my knowledge, this situation has not been a problem.

Plaintiffs’ attorneys may fear jury verdicts after an expedited trial will be less than an arbitrator’s award. Initially, that may be the case. But they will not have to fear the expense and delay involved with a trial *de novo.* Furthermore, the more our citizens are called upon to decide these matters, the greater the chance to educate them about how our civil justice system works. Eventually, I submit that verdicts will gradually increase because jurors’ knowledge will increase.

**The Time for Debate Begins Now**

President Bastian expressed the desire to stimulate debate. He recognized it is the professional responsibility of all of us to control the escalating costs of litigation, “otherwise, it will become an increasingly irrelevant tool for our clients.”

Are the stars now aligned to allow expedited trial rules to become a part of our system of justice? The answer depends upon which view you adopt and promote. I, for one, prefer the view that restores public trust and confidence in our judicial system and provides individuals who need the services of our third branch of government an affordable day in court.

Let the debate begin!

**Expedited Trial Rules (ETR)**

**Preamble**

As the cost of trying a lawsuit continues to increase, access to our civil justice system decreases. More and more often, parties are resorting to alternative dispute resolution techniques and mandatory arbitration.

While these alternative dispute resolution techniques may allow parties to resolve their disputes more economically, they deny the parties their “day in court.” Particularly in matters involving $50,000 or less which are subject to our mandatory arbitration rules, litigants must run the risk of paying the other side’s attorney fees for their right to their day in court.

We believe the erosion in confidence in our civil justice system stems in part from the public’s perceived denial of access to it.

In order to promote access to our civil justice system and provide litigants an alternative to mandatory arbitration, the following expedited trial rules are hereby adopted.

**I. SCOPE AND PURPOSE OF RULES**

**Rule 1.1 Application of Rule**

These expedited trial rules apply to mandatory arbitration of civil actions under RCW 7.06.

**Rule 1.2 Matters Subject to Arbitration**

A civil action other than an appeal from a court of limited jurisdiction is entitled to an expedited trial under these rules when (1) the action is subject to mandatory arbitration as provided in RCW 7.06; (2) all parties for purposes of expedited trial only, waive claims in excess of the amount authorized by RCW 7.06, exclusive of attorney’s fee, interest, and costs; and (3) the court enters an order determining the action will proceed under these rules.

**Rule 1.3 Which Rules Apply**

1. **Generally.** Until a case is subject to these expedited trial rules by order of the Court under Rule 1.2, the rules of civil procedure apply. After a case is subject to these expedited trial rules by order of the Court under Rule 1.2, these expedited trial rules apply, except where an expedited trial rule states that a civil rule applies.

2. **Service.** After a case is subject to these expedited trial rules, all pleadings and other papers shall be served in accordance with CR 5 and filed with the judge assigned to hear the trial.

3. **Time.** Time shall be computed in accordance with CR 6(a) and (e).

**II. TRANSFER TO EXPEDITED TRIAL RULE DOCKET**

**Rule 2.1 Transfer to Expedited Trial**

The point at which a case is transferred to expedited trial and the procedures for accomplishing the transfer shall be provided by local rule.

**Rule 2.2 Court Shall Determine Eligibility for Expedited Trial**

The court upon motion to submit the case to the expedited trial docket as set forth in Exhibit A attached shall determine whether a case is subject to expedited trial under these rules without oral argument. If accepted by the court, the court shall sign the order assigning the case to the expedited trial docket. Only in extraordinary circumstances after a case has been assigned to the expedited trial docket will the court order a case re-
turned from the expedited trial calendar to the regular trial calendar.

III. PROCEDURES AFTER ASSIGNMENT

Rule 3.1 Discovery

After the assignment of a case to the expedited trial docket, a party may demand a specification of damages under RCW 4.28.360, may request an examination under CR 35, may request admissions from a party under CR 36, and may take the deposition of another party, unless the court orders otherwise. No additional discovery shall be allowed, except as the parties may stipulate or as the court may order. The trial court may allow discovery only when reasonably necessary.

Rule 3.2 Subpoena

In accordance with CR 45, a lawyer of record may issue a subpoena for the attendance of a witness at the expedited trial or for the production of documentary evidence at the trial. A subpoena for discovery purposes may be issued only with the permission of the court or by stipulation.

IV. EXPEDITED TRIAL

Rule 4.1 Notice of Trial

The court shall set the time, date, and place of the expedited trial and shall give reasonable notice of the trial date to the parties. Except by stipulation or for good cause shown, the hearing shall be scheduled as soon as possible.

Rule 4.2 Pre-Expedited Trial Statement of Proof

At least 14 days prior to the date of the expedited trial, each party shall file with the trial court and serve upon all parties a statement containing a list of witnesses whom the party intends to call at the expedited trial and a list of exhibits and documentary evidence. The statements shall contain a brief description of the matters about which each witness will be called to testify. Each party, upon request, shall make the exhibits and other documentary evidence available for inspection by other parties. A party failing to comply with this rule or failing to comply with a discovery order may not

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**Rule 4.3 Jury Instructions**

If the expedited trial is to be heard by a jury, then at least 14 days prior to the date of the expedited trial, each party shall file with the trial court and serve upon all other parties their proposed jury instructions and verdict forms.

**Rule 4.4 Conduct of Expedited Trial; Witnesses; Rules of Evidence**

(a) ** Witnesses.** The trial court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the facts; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment. In the discretion of the judge, a witness may testify by telephone.

(b) **Recording.** Hearings shall be reported in the same manner as a regular trial.

(c) **Rules of Evidence.** The Rules of Evidence shall apply and be liberally construed in order to promote justice. The parties should stipulate to the admission of evidence when there is no genuine issue as to its relevance or authenticity.

(d) **Certain Documents Presumed Admissible.** The documents listed below, if relevant, are presumed admissible at the expedited trial, but only if (1) the party offering the document serves on all parties a notice, accompanied by a copy of the document and the name, address, and telephone number of its author or maker, at least 14 days prior to the expedited trial date; and (2) the party offering the document similarly furnishes all other related documents from the same author or maker. This rule does not restrict argument or proof relating to the weight of the evidence admitted, nor does it restrict the trial court’s authority to determine the weight of the evidence if sitting without a jury after all of the evidence has been presented and the arguments of opposing parties. The documents presumed admissible under this rule are:

1. A bill, report, chart, or record of a hospital, doctor, dentist, registered nurse, licensed practical nurse, physical therapist, psychologist, or other healthcare provider on a letterhead or billhead;
2. A bill for drugs, medical appliances, or other related expenses on a letterhead or billhead;
3. A bill for, or an estimate of, property damage on a letterhead or billhead. In the case of an estimate, the party intending to offer the estimate shall forward with the notice to the adverse party a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part, attaching a copy of the receipted bill showing the items of repair and the amount paid;
4. A police, weather, wage loss, or traffic signal report, or standard United States government life expectancy table to the extent it is admissible under the Rules of Evidence but without the need for formal proof of authentication or identification;
5. A photograph, X-ray, drawing, map, blueprint, or similar documentary evidence, to the extent it is admissible under the Rules of Evidence, but without the need for formal proof of authentication or identification;
6. The written statement of any other witness, including the written report of an expert witness, and including a statement of opinion which the witness would be allowed to express if testifying in person, if it is made by affidavit or by declaration under penalty of perjury;
7. A document not specifically covered by any of the foregoing provisions but having equivalent circumstantial guarantees of trustworthiness, the admission of which would serve the interests of justice.

(e) **Opposing Party May Subpoena Author or Maker as Witness.** Any other party may subpoena the author or maker of a document admissible under this rule, at that party’s expense, and examine the author or maker as if under cross-examination.

**V. JUDGMENT**

**Rule 5.1 Entry of Judgment, New Trial, Reconsideration, and Amendments of Judgments**

CR 58 and CR 59 shall apply to the entry of judgments motions for new trial, reconsideration, and amendment of judgments.

**Rule 5.2 Relief from Judgment and Stay of Proceedings to Enforce Judgment**

CR 60 and CR 62 shall apply to all requests for relief from judgment and stay of proceedings to enforce judgment.

**Rule 5.3 Witness Fees and Costs**

Witness and other costs provided for by statute or court rule in superior court proceedings shall be payable upon entry of judgment in the same manner as if the expedited trial were a regular trial.

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_The Honorable T.W. Small is a Chelan County Superior Court judge and can be reached at chip.small@co.chelan.wa.us._

**NOTES**

1. $250 is the fee for dissolutions in Chelan County Superior Court; $200 filing fee, $30 domestic violence fee, and $20 family court facilitator charge.
2. The adage “Attorneys who represent themselves have fools for clients” comes to mind.
3. In the last six months, two cases on my trial calendar had to be continued because the parties had still not had their arbitration hearing despite the requirement that the hearing be held within 63 days of appointment of the arbitrator, MAR 5.1.
4. There are other reasons for this erosion, but I’ll leave those for another day.
5. No offense intended to counsel, who, in my experience, do an excellent job resolving these arbitrations. I am speaking of the message perceived by the general public.
6. The district courts may now resolve disputes up to $75,000.
8. No disrespect to Ford intended. Although the author is a former BMW owner, I now own a 2005 Ford Mustang GT convertible.
9. Supra note 7.
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Aubin has extensive and comprehensive training in Mediation and Arbitration, including the San Francisco Bar’s Advanced Mediator Practitioner course, successful completions of one of Pepperdine University’s prestigious Strauss Institute for Dispute Resolution Programs and the first CR 39.1 Mediator-Arbitrator certification program by the United States District Court for the Western District of Washington. Upon request, Aubin has references from some of Seattle’s and the Nation’s most highly regarded Neutrals.

*What were your perceptions of the relative positions of the parties in the cartoon? Did you know?
An ostrich is the second fastest animal in the world, the fastest two-legged animal, and can maintain a speed of 45 m.p.h. (70 k.p.h.) for at least thirty minutes (See, ostrich.com)
An elephant can maintain a speed of 24 m.p.h. (39 k.p.h.) only for short distances. (See, indianchild.com)
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For Aubin’s complete bio go to: www.staffordfrey.com/a_barthold.htm ©Aubin Barthold—All Rights Reserved
County Budgets and the Crisis in Our Courts  
by Bob Ferguson

Across the state of Washington, counties are grappling with significant budget challenges. The cuts in court services experienced this year will slow the administration of justice across the state, and unless lawmakers in the current session of the state Legislature fix the antiquated revenue structure that supports counties, the state’s local courts will soon be unrecognizable.

Statewide, local leaders are struggling to balance budgets. King County faced a $93 million general fund shortfall for 2009. Snohomish County laid off 160 workers to close its $21 million gap. Clark County dialed back services to 1980 levels, and Pierce County dipped into its reserves to close its budget shortfall.

Last fall, I served on the King County Council’s budget leadership team, the bipartisan group charged with crafting the council’s budget. It was my third consecutive year in this role, and easily the most difficult. No choice was a good one: whether to shut down public health clinics, lay off sheriff’s deputies, fund food banks, or pay for tuberculosis control.

As a lawyer, I was particularly troubled with the tough tradeoffs that confronted our county’s legal system. Competing for funds with other core government functions, such as elections, the sheriff, and the jail, meant that every element of our justice system — from Superior Court to District Court, public defense to the prosecuting attorney — took significant cuts in 2009.

Our courts will feel the impact. Processing delays will become more common. Public defense attorneys will have a mountain of cases and mere minutes to spend with their clients. Judges will have fewer resources to review cases, and prosecutors less time for investigations. All of us will be affected, including those who do not practice in the courts every day. As members of the Washington State Bar, we all share a common interest in maintaining the integrity of the justice system.

This article explores some of the reasons for the budget crisis, how the courts are affected, and how we might avert a long-term crisis.

Why are county budgets in crisis?
For most counties, the epicenter of the budget crisis is the general fund, which constitutes the main source of dollars for core government services, including the sheriff, courts, jails, elections, public health, and human services. For counties, the sales tax and the property tax make up the two pillars of general fund revenue. Both have budgetary flaws:

- **Property tax.** State Initiative 747, adopted by voters and recently codified by the Legislature, caps property tax revenue growth at one percent plus taxes on new construction. Due to this artificial ceiling, property tax revenues are insufficient to keep up with the inflationary costs of doing business because fuel, health care, and other costs rise by nearly four to five percent annually. In recent years, the state’s strong economy and the housing boom compensated by providing ample taxes from new construction.

- **Sales tax.** Sales tax revenue is directly linked to the health of the economy. As we have seen in the last several months, when times are tough, consumers reel in spending and sales tax revenues plummet. At the time this article was written, statewide revenues dropped below 2007 levels in 10 of the previous 11 months. In November alone, revenues were down nearly nine percent compared to the previous year.

While cities receive revenues from a variety of sources, including utility taxes and business and occupation taxes, counties must survive on a two-legged stool that is unsustainable. This structural funding gap and our weakening economy have helped create a perfect storm for county finances.

How are our courts affected?
For most counties, the bulk of general fund dollars are spent on criminal justice and public safety. When general fund revenues shrink, the criminal justice system is unavoidably impacted. For example, King County criminal justice agencies comprise more than 73 percent of general fund expenditures, with nearly 30 percent directly related to funding the courts. Consequently, it is not surprising that courts around the state are feeling the impact of budget cuts.

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all shed positions. Snohomish County cut nearly 10 percent of its prosecuting attorneys and changed filing standards to send more cases to municipal courts, passing the budgetary burden on to the cities.

In King County, we cut $3.6 million from Superior Court’s budget and nearly $3 million from the prosecuting attorney’s budget. Our elected judges and the prosecuting attorney took the lead in changing the way we do business in order to meet these reductions. Both District Court and Superior Court will be moving to paperless filings, saving the county millions of dollars in processing costs once fully implemented. District Court worked with the Prosecuting Attorney’s Office to develop a new filing system for low-level felony drug cases, which will enable swifter justice and achieve cost savings. Additionally, Superior Court agreed to suspend new civil jury trials during the last weeks of January and February, saving jury-related costs for those periods.

However, even with these efficiencies, the cuts to our justice system were difficult. For example, the Prosecuting Attorney’s Office cut 20 deputy prosecutors, and District Court cut approximately 12 clerical and professional staff positions. Moreover, Superior Court must process more than 10,000 felony cases and nearly 24,000 civil cases with 29 fewer positions. Undoubtedly, this will impair the administration of justice.

The budget process also raised a number of important policy questions regarding the courts:

1. **Furloughs.** In order to balance the 2009 budget, King County relied on labor savings achieved through a 10-day furlough. Approximately one day a month this year, county government will be shut down and employees will not be paid. A seemingly simple concept, the furlough created numerous implementation problems, particularly for the courts.

   The state Constitution requires that Superior Court “shall always be open, except on non-judicial days,” and state law dictates that the District Court “shall be open except on non-judicial days.” Chief Justice Gerry Alexander of the Washington State Supreme Court concluded that county furlough days did not constitute non-judicial days. The courts must be open to process justice.

   Similarly, prosecutors are required by state law to prosecute all felonies and unincorporated area misdemeanors. On furlough days, the Prosecuting Attorney’s Office is required to handle rush filings and first appearance calendars.

   To achieve the needed cost savings, the courts implemented the furloughs in ways that preserve access to justice, but help the county achieve savings. Because the courts cannot be closed on any given day, Superior Court will institute a rolling four-day furlough for its employees, with staff members selecting one day in each of the months of January, February, April, and October to be on unpaid furlough. The elimination of new civil jury trials during the last weeks of January and February will aid with this implementation. District Court will be open, but operate on a limited basis during the county’s 10 furlough days. On these days, only the cities’ calendars, jail calendars, emergency protection, and civil ex parte orders will be heard on a normal schedule.

2. **Raising Fees.** An alternative to making cuts is instituting fee increases to generate additional revenues. However, policymakers must weigh the impact of fees on the provision of justice. While charging those who use a service for the cost of that service makes good business sense, a public-good question arises if certain segments of the population cannot access the justice system due to insufficient funds, or if other segments of the population can pay a premium for faster justice.
In King County, we chose to implement a number of fees, including a $30 *ex parte* fee and new fees for family law facilitator services. These fees will raise significant revenue that will keep drug court, mental health court, and unified family court functioning.

3. Funding Discretionary Court Programs. The vast majority of our courts and court services are legally mandated. As a result, the few discretionary programs are subject to the chopping block during a budget crisis. Unfortunately, these are often programs that save King County dollars by helping our courts run more efficiently and achieving better outcomes. For example, the county’s award-winning drug court serves more than 500 clients a year and reduces the recidivism rate by eight to 10 percent. The county’s mental health court reduces jail usage by 90 percent among its graduates, and the family court services division of Superior Court provides judges with professional assistance in difficult family matters.

All three of these discretionary programs faced elimination this year. However, given the cost savings and improved outcomes they generate, the County Council chose to fully fund these programs in 2009 by cutting expenditures in other areas of the budget. In future years, however, it is not clear how these discretionary programs will be funded, which may in turn lead to higher jail and social services costs.

2010 and beyond

Even as the ink dries on county budgets for 2009, we must turn our attention to 2010 and beyond. The outlook is bleak. As the nation settles into a deepening recession, counties are predicting revenue shortfalls for the foreseeable future.

In King County, our latest forecasts show a $40.8 million shortfall in the general fund for 2010 and another $62.3 million short in 2011. Without a change in how counties are financed, the future is uncertain for our courts.

Counties have some potential options for expanding the general revenue base. For instance, each county has the authority to levy up to 3/10 of 1 cent in a sales tax for criminal justice purposes. The levy must be approved by the voters and the revenues are split with the cities located within the county based on population. However, current state law contains “non-supplantation” language requiring that these revenues be used only for expanded services. They cannot be used to fund the existing core of our justice system. While this option may provide relief, it worsens the reliance on sales-tax revenue. As such, counties must seek other tools from the state that address the long-term financial challenges. Of course, the state has its own budget challenges, so we are not asking for a blank check. Rather, we are requesting more tools in our tool box, including more revenue options and greater flexibility with some of the options we already possess.

I have faith that the legislative session will yield relief for county finances and provide funding options for our courts and justice system. If not, King County Superior Court Presiding Judge Bruce Hilyer may be right in predicting that we are headed for “a train wreck.”

King County Councilmember Bob Ferguson is a graduate of New York University Law School. He clerked for Judges William Fremming Nielsen (U.S. District Court, Eastern District of Washington) and Myron H. Bright (8th Circuit Court of Appeals). He is now a litigation associate at K&L Gates. He was elected to the King County Council in 2003.

NOTES
1. Ervin, Keith, “King County’s budget passes, but more cuts are ahead next year as shortfalls are expected to grow,” Seattle Times, November 25, 2008.
Working Together to Ensure Justice in Tough Times

by John M. Cary and Nell McNamara

Our economy is in a recession. Beyond the crisis for markets and businesses, financial downturn means more and more families are finding themselves in potentially catastrophic situations. Low-income people already walk an economic tightrope every day — a reality made even shakier by pervasive job loss; housing insecurity; and rising food, health, and energy costs.

These vulnerable families do not have a financial cushion to fall back on; they are just one car accident, health problem, or missed payment away from losing their precarious balance. After struggling to keep their heads above water, many have finally slipped into poverty and face an array of problems with legal consequences that impact basic human needs. For example, fallout from the sub-prime mortgage crisis has resulted in an alarmingly large and rapidly growing number of families who face homelessness. Reasonably prudent consumers, including many seniors, have been victimized by predatory lending scams and risk losing everything. Increasing numbers of military personnel and their families need legal assistance with multiple issues. Heightened financial stress results in more families seeking personal safety and protection from domestic violence. In all of these circumstances, timely legal intervention by an attorney can help families preserve their homes, assert consumer rights, protect themselves from violence, or maintain income or benefits, while reducing demand on government services.

Budget deficits heighten problem

Yet while economic problems skyrocket and affect unprecedented numbers of people, legal aid programs in Washington are already unable to serve everyone in need. A 2003 study showed that even during good times, fewer than one-fifth of indigent individuals seeking help with a legal problem gain access to a legal aid attorney. Now, low-income people with critical legal problems are growing in numbers and desperation, precisely when funding sources are being dramatically reduced. This year, the Legal Foundation of Washington — charged by the Supreme Court to administer interest on lawyer trust accounts (IOLTA) — was forced to reduce grants for more than 30 legal aid programs, because plummeting interest rates and the housing market slow-down created a steep drop in IOLTA revenues. Facing huge budget shortfalls, counties and cities are cutting social services and reducing funding for legal aid programs. Even federal funding is stagnant; today’s appropriation to the Legal Services Corporation is less, in real dollars, than it was in 1980. Finally, the most recent revenue forecast shows Washington faces an unprecedented state budget deficit, estimated at between $5 billion and $6 billion. Needless to say, state and local lawmakers are facing difficult budget decisions.

Protecting the most vulnerable

The economic crisis creates uncertainty for all of us, but we know the downturn hits our most vulnerable neighbors the hardest. The legal community must be proactive in our efforts to prevent these tough times from disproportionately impacting low-income families. The Alliance for Equal Justice is Washington’s network of more than 30 programs providing legal aid for those with nowhere else to turn. These programs are uniquely situated to help alleviate some of the harshest effects of the economic downturn and help preempt a costly spiral of social problems. Currently, our programs face both unparalleled demand and an unfortunate loss of funding.

Legal aid is a proactive investment for the state, preventing further strains on our public safety nets and saving government dollars in the long run, because legal aid attorneys can quickly identify and resolve legal problems before situations needlessly deteriorate. Moreover, legal aid can reduce the strain on precious government resources. State administrative agencies are experiencing overwhelming case loads — many of those seeking help have never before come into contact with public services. Legal aid attorneys facilitate this process by helping individuals successfully navigate complex bureaucratic systems and secure the appropriate assistance to which they are legally entitled.

What can you do?

In a time of crisis, Washington’s public-private partnership can help mitigate the negative impacts of this economy for our most vulnerable. The legal community is coming together to do everything possible to provide timely legal help that will benefit families, neighborhoods, the community, and our overall economy. You can help!

- There are more than 20 programs throughout the state coordinating volunteer attorneys doing pro bono work — contact your local bar association to find the volunteer opportunity that is right for you.
- Charitable donations to the Campaign for Equal Justice — our state’s unified annual giving drive for legal aid — are more important than ever. It’s an easy way to make a big difference. Visit www.c4ej.org to make a secure online donation.
- The Equal Justice Coalition will advocate for increased state and federal support for legal aid in 2009. This year, every voice counts. Make your voice heard in Olympia and Washington, D.C., and join the Equal Justice Coalition today at www.ejc.org.

The Equal Justice Coalition (EJC) educates policymakers and the public about the importance of civil legal aid in our communities and advocates for sufficient public funding for legal aid on behalf of low-income people living in Washington. Thanks to active participation of our members, the EJC successfully obtained incremental public funding increases for legal aid in recent years and we will continue to work toward closing the justice gap in Washington.

John M. Cary is the chair of the Equal Justice Coalition and can be reached at caryj@att.net. Nell McNamara is EJC’s director and can be reached at nell@ejc.org.
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Do not expect anybody’s theory of statutory interpretation, whether it is your own or somebody else’s, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that courts in America have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.¹

It is easy to be cynical about statutory interpretation. It often appears that courts simply grab what is handy — be it legislative history, canon of construction, or caselaw — to support an interpretation. More than 50 years ago, Karl Llewellyn skewered judicial construction of statutes by pointing out that every canon of construction had its opposite canon, so that any result could be supported.² And yet, although Llewellyn’s critique is often cited, many lawyers and judges still yearn for a consistent method of statutory construction to guide advocates and the courts.

Washington courts do have a loosely prescribed procedure for investigating statutory meaning. It is far from rigid, either in definition or application, but it represents an effort to achieve consistency. The court is to begin with the statute’s plain meaning, and only if plain meaning leaves an ambiguity should the court resort to extrinsic aids to construction, such as legislative history or policy-based canons. This procedure is flexible. Plain meaning includes not only text but also context. The definition of ambiguity and the rule to avoid absurd results give further interpretive room. Nevertheless, the approach provides some structure for advocates and courts.

The Supreme Court recently described Washington’s approach as follows:

A court’s objective in construing a statute is to determine the legislature’s intent. Dep’t of Ecology v. Campbell v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” Id. at 9-10, 43 P.3d 4. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Id. at 9-12, 43 P.3d 4. An undefined statutory term should be given its usual and ordinary meaning. Barton v. Lehman, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). Statutory provisions and rules should be harmonized whenever possible. Emwright v. King County, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statu-
Innumerable cases state that the goal of statutory interpretation is to effectuate the Legislature's intent. It is not clear what this means: The intent as expressed in the words of the statute? An intent to be gleaned from the context or legislative history? Should a court's understanding of the Legislature's intent be allowed to trump otherwise unambiguous language?

This expansive view of plain meaning allows courts to consider more than the text of the provision at issue. “Context” may even include matters outside of the code and session laws such as “background facts of which judicial notice can be taken . . . because presumably the legislature was also familiar with them when it passed the statute.”

There is a contrary view on the court. Justice Sanders would not include the context of a statute when first examining the text:

I take issue with the majority’s [statement that] plain meaning is to be “discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” Majority at 886.

The term “plain meaning” necessarily means we do not look beyond the statutory language itself. “Where statutory language is plain and unambiguous, a court will not construe the statute but will glean the legislative intent from the words of the statute itself.” Where a statutory term is not defined, it is “given its usual and ordinary meaning.” Courts may not read into a statute a meaning that is not there.

Despite this objection, the majority’s approach has prevailed. Thus, the advocate should treat context broadly, but remain aware that some judges may have methodological objections.

Tools for reading the text of the disputed provision

The plain-meaning inquiry begins with the disputed text. The court may use some of the following guidelines to interpret particular words or phrases:

- Terms should be given their “usual and ordinary meaning” unless defined by the statute.
- Technical dictionaries should be used for technical terms.
- Common law usage may apply.

Often-cited dictionaries include Webster’s Third New International Dictionary of the English Language and Black’s Law Dictionary. Sometimes the court will use an earlier edition in use at the time the relevant statutory language was drafted. Sometimes it will simply use the most recent dictionary.

Sometimes the court will determine meaning without a dictionary. Where words have multiple dictionary definitions, the court must choose between the definitions based on other factors such as context.

Where the relationship between words is in dispute, the court may resort to textual canons of construction (intrinsic aids to construction). There are many of these, including:

- The last antecedent rule: “Unless a contrary intention appears on the statute, qualifying words and phrases refer to the last antecedent.” The last antecedent rule does not necessarily apply where a comma precedes the qualifying word or phrase.
- Ejusdem generis: Where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind of class as those specifically mentioned.

"Legislative intent" as the court’s goal

Innumerable cases state that the goal of statutory interpretation is to effectuate the Legislature’s intent. It is not clear what this means: The intent as expressed in the words of the statute? An intent to be gleaned from the context or legislative history? Should a court’s understanding of the Legislature’s intent be allowed to trump otherwise unambiguous language?

Ascertained through the language and context or legislative history. Perhaps because of the these and similar questions about the role of intent, the court has also stated a contrary view:

“We do not inquire what the legislature meant; we ask only what the statute means.” Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 419 (1899). “[It] seems axiomatic that the words of a statute — and not the legislators’ intent as such — must be the crucial elements both in the statute’s legal force and in its proper interpretation.” Laurence Tribe, Constitutional Choices 30 (1985).

The method the court has established recently for statutory interpretation implies that legislative intent should be first ascertained through the language and context of the particular statute.

Plain meaning: text, context, and “background facts”

The court in Dept of Ecology v. Campbell & Gwinn, LLC, defined plain meaning to incorporate more than simply the text in question:

[T]he plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature and relevant case law for assistance in discerning legislative intent. Coe v. Dept of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).3

Of course, a court following this procedure can stop at the plain-meaning stage if it believes it has resolved the issue. Advocates, however, must argue in the alternative. So the careful advocate will usually include arguments addressing both plain-meaning and “extrinsic” aids to construction. Like a cable, an argument is stronger when it consists of many threads woven together.

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• *Expressio unius:* “To express one thing in a statute implies the exclusion of the other.”
• *Noscitur a sociis:* “A single word in a statute should not be read in isolation,” or “A word is known by the company it keeps.”
• “May” is permissive; “shall” is mandatory.
• All the language in a statute shall be given effect; no portion shall be rendered meaningless.

For arguments based on grammar, courts may also consult Strunk and White’s *The Elements of Style* and Bryan Garner’s *A Dictionary of Modern Legal Usage* (2d ed. 1995).

**The context of the disputed provision as part of plain meaning**

Context includes the statute as a whole, as well as the text of related statutes. Because there may be many related provisions, there may be many conflicting bases for comparison and context. This broad view of context increases the potential sources of arguments about the text.

Several canons are particularly relevant to examinations of context. They pertain to how statutes should be reconciled with other statutes and the common law:

• The borrowed statute rule: Where the legislature borrows a statute, it impliedly adopts the statute’s judicial interpretations.
• The reenactment rule: When the legislature reenacts a statute, it incorporates settled interpretations of the reenacted statute.
• In pari materia: Similar statutes should be interpreted similarly.
• The presumption against repeals by implication.
• The rule requiring interpretation of provisions consistently with subsequent statutory amendments.
• The rule requiring interpretation of provisions consistently with subsequent statutory amendments.
• The presumption that when the legislature acts, it intends to change existing law.
• The presumption that the legislature is aware of prior law, including judicial or administrative interpretations of statutes.
• The presumption that the legislature is aware of prior law, including judicial or administrative interpretations of statutes.
• The presumption in favor of prospective application of a statute and its corollary canon, which rejects retroactive application of statutes.

The legislature has also enacted rules for reading statutes in context, and these rules may at times conflict with judicial canons.

**Avoiding “absurd” results: the escape clause**

Even where text and context strongly support a particular construction, the court will avoid literal readings that result in “unlikely, absurd, or strained” consequences. This commonly invoked principle can be brought in at any stage of the inquiry. Sometimes courts invoke it before looking at context or legislative history. Sometimes it comes later in the analysis; often it is one of many reasons for a particular construction.

A critique of the “absurd results” canon is that it can mask simple policy preferences by the court. As the court itself once put it: “[I]t is the legislature’s job — not ours — to stem the tide of potential absurd results that might result from impartially applying the plain meaning...
Ambiguity: more than one reasonable interpretation

Ambiguity marks the threshold between plain meaning and extrinsic sources or canons. Only if text and context are ambiguous is the court to look beyond plain meaning to, for example, legislative history or policy. However, the advocate should not feel too constrained by this general rule. The court will sometimes look to extrinsic aids without an express finding of ambiguity. Advocates should always consider extrinsic aids as well as textual arguments.

A statute is ambiguous if it is susceptible to two or more reasonable interpretations. “[S]tatutes are ‘not ambiguous simply because different interpretations are conceivable.’ Constructions that would yield ‘unlikely’ or ‘absurd’ results should be avoided.” Of course, one person’s ambiguity is another’s absurd result; ambiguity appears to be in the eye of the beholder.

Legislative history

Not all types of legislative history are of equal weight, and there is reason to be skeptical of many sources. Final bill reports are perhaps the most authoritative. A single legislator’s isolated statement is not as persuasive, and that of a lobbyist carries even less weight. Comments can be taken out of context and may not reflect the collective intent — if such a thing exists. Colloquies can be misleading: A legislator’s argument that the proposed legislation will lead to terrible results might be used to support an argument that the enacted law was intended to lead to those results. And there are many accounts of legislative history being manufactured. An in-depth discussion of the various types and proper uses of legislative history is beyond the scope of this article.

In Washington, there is little to no legislative history available for statutes enacted before the mid-1970s. More information exists for statutes enacted after that point, but only in the last 10 years has there been easy access to materials online. It remains to be seen whether this easy availability of legislative history will result in more use of these materials in statutory interpretation.

Extrinsic canons based on policy preferences

Like legislative history, extrinsic canons are only to be consulted if the disputed provision is ambiguous. These canons represent the court’s policy preferences, and include:

- Remedial statutes are to be liberally construed, and exemptions to such a statute interpreted narrowly.
- Tax statutes are to be read in favor of the taxpayer, although tax exemptions are to be construed narrowly.
- Statutes in derogation of the common law are to be narrowly construed. Justice Scalia has called this canon a “sheer judicial power grab.”
- Penal statutes must be strictly construed (the rule of lenity).
- “Where possible, statutes should be construed so as to avoid unconstitutionality.” This canon reflects separation-of-powers considerations.

Conclusion

Washington courts have adopted a general methodology for statutory interpretation. While the methodology is flexible and has many exceptions, it nevertheless provides a structure for arguments and can help both judges and advocates approach the often complex questions of statutory meaning.

Helen Anderson is an assistant professor at the University of Washington School of Law. She experience

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NOTES
5. See, e.g., Christensen v. Ellsworth, supra, note 3; Quadrant Homes v. State Growth Management Hearings Bd., 154 Wn.2d 224, 244, 110 P.3d 1132 (2006) (“The primary goal of statutory construction is to discern the legislature’s intent”); Featherstone v. Dessert, 173 Wash. 264, 268, 22 P.2d 1050, 1052 (1933) (“In the interpretation of a statute, the intent of the legislature is the vital thing, and the primary object is to ascertain and give effect to that intent.”).
7. 146 Wn.2d 1, 9, 43 P.3d 4 (2002).
8. Id.
13. State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (holding “reckless manner” and “reckless driving” are terms of art long interpreted by courts and used by the Legislature).
18. Boeing v. Dep’t of Licensing, 103 Wn.2d 581, 587, 693 P.2d 104 (1985) (“the qualifying phrase ‘operating under a certificate of public convenience and necessity’ refers to the immediate antecedent phrase ‘any air carrier or supplemental air carrier’. It does not refer to the prior phrase ‘the operation of aircraft’.”).
19. In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 781, 903 P.2d 443 (1995) (comma introducing “but only if” qualifying clause supported argument that qualifier applied to all of the nouns listed before the clause).
23. S.D. Warren Co. v. Maine Bd. of Environmental Protection, 547 U.S. 370, 378 (2006). This canon is “invoked when a string of statutory terms is “invoked when a string of statutory terms in a list should be given related meaning. ‘”Id.
30. See RCW 11.02.010-070.
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Justice: More than Skin Deep

by Michael Heatherly

As Barack Obama, the nation’s first mixed-race president, took office, I was inspired to share a story from my childhood involving race and social conventions. The story is true, although I have changed the baby’s name for reasons of privacy. On a lighter note, for any of you who might get nostalgic reading about 1960s Seattle, check out the Elvis Presley film “It Happened at the World’s Fair,” which offers a festival of vintage Seattle scenes.

It was late November, maybe early December, of 1962. The gift buzz from my fifth birthday party on November 12 was just fading when the Sears Christmas Wish Book arrived, promising another fix. Rising early, I settled onto the floor of our living room in southwest Seattle, prepared to work on my list for Santa. My mom was already seated in her red upholstered rocking chair. It appeared she had been weeping. I couldn’t imagine why, and it gave me an awful feeling in my stomach.

It had been a memorable year for me, which I suppose isn’t saying much, given that it is the first year about which I remember much of anything. That summer my grandma had visited from Idaho and we took her to the Seattle World’s Fair (officially the Century 21 Exposition, but more popularly known as the Seattle World’s Fair), “which offers a festival of vintage Seattle scenes.”

Among the things going on elsewhere that year was the deployment of 5,000 troops by President Kennedy in October to quell rioting that had broken out when a young man named James Meredith became the first African-American to enroll at the University of Mississippi. Seattle historically had a small but vibrant African-American community that was largely separated from the rest of the population. While insidious racism existed, the city had been spared the overt, violent race wars that had erupted in the 1950s and early 1960s, particularly in the South.

In 1964, our family would relocate to Whiteman Air Force Base near Sedalia, Missouri, where my dad, an accountant for the Boeing aerospace division, was transferred to work on missile projects, a key part of the nation’s Cold War defense system. We Northerners don’t typically think of Missouri as part of the South. But by the 1960s, many African-Americans had migrated from the deeper South to states like Missouri, and racial tension followed. St. Louis and Kansas City had sizeable black populations and while outright racism was less intense than in the Deep South, racial segregation was obvious. I vividly remember riding through Kansas City in the family car and being astonished at how several city blocks would contain only blacks while the next several blocks would contain only whites. The courts and more progressive public officials had begun the push toward official desegregation. But racial separation remained a fact of everyday life. I had my first-ever swimming lessons at a private pool established by whites who fled the town’s public pool after it became desegregated. On July 2, 1964, President Johnson signed the Civil Rights Act, officially outlawing racial discrimination nationwide. Although I didn’t understand what was happening at the time, I remember black Sedalians honking horns and celebrating in the streets that summer.

But in Seattle, shortly before Christmas of 1962, why was my mom crying? Earlier that fall, our family had experienced something even more wonderful than the World’s Fair or my fifth birthday. We welcomed a fourth member of the family into our home, a gorgeous baby girl named Samantha. Samantha, like me, was adopted at birth through an adoption agency. Her young, unwed biological mother simply couldn’t afford to support her. I remember riding with my parents to pick up Samantha at the hospital. They brought her out swaddled in a blanket, lying in what looked like an Easter basket. I was overjoyed to have a baby sister. A one-child Catholic family during the baby boom was almost unheard of, and I was painfully envious of my young friends with siblings. My parents had spent months converting a spare room of our house into a nursery. I found the baby-care rituals fascinating: the feeding, the burping, even the diaper-changing, in which I participated at arm’s length for as long as I could suppress my gag reflex.

My biological parents were Spanish and I inherited characteristic Mediterranean features. Although my hair today has a “distinguished” salt-and-pepper appearance and I scrupulously protect my skin from the tan-inducing but carcinogenic rays of the sun, as a child I had black hair and dark olive skin. This was in stark contrast to my heavily freckled, red-headed adoptive dad. Although my adoptive mom is half-Italian, with dark hair and skin that would tan in the summer, it was still
But in Seattle, shortly before Christmas of 1962, why was my mom crying? Earlier that fall our family had experienced something even more wonderful than the World’s Fair or my fifth birthday. We welcomed a fourth member of the family into our home, a gorgeous baby girl named Samantha.

obvious that I was not their biological child. This was uncomfortable for me at times, particularly as a typically sensitive teenager. However, to their great credit, it seemed to mean nothing whatsoever to my parents, even though both grew up in small towns with virtually no racial diversity. Even at a time when mixed-race or mixed-nationality families were rare, they never seemed to care about or even notice that their son’s skin was several shades darker than theirs. Aside from the physical differences, I don’t think anyone would have imagined I was adopted.

Setting aside my Santa list, I asked my mom why she was crying. She said we had to give up Samantha. She was so distraught that I felt even worse for her than I did for myself. I don’t recall whether she even attempted an explanation at the time. It wouldn’t have made any sense to me then anyway. Years later, she gave me the full story. As Samantha grew, her skin slowly turned darker, starting at the tips of her tiny fingers. Several weeks after we brought her home, the adoption agency sent a worker to the house for a routine inspection to ensure she was getting proper care and affection, which she certainly was. However, the worker reported back to the agency about Samantha’s darkening skin. Although we never learned all the details, or whether the determination was even accurate, the adoption agency concluded that Samantha’s biological father was black. Apparently, the agency’s policy at the time prohibited the placement of African-American (or half-African-American, evidently) babies with white parents. The rationale was that such children would face not only racial discrimination but derision from their peers because their physical appearance made it obvious they were adopted. To me today, that seems ridiculously illogical. After all, the adoption agency had placed me, a Hispanic, with a non-Hispanic couple. Why should a half-black baby be treated differently from a brown one? Meanwhile, I am living proof that adoptive parents provide just as loving a home as biological ones, an idea one would think an adoption agency would seek to promote at every opportunity. I can’t think of a more telling example of the absurdity of racism than the notion that an innocent months-old baby could be removed from her loving adoptive family simply because her skin began changing color.

Whatever the justification, the agency insisted on taking Samantha back, presumably to adopt her out to a black or mixed-race couple. This might have been complicated by the reality that mixed-race couples also were still frowned upon by many at the time. In fact, it wasn’t until five years later that anti-miscegenation
laws were overturned nationwide by the U.S. Supreme Court in Loving v. Virginia, at which time 16 states still had them on the books. Washington Territory had a statute prohibiting whites from marrying African-Americans or Native Americans, but it was repealed before Washington achieved statehood.

For their part, my parents had no more qualms about raising a half-African-American baby than they did about raising a Spanish one. They consulted with an attorney about challenging the adoption agency’s decision. However, they ultimately realized litigation would be too costly, financially and emotionally. Our parish priest came to our home to take Samantha back to the adoption agency. I have no idea what his personal feelings about the matter were, but I remember afterward having nightmares in which his image appeared and I was overcome with rage. I doubt he is still alive, and I harbor no ill will toward the Catholic Church now, even though it was a Catholic adoption agency involved. I realize their attitude about race simply reflected that of much of society at the time.

In some ways, our family never recovered from the loss of Samantha. Over the following years, my parents’ marriage slowly deteriorated, although not just because of the failed adoption. By the time I was in high school, they had separated, and when I was in college, they divorced. I remained an “only child,” and while I didn’t consciously think about Samantha much, I often felt a vague sense of loss and remained envious of friends who had brothers and sisters with whom they could share family joy in good times and grief in bad.

My parents were not civil-rights crusaders. They never viewed the loss of Samantha as an issue of legal rights or racial discrimination. To them, the tragedy was simply that they had to give up a baby they had grown to love. But that aspect of human nature is what fuels the fight against racism and other forms of unfair discrimination. Without question, we owe a debt of gratitude to the civil rights leaders, progressive lawmakers, courageous judges, and dedicated lawyers who eventually rendered racial discrimination illegal. But if racism is ever to be eradicated outright, it will be because ordinary people continue to make friends, fall in love, get married, bear and adopt children, all based on a yearning for human connection that is stronger than the impulse to differentiate people based on superficial features like skin color.

To me, this is the significance of Barack Obama’s election as president. Enough ordinary people of diverse backgrounds decided that the strengths Obama offered as a leader were more important than whatever prejudices they might have had against him because of his skin color. Whether he lives up to the high expectations he faces remains to be seen. But now that Obama has broken down a 220-year-old racial barrier by being elected, we can hope that his successes and failures as president will be attributed to his skills rather than his skin color. Although race undoubtedly will remain a factor in politics, perhaps race alone will no longer be enough to decide an election, just as the color of a baby’s skin no longer justifies removing her from her home.

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Applied Legal Ethics: Disqualification in Washington Courts

BY MARK J. FUCILE

When we think of the regulatory aspects of law practice, discipline as enforced through the Bar Association usually comes to mind. Disqualification, however, is an equally long-standing and often more direct way that clients and other litigants enforce the Rules of Professional Conduct. In this column, we’ll look at this unique form of “applied legal ethics.”

Disqualification Procedure
Disqualification is a blend of procedural law supplied by the courts and substantive law supplied by the RPCs. Although courts in theory can exercise disqualification authority on their own motion, the far more common scenario in practice is that one of the parties seeks an order disqualifying opposing counsel. The procedural rules governing motion practice generally in the court concerned apply with equal measure to disqualification. In addition, both state and federal courts have fashioned three rules specific to disqualification addressing standing, waiver, and appeal.

Standing. Generally, the moving party on a disqualification motion must be either a current or former client of the lawyer or law firm against whom the motion is directed. See FMC Technologies, Inc. v. Edwards, 420 F.Supp.2d 1153, 1155-58 (W.D. Wash. 2006). If not a current party to the case involved, intervention is permitted at the discretion of the trial court for the limited purpose of moving to disqualify a current or former lawyer or law firm. See, e.g., Oxford Systems, Inc. v. CellPro, Inc., 45 F.Supp.2d 1055, 1058 (W.D. Wash. 1999).

Exceptions occur, however, when the participation of the lawyer or law firm involved would affect the rights of other parties to the case, with lawyer-witness and discovery issues being common situations in civil litiga-

Appeal. Trial court orders granting or denying motions for disqualification are not immediately appealable as a matter of right. See First Small Business Inv. Co. of California v. Intercapital Corp. of Oregon, 108 Wn.2d 324, 328, 738 P.2d 263 (1987) (discretionary review); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 440, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985) (where the trial court had ordered disqualification); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (where the trial court had denied disqualification). Discretionary review may be available in state court and mandamus may be available prior to entry of a final judgment in federal court, but each is used sparingly by the appellate courts. See First Small Business, 108 Wn.2d at 328; Cole v. U.S. District Court, 366 F.3d 813, 816-18 (9th Cir. 2004). At the same time, this discretionary remedy is often the only practical path available. See RWR Management, Inc. v. Citizens Realty Co., 133 Wn. App. 265, 279-280, 135 P.3d 955 (2006) (noting the practical futility of appeal of disqualification after the case has been tried by able replacement counsel).

Substantive Disqualification Law
The RPCs control the professional conduct of lawyers appearing in both Washington’s state and federal courts. See GR 1 (state court); U.S. District Court, Western District of Washington, GR 2(e); U.S. District Court, Eastern District of Washington, LR 83.3(a). Therefore, the RPCs
supply the substantive law on whether an ethics violation warranting disqualification has occurred. The substantive aspects of the RPCs applied in disqualification include choice-of-law, conflicts, and other asserted ethics violations that may impact the litigation involved.

**Choice-of-Law.** The 2006 amendments to the RPCs included a choice-of-law provision, RPC 8.5(b). Under that provision, litigation is most often controlled by the law of the forum. In some instances where specific conduct or its predominant effect occurred in another jurisdiction, however, the other state’s substantive law may apply using Washington’s choice-of-law provision.

**Conflicts.** Asserted current or former conflicts are by far the most common grounds for seeking disqualification of opposing counsel. See, e.g., *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F.Supp.2d 1055 (disqualification sought based on asserted current client conflict); *FMC Technologies, Inc. v. Edwards*, 420 F.Supp.2d 1153 (disqualification sought based on asserted former client conflict). Current multi-client conflicts are governed by RPC 1.7. Former client conflicts, in turn, are governed by RPC 1.9. RPC 1.10 generally imputes one firm lawyer’s conflict to the entire firm under the “firm unit rule.”

With both asserted current or former client conflicts, the moving party must first show that there was, in fact, an attorney-client relationship between that party and the lawyer or law firm against which disqualification is sought. In Washington, that question is a matter of state substantive decisional law rather than the RPCs. The leading case on that point is *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). Under *Bohn*, the test for determining whether an attorney-client relationship exists (or existed) is twofold. The first element is subjective: Does the client subjectively believe that the lawyer represents the client? The second is objective: Is that subjective belief objectively reasonable under the circumstances? Both elements of the test must be met for an attorney-client relationship to exist.

Because current clients have very broad rights to block “their” lawyer from opposing them on any other matters, disqualification motions based on asserted current client conflicts usually turn on whether a current attorney-client relationship exists. See, e.g., *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F.Supp.2d 1055 (whether periodic client was a current client); *Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000 (whether current client conflict existed by virtue of representation of affiliated corporation). Disqualification motions based on alleged former client conflicts, by contrast, usually focus on whether, in the vernacular of RPC 1.9, the current matter is the “same or substantially related” to one the lawyer or the law firm handled for the former client. See, e.g., *State v. Hunsaker*, 74 Wn. App. 38, 41-48, 873 P.2d 540 (1994) (finding no substantial relationship); *FMC Technologies, Inc. v. Edwards*, 420 F.Supp.2d 1153 (finding a substantial relationship). Disqualification motions are also occasionally based on as-
sated imputed conflicts, such as claimed inadequacies in new-hire lateral screening (see, e.g., Daines v. Alcatel, S.A., 194 F.R.D. 678 (E.D. Wash. 2000)) or claimed conflicts arising through sharing information between co-counsel or other associated counsel (see, e.g., First Small Business, 108 Wn.2d 324; Avocent Redmond Corp. v. Rose Electronics, Inc., 516 F.Supp.2d 1199 (W.D. Wash. 2007)).

**Other Grounds.** Although less common, disqualification motions are also predicated on other asserted violations of the professional rules, such as: claimed violations of the lawyer-witness rule (RPC 3.7), see, e.g., Barbee v. Luong Firm, P.L.L.C., 126 Wn. App. 148; and alleged discovery violations, particularly those that intrude on opposing counsel’s attorney-client privilege or work product protection (RPC 4.4), see, e.g., In re Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411 (1996) (unauthorized contact with opposing expert); Richards v. Jain, 168 F.Supp.2d 1195 (unauthorized access to opponent’s privileged communications).

**Summing Up**

Disqualification is a unique blend of procedural and substantive law that applies legal ethics precepts directly in litigation. This form of “self help” does not foreclose other relief, such as bar discipline or breach of fiduciary duty claims (see, e.g., In re Kronenberg, 155 Wn.2d 184, 117 P.3d 1134 (2005) (disciplinary proceeding against disqualified lawyer); Cotton v. Kronenberg, 111 Wn. App. 258, 44 P.3d 878 (2002) (breach of fiduciary duty claim for same conduct)), but it offers a very direct remedy to remove opposing counsel for violations of the RPCs.

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Report from the November 21, 2008, meeting

BY ROBERT D. WELDEN

The Lawyers’ Fund for Client Protection Committee meets quarterly to review applications for gifts from the Fund. The Committee is authorized to make gifts less than $25,000 to eligible applicants. On applications for $25,000 or more, the Committee makes recommendations to the Board of Governors who are the Fund Trustees. At their meeting on November 21, 2008, the Committee conducted the following business.

Dennis F. Olsen — WSBA No. 22519 (Everett); interim suspension 11/10/05; disbarred 9/19/06 (suspended by the Board of Immigration Appeals 2/21/06)

The applicant, a Canadian citizen who was purchasing a business in Washington, initially paid Olsen $1,000 to cancel an E-2 visa that another lawyer had obtained for her, which she says was in error. Olsen told her that he had cancelled the visa and recommended that she apply for an L-1 visa, described as follows:

L-1 Visa Eligibility Requirements: The main requirement is that the applicant must be employed outside the United States and is being transferred to the United States branch, subsidiary, affiliate, or joint venture partner of the non-U.S. company.

The applicant paid Olsen an additional $2,500 to apply for the L-1 visa. She said that after she did not hear from Olsen for several weeks, she researched the requirements for an L-1 visa and discovered that she did not qualify, as her U.S. business was not a subsidiary of a Canadian business. She phoned Olsen and told him this, and she says he responded, “What do you know, you’re not a lawyer.” She says after that he refused to speak with her. She eventually contacted the Canadian consulate and learned that her E-2 visa had not been cancelled, contrary to Olsen’s representations. The applicant wrote to Olsen requesting a refund of the fees she paid for which no service had been performed, which he denied. The Committee approved payment to the applicant of $3,500.

Roger D. Ost Jr. — WSBA No. 22141 (Seattle); interim suspension 11/29/07; disbarred 12/7/07

The applicant paid Ost $500 on 10/3/07 to pay a fine regarding a bench warrant issued for his arrest in Salt Lake City. Ost never paid the fine. Ost was suspended on 11/29/07 and disbarred on 12/7/07.

The receipt signed by Ost reads: “Received from [the applicant] in trust to retain Utah attorney [A].” Attorney A advised the WSBA that he recalls speaking with someone about this. He wrote:

Upon receipt of your letter of October 12, 2008 I again reviewed my financial records and can find no entry related to an amount received from Roger Ost Jr. on behalf of [the applicant]. At some point in the past it seems that I did receive a call from an attorney in Washington inquiring about a retainer on a Utah traffic matter but nothing ever came of it . . . My best recollection is that if it was Mr. Ost that called me from Washington he never followed up with the retainer.”

The Committee approved payment of $500 to the applicant.

Theresa M. Sowinski — WSBA No. 32549 (Edmonds); suspended pending discipline 11/29/06; disbarred by stipulation 9/10/08

Sowinski pleaded guilty to two counts of first-degree theft of client funds. One count relates to theft of funds from the applicant. She was sentenced to one year in jail with credit for time served, and she was ordered to pay $258,000 in restitution to the applicant.

The applicant hired Sowinski to represent her in the sale of her home and an adjacent lot. Sowinski paid herself or disbursed a total of $80,000 to the applicant. The applicant asked Sowinski to transfer all remaining funds to the applicant’s personal account. Sowinski agreed to do so, but did not do it. As of March 2006, the balance in Sowinski’s trust account was $91.32. Between 6/1/05 and March 2006, Sowinski paid herself or her law firm $212,868 from her trust account. She also disbursed an additional $29,345 by counter withdrawal. Sowinski stipulated that she used the applicant’s funds for her personal benefit. The Committee recommended and the Trustees approved payment of $75,000.

Barry A. Hammer — WSBA No. 6444 (Everett); resigned in lieu of disbarment 6/30/05

Hammer advertised himself as a personal injury attorney as well as a tax and estate planner, and conducted a substantial tax preparation business from his law office. On his letterhead, he said that he had a L.L.M. in taxation. He was also a licensed CPA between September 8, 1972, and July 1, 1986, when he allowed his license to lapse.

In addition to his law practice, Hammer owned a corporation called Able Mortgage and Investment, Inc., which he ran out of his law office. Hammer would recommend clients and others to invest in Able. He gave the investors promissory notes and, in some instances, represented that they were secured by deeds of trust on real property. Promissory notes from...
Able Mortgage were all personally guaranteed by Hammer individually.

Hammer filed a Chapter 7 bankruptcy proceeding in September 2004, claiming $13.5 million in assets, of which $11.2 million was in the form of real estate owned by him or by Able Mortgage. He alleged over $13 million in debts, of which $9.5 million was owed to Able Mortgage “investors.” According to the bankruptcy trustee, Hammer’s valuation of what he listed as the most valuable real property, the Sultan Airport property, was drastically overinflated. Hammer listed the property as having a value of $6.5 million; however, the property was assessed at only $646,000, and ultimately sold for approximately $2 million. There is one remaining piece of real property, the Arlington Airport property, which may have a value between one and two million dollars. It has been on the market for some time.

More than 150 creditors filed claims. The Fund worked with the bankruptcy trustee to notify persons potentially eligible for recovery from the Fund about the Fund, and to protect the WSBA’s interest. In taking possession of Hammer’s estate, the trustee discovered that there was approximately $15,000 in Hammer’s IOLTA account for which no owner could be identified. With approval from the Board of Governors, the Fund successfully petitioned the Supreme Court for authority to transfer those funds to the Fund, which resulted in the Fund’s receiving $15,260.

The Fund received a total of 48 applications regarding Hammer. Two were approved and paid in 2006. Of the remaining 46, it became apparent to the Committee that there was a serious potential that approved applications might greatly exceed the funds available in the Fund. In September, the Committee made a preliminary report to the Board of Governors, who are the Fund’s Trustees, and sought their guidance. The Board voted to pay all non-Hammer applications to the full amount recommended by the Committee, and to prorate all approved Hammer applications against 75 percent of the Fund balance as of September 30, 2008 (the end of the WSBA fiscal year). Twenty-four of the remaining applications were approved. If paid in full, the total would have been $1,278,116.28. However, only $695,409.88 was available, pursuant to the formula approved by the Board.

Also, in considering the applications, the Committee determined that if the client received interest payments from Hammer (or, in more than one instance, insurance proceeds), those would be deducted from the principal amount paid to Hammer, as would any payments from the bankruptcy estate, which resulted in the denial of some applications where interest exceeded principal. (The approved payment amounts shown are as prorated.)

Application A. Hammer was the applicants’ lawyer for over 30 years. He encouraged them to invest with him. “We trusted him enough to proceed,” they said. In 1997, they loaned Hammer $30,000. They received yearly interest payments on that loan. In 2003, they loaned an additional $40,000 and received a promissory note for $70,078.09 (combining the 1997 and 2003 loans into one unsecured note). A second loan in 2003 was for $60,000. Interest payments were made until Hammer filed for bankruptcy. The applicants received $8,661.67 from the bankruptcy on in 2006, and their unaccounted-for principal appears to be $121,338.33. The Committee recommended and the Trustees approved payment of $18,949.73.

Application B. The applicant had been Hammer’s clients for tax and estate work for many years. Starting in 1990, she loaned a total of $40,826.05 to Able Mortgage (all accrued interest was rolled back into the loan). She received $5,998.65 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $18,949.73.

Application C. The applicants had been Hammer’s clients for tax and estate work for many years. In 1997 they loaned $36,000 to Hammer and received a personal promissory note. In 1999, the applicants paid an additional $8,500 to Able Mortgage. In 2002, they paid an additional amount which made the total principal amount loaned to Able $50,000. They received interest payments totaling $28,900, and were paid $3,231.50 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $7,551.86.

Application D. Hammer probated the applicant’s father’s estate. Hammer encouraged her to invest some of the estate

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proceeds with him. She had four loans at the time of Hammer's bankruptcy filing. They totaled $690,000, and she received interest totaling $239,749.69. She received $45,660.79 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application E.** The applicants were tax clients of Hammer since 1978. He recommended that they refinance their home in 2003 and invest $100,000 of the proceeds with Able Mortgage, which they did. They received interest payments of approximately $18,000. They also received a distribution of $7,100 from the bankruptcy. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application F.** The applicants became estate-planning clients of Hammer in August 1991. While discussing their wills and estate-planning needs, they discussed investing. The applicants invested with Hammer several times over the years. They made three supposedly “secured” loans between 1991 and 1995 totaling $36,627.09, for which they received promissory notes which stated that they were secured by unidentified property. When the applicants sold their home in 2003, they invested $130,000 in the form of four unsecured promissory notes, making the total investment $166,677.09. In all, they received interest payments in the approximate amount of $56,500, and they received $12,276.17 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application G.** The applicants employed Hammer since 1987 for tax preparation and legal advice. On Hammer’s advice, they refinanced their home to use the equity as start-up capital; however, they decided not to open the business, and Hammer recommended that they invest with him instead. In 1993, they loaned Able Mortgage $10,000. In 2001, they added $1,500 into this investment account. In 2002, they refinanced their home again, and invested $20,000 of the proceeds with Able Mortgage. In September 2004, they asked Hammer to disburse $1,800 from the account; he asked them to wait a week, and subsequently filed bankruptcy. Over the years, they received principal payments of $8,806, and interest payments of $6,200. Most of the time, the interest was reinvested into their account. The Committee recommended and the Trustees approved payment of $7,218.36.

**Application H.** The applicants were clients of Hammer. He was recommended to them after the wife’s mother’s assisted-living costs were $45,660.79 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application I.** The applicants became clients in 1985; they had “tax consultations” with Hammer once or twice a year for 20 years, through the spring of 2004. During their 1998 tax consultation, Hammer recommended they do a revocable living trust (which he then drafted). While going over their assets for purposes of drafting the trust, they told Hammer that the wife’s father had just inherited $200,000, that her parents wanted to preserve this money if possible, and that the money was then in a savings account. Hammer advised them that the state would require that the funds be used to pay for the parents’ care if they had to go into a nursing home or care facility, and that if they moved the money to conventional investments the state could track it and the money would still be lost. He advised the applicants that the funds should be put into promissory notes. He told them the notes would be unsecured “but fully backed with real estate holdings, and that, as a lawyer, he had liability protection in Washington state that exceeded a million dollars.” He also stated that the notes would be backed by his personal and business assets. He advised the clients that if the money was in the form of a promissory note not due for four years, the state could never go after the money because it wasn’t available, and that if her mother’s name wasn’t on the notes, the state couldn’t go after it for her mother’s care, either. In 1998, the wife’s father loaned $180,000 to Able Mortgage & Investments; the promissory note listed the wife and her brother as beneficiaries if the father died. He died later that year. $55,200 was withdrawn from this loan after the father died to cover the cost of the wife’s mother’s assisted-living care. The wife’s mother died in 2001, and

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the note was “split” between the wife and her brother; each received new promissory notes. Hammer urged them to reinvest the promissory note proceeds, instead of cashing it out, because they would have to “claim about $40,000 in accrued interest,” and that it would be better to wait until they retired and claim the interest when they were in a lower tax bracket. So they reinvested the proceeds. They reinvested the interest most of the time, but did receive $29,000 in principal on the first loan.

The husband retired in November 2003. When the applicants went to Hammer to discuss the tax ramifications of a house sale, Hammer convinced the husband to invest his cash retirement payout into a new promissory note. He loaned $70,000 to Able Mortgage & Investments. They withdrew $18,000 before bankruptcy, so total principal remaining owed is $52,000.

The applicants received a $9,586 distribution from the bankruptcy on 01/03/2006. The Committee recommended and the Trustees approved payment of $40,806.73.

Application J. The applicants became clients in 1976 when they needed help settling the estate of the wife's parents. He also handled the sale of the parents' home. Hammer did any legal work the clients required, as well as their taxes, from 1980 to September 2004.

When the husband retired in 1998, Hammer advised them to cash out their investments and invest in real estate. In 1999 they invested $110,000, secured by a deed of trust. In April 2000, Hammer sold the property which secured the $110,000 investment. When they were notified of the sale, and the sale closed, the applicants received, at their request, $10,000 and reinvested the remaining $100,000 with Hammer, at his suggestion. They received a new, unsecured promissory note. Later, they requested and received $3,000 of principal, which reduced their principal to $97,000. In 1999, they loaned an additional $55,000 and received an unsecured promissory note. They received interest totaling $30,318.75. Also in 1999, they loaned $15,000. They received interest totaling $30,000 of her settlement with Hammer. The applicant withdrew $9,000 in principal in 2003, which brought her principal down to $31,000. She was paid $21,000 in interest and she received a distribution of $2,983.92 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $3,817.43.

Application K. The applicants became clients in 2001 for income taxes and for estate planning. He advised them not to pay off their mortgage so they would keep the tax deduction. In 2003, Hammer advised them to refinance their house for $150,000 and invest with him, which they did. They received approximately $14,000 in interest and received $9,662.50 from the bankruptcy. The Committee recommended and the Trustees approved payment of $40,806.73.

Application L. Hammer handled the probate of the applicant's mother's estate for her father. In 1996, Hammer convinced her father to lend him $120,000; he paid back $100,000 (without interest) but not the $20,000. The father left those funds invested with Hammer for the benefit of the applicant's two children. In 1996, Hammer gave the applicant a promissory note from Able Mortgage & Investments for $20,000, payable to the applicant as trustee for benefit of her children. She wanted to cash it out in September 2001, and sent Hammer a letter requesting that the fund be liquidated; instead, Hammer sent her a replacement promissory note, also unsecured, for $31,313.62. The applicant received a $3,054.12 distribution from the bankruptcy. The Committee recommended and the Trustees approved payment of $9,220.08.

Application M. Hammer started preparing the applicant’s taxes in 1986. In 1995, she transferred then-ongoing auto accident litigation, which was being handled by another law firm, to Hammer's then-partner at Hammer’s urging. The case settled, and the applicant received a $100,000 net insurance settlement; when she went to pick up the settlement check, Hammer urged her to invest with him. She invested $40,000 of her settlement with Hammer. The applicant withdrew $9,000 in principal in 2003, which brought her principal down to $31,000. She was paid $21,000 in interest and she received a distribution of $2,983.92 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $3,817.43.
when the proceeds of sale came in, Hammer recommended they invest with Able Mortgage & Investments. They loaned Able $50,000. They allowed the accrued interest to roll over into the loan. They received a $7,211.81 distribution from the bankruptcy estate. The Committee recommended the Trustees approved payment of $23,280.61.

**Application P.** The applicants were clients of Hammer’s since 1998. In 2001, they sold some property and invested the proceeds with Hammer. Hammer also prepared their wills and estate-planning documents. In 2001, they loaned Hammer $280,000 and received a personal promissory note from Hammer. Also in 2001, they loaned him $20,000 and received a second personal promissory note from Hammer. They made a third loan in 2001 of $100,000, secured by a personal promissory note from Hammer. The applicants received approximately $42,000 from the bankruptcy estate, and they received $20,000 principal from Hammer in 2003. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application Q.** Hammer was the attorney for the applicant in the applicant’s capacity as personal representative of his late father’s estate. The estate was administratively closed by the court clerk for want of prosecution in November 2005. Hammer failed to account for estate funds. The Committee recommended and the Trustees approved payment of $8,204.74.

**Application R.** In the summer of 1994, the applicant’s father died. He had invested a significant amount of his retirement with Hammer. The applicant was to receive half of the estate assets. Hammer handled the probate. When the applicant and her brother sold the last remaining estate asset in 2004, at Hammer’s urging she decided to invest proceeds with Hammer. She gave Hammer $25,000 and received an unsecured promissory note which called for interest-only payments. The applicant received $1,656.41 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $13,182.78.

**Application S.** The applicant is the brother of the applicant in Application R. When he received his share of the estate, he also decided at Hammer’s urging to invest proceeds with Hammer. He gave Hammer $37,000 and received an unsecured promissory note which called for interest-only payments. He received $2,457.76 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $18,794.08.

**Application T.** Hammer prepared the applicants’ business and personal taxes. Hammer encouraged them to invest in his business, and urged them to sell some real property and invest with him. They listed the property with a Realtor and, after the listing expired, a private party made an offer. Hammer said he would prepare the sale papers for free if they invested at least $100,000 with him. They gave Hammer $100,000 and received a promissory note calling for interest-only payments. The applicants received $6,671.17 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application U.** The applicant is the court-appointed personal representative and filed the claim in that capacity. Hammer represented the deceased during his life, and he was also handling the probate. The deceased had sold some real property and invested $240,000 in Able Mortgage & Investments. The estate received $16,264 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application V.** Hammer was the attorney for the applicant’s mother. He drafted her revocable living trust and the applicant submitted his application in his capacity as successor trustee of the trust and/or as the sole beneficiary of her estate. The mother loaned Hammer $325,000, and assigned the loan to the revocable living trust. She subsequently made a second loan to Hammer of $139,091.73. A distribution of $36,789.59 was made from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application W.** The applicants had a long-time attorney-client relationship with Hammer. He prepared their tax returns and handled a number of different legal matters for them. The applicants made two loans to Hammer at his request. The first was for $110,000, and they received an unsecured promissory note which called for interest-only payments. The second was for $100,000. The applicants received $23,719.78 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $40,806.73.

**Application X.** The applicants were tax clients and Hammer also did general legal work for them, including a real estate sale. They invested $53,823.33 and received an unsecured note from Able Mortgage & Investments which called for interest-only payments. Subsequently, they invested $155,000 and received an unsecured note from Able Mortgage & Investments which called for monthly payments of $1,000. The funds for this loan came from the proceeds of sale of their home. The applicants received $14,503.33 from the bankruptcy estate. The Committee recommended and the Trustees approved payment of $40,806.73.

**Other business:** The Committee reviewed 27 additional applications that were denied for lack of evidence of dishonest conduct, as fee disputes or claims for malpractice, because restitution was made, for unjust enrichment, or were deferred for further investigation.

**Restitution:** Before payment is made, the applicant must sign a subrogation agreement with the Fund, and the Fund seeks restitution from the lawyers. Because in most cases those lawyers have no assets, the chief avenue of restitution is through court-ordered restitution in criminal cases. Prosecuting attorneys cooperate with the fund in getting the Fund listed in restitution orders. Between October 1, 2007, and September 30, 2008, seven lawyers were making regular restitution payments to the Fund which total $26,840.13. This includes $15,260 deposited into the Fund pursuant to Supreme Court order from abandoned and unidentifiable funds in the trust account of former attorney Barry A. Hammer.
Opportunities for Service

WSBA Presidential Search

Application Deadline: May 1, 2009

The WSBA Board of Governors is seeking applicants for the position of WSBA president for 2010–2011. Pursuant to Article IV (A)(2) of the WSBA Bylaws, the primary place of business of candidates for president for 2010–2011 must be King County. The WSBA member selected to be president will have an opportunity to provide a significant contribution to the legal profession.

Applications for 2010–2011 WSBA president will be accepted through May 1, 2009, and should be limited to a current résumé, a concise application letter stating interest and qualifications, and no fewer than five or more than 10 references. The Board of Governors will consider endorsement letters received by May 15, 2009. Applications and endorsement letters should be sent to the WSBA Executive Director, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101.

Direct contact with the Board of Governors is encouraged. All candidates will have an interview with the full Board of Governors in open session at the May 29, 2009, Board of Governors meeting in Yakima. Following the interviews, the board will select the president.

Although prior experience on the WSBA’s Board of Governors may be helpful, there is no requirement that one must have been a member of the Board of Governors or had previous experience in Bar activities. The candidate must be willing to devote a substantial number of hours to WSBA affairs and be capable of being a positive representative for the legal profession. The position is unpaid. Some expenses, such as WSBA-related travel, are reimbursed.

The commitment begins in June 2009 following selection. A one-year term as president-elect will begin at the Annual Business Meeting in September 2009. The president-elect is expected to attend the two-day board meetings held approximately every five to six weeks, as well as numerous subcommittee, section, regional, national, and local meetings. In September 2010, at the WSBA Annual Business Meeting, the president-elect will assume the position as president. During his or her service, the president-elect and president will also be required to meet with members of the Bar, the courts, the media, and public and legal interest groups, as well as be involved in the Bar’s legislative activities. Appropriate time will need to be devoted to communication by letter, e-mail, and telephone in connection with these responsibilities.

The duties and responsibilities of the president are set forth in the WSBA Bylaws. The Bylaws can be found at www.wsba.org/info/bylaws.

Letters of Application Invited for the At-Large Young Lawyer Position on the WSBA Board of Governors

Application Deadline: February 27, 2009

Letters of application are invited for the At-Large Young Lawyer position on the WSBA Board of Governors.

This at-large seat is a designated young lawyer seat. To be eligible for the position, a candidate must be a member of the Washington Young Lawyers Division (WYLD) through the election in May 2009. The elected governor will serve a three-year term, commencing on October 1, 2009.

For full application and election details, see www.wsba.org/lawyers/groups/wyld.

2009 Notice of Board of Governors Election

Four positions on the WSBA Board of Governors will be up for election this year. These are the governors representing the 1st, 4th, 5th, and 7th-West* Congressional Districts. These positions are currently held by Russell M. Aoki (1st District), Edward F. Shea Jr. (4th District), Peter J. Karademos (5th District), and Anthony L. Butler (7th-West District).

The WSBA Bylaws provide that any member in good standing, except a member previously elected to the Board of Governors, may be nominated for the office of governor from the congressional district (or geographical region within the 7th District*) in which such member is entitled to vote. Nominations are made by filing a statement of interest and a biographical statement of not more than 100 words.

Generally, members are entitled to vote in the congressional district in which the member resides. All out-of-state active WSBA members are eligible to vote in the district of the address of their agent within Washington for the purpose of receiving service of process as required by APR 5(e), or, if specifically designated to the executive director, within the district of their primary Washington practice. However, the member must reside in the congressional district to be eligible for election.

Nomination forms are available from the Office of the Executive Director, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; 206-727-8244 and on the WSBA website at www.wsba.org/info/bog. The WSBA executive director must receive nomination forms by 5:00 p.m. on March 3, 2009. The Board of Governors determines the official dates of the election. Ballots are mailed on or about April 15 and must be returned by May 15.

Note: The biographical statements of nominated candidates will be published in the May issue of Bar News.

*Mandatory Continuing Legal Education (MCLE) Board

Application deadline: March 6, 2009

The WSBA Board of Governors is seeking applications from active WSBA members for appointment to the MCLE Board. One position is available, and members from any district may apply. This is a three-year term commencing October 1, 2009. The MCLE Board approves courses and educational programs that satisfy the educational requirements of the mandatory CLE rule and considers MCLE policy issues, as well as reporting and exception situations. Interested individuals should 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.
Notice of Hearing on Petition for Reinstatement of D. Willas Miller, WSBA No. 25454

A petition for reinstatement after disbarment has been filed by D. Willas Miller, who was suspended pending discipline on October 5, 2000, and disbarred on September 17, 2004. At the time of his suspension and disbarment, Mr. Miller practiced in King County, Washington.

A hearing on Mr. Miller’s petition will be conducted before the Character and Fitness Board on April 6, 2009. Not later than March 23, 2009, anyone wishing to do so may file with the Character and Fitness Board a written statement for or against reinstatement, setting forth factual matters showing that the petitioner does or does not meet the requirements of Admission to Practice Rule 25.3(a). Except by its leave, no person other than the petitioner or petitioner’s counsel shall be heard orally by the Character and Fitness Board.

Communications to the Character and Fitness Board should be sent to Robert D. Welden, General Counsel, WSBA, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539, or to bobw@wsba.org. This notice is published pursuant to APR 25.4(a).

Seeking Questionnaires from Candidates for Judicial Appointments

Deadline: April 30 for June 11 interview

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 date 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/judicialrecommendation or contact the WSBA at 206-727-8212 or 800-945-9722, ext. 8212, or barleaders@wsba.org.

New WSBA Civil Rights Law Section

At their meeting on December 5, 2008, the WSBA Board of Governors approved the formation of a new section to be known as the Civil Rights Law Section. The section’s interim leadership includes Tracy Flood, chair; Sharon Payant, vice chair; Mary Englund, secretary; and Patricia Paul, treasurer.

The Civil Rights Law Section will be concerned with all aspects of law and policy related to the improvement of the legal practice in the substantive area of civil rights law. This includes, but is not limited to, violations of rights provided under the constitutions of United States and Washington state, federal and state statutes, local laws and regulations; criminal harassment and hate crimes; and immigration matters. Among other priorities benefiting its members, the section will sponsor continuing legal education on civil rights law and provide a network for communications with civil rights organizations throughout the state.

The new section is an offshoot of the WSBA Civil Rights Committee (CRC) which has been the main WSBA entity whose primary focus is on civil rights law. An active subcommittee of the CRC, chaired by Patricia Paul, completed the various requirements for the Board of Governors’ approval of the new section. Other CRC subcommittee members included Wilberforce Agye-kum, Tracy Flood, Molly Maloney, and Sharon Payant.

Banish Bad CLEs Forever

Have you ever been to a CLE so terrible it makes you want to give up law and try your hand in real estate? Or been to one so good it renews your faith in your profession and puts an extra spring in your step? The MCLE Board wants to know! That dreary lecture that you slept through? Let us know! The fabulous presenter you want to invite to all your parties? We want to know about her, too. Our mission is to ensure that members get first-rate continuing legal education, and we need your help.

In March, the WSBA will e-mail another online survey and invite members to participate as an easy and anonymous way to tell the Board about good or bad CLE courses attended in the past year. In addition, you can e-mail Kathy Todd at kathyt@wsba.org regarding your thoughts on the recent CLEs you have taken. The Board has just revised the CLE rules and regulations, and our goal is that CLE presenters exceed these minimum standards. It’s for your benefit, so let us know your thoughts.

Rule 9 Task Force

The Board of Governors authorized a Rule 9 Task Force to review the current rule and program and provide input for improvement. “Rule 9” refers to Admission to Practice Rule 9, which provides for a qualified law student or recent graduate with a license for the limited practice of law as a legal intern under the supervision of a lawyer. The rule has not been fully reviewed or revised for many years, and the current effort is prompted by WSBA’s strategic goal to review all programming. The Task Force is composed of lawyers who frequently supervise legal interns (public/private, defense/prosecution), current legal interns, judges, and WSBA staff. WSBA Governor Carla Lee is the Task Force chair.

For the Task Force charter, meeting minutes, review drafts, and updates, go to www.wsba.org/lawyers/groups/rule+9+task+force.htm.

2009 Licensing Information and Changes

• Deadline is February 2. If you haven’t paid all of your license fees or if you are on Active status and haven’t paid your Lawyers’ Fund for Client Protection assessment or filed your completed A1 Licensing form, please do so now. Instructions are available online at www.wsba.org/licensing.

• Licensing Forms Changes. In an effort to control costs and simplify renewal, the 2009 licensing forms have been condensed into one double-sided form or two forms for those reporting MCLE credits this year. The form(s) were mailed the first week of December in a standard-size envelope.

• Verify Your Address in the Online Lawyer Directory (http://pro.wsba.org). You are required to keep your contact information current; see Admission to Practice Rule 13. If you have not received the 2009 licensing forms, you may print them online or call the WSBA Service Center.

• WSBA Bylaw Section II.E.1.b. on Armed Forces Fee Exemption provides for a fee exemption for eligible members of the Armed Forces whose WSBA membership status is active. The WSBA will accept fee exemption requests from December 1, 2008, until March 2, 2009, for the 2009 Licensing Year.
**MCLE Certification for Group 2 (2006–2008)**

If you are an active WSBA member in MCLE Reporting Group 2 (2006–2008), you should have received your Continuing Legal Education Certification (C2/C3) forms in the license packet that was mailed in early December. The deadline for returning the C2/C3 form to the WSBA is February 2, 2009. Any C2/C3 forms delivered to the WSBA or postmarked after March 2, 2009, will be assessed a late fee.

Members in Group 2 include active members who were admitted to the WSBA in 1976–1983, 1992, 1995, 1998, 2001, or 2004. Members admitted in 2007 are also in Group 2 but are not due to report until the end of 2011. Their first reporting period will be 2009–2011; however, any credits earned on or after the day of admittance to the WSBA may be counted for compliance.

The C2/C3 form that you received in your license packet is a declaration that lists all the MCLE Board-approved courses that were in your online profile for the 2006–2008 reporting period as of mid-October 2008. If you took other courses after mid-October, you can add these to the back of the C2/C3 form when you receive it. As an alternative, you may print your online roster and attach it to the C2/C3 form; indicate that it is a correct listing of the courses you took for compliance.

The C2/C3 form, not your online profile, is the official record of MCLE compliance. The original copy of the C2/C3 form must be returned to the WSBA to meet compliance requirements.

All courses that you list on your C2/C3 form must be Washington MCLE Board approved and have an Activity ID number. This number is listed in your online profile and is assigned at the time that the Form 1 for each course is input to the MCLE system. A "Certificate of Attendance" or other sponsor-provided certification is not sufficient to receive course credit.

If you have taken courses that have not yet been approved by the MCLE Board, submit Form 1s for these courses immediately to ensure that they are approved before your C2/C3 is due. Each Form 1 application must include a full agenda for the course in order to receive credit. The agenda must have the start and end times for each session and each break. Because of high volumes from October through February, Form 1s submitted electronically (at http://pro.wsba.org) could take up to four weeks or more to process. Paper Form 1s may take up to six weeks or more to process. If you submit a paper Form 1, you will be notified by mail of its Activity ID number.

If you were not able to meet the credit requirement by December 31, 2008, and need more time to complete your credits, you must submit a petition to the MCLE Board to request more time. There is no longer an automatic extension until May 1. You must give a complete explanation on the petition of the reason that you need an extension.

A late fee will be assessed if you took any courses after December 31 that are needed for compliance or if your C2/C3 form is submitted late. If this is the first reporting period in which you will not meet MCLE compliance requirements, the late fee will be $150. The late fee increases by $300 for each consecutive reporting period you are late in meeting MCLE requirements.

If you have questions about the Form 1 process or MCLE compliance, please contact the WSBA Service Center at 800-945-WSBA (9722) or 206-443-WSBA (9722), or e-mail questions@wsba.org.

**MCLE Certification Information for Active Members**

**Due Date for MCLE Reporting.** WSBA members are divided into three MCLE reporting groups based on year of admission. (Newly admitted members are exempt. See "Newly Admitted Members" below.)


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<th>Reporting Group</th>
<th>Next Reporting Period</th>
<th>Complete Credits by</th>
<th>File C2/C3 Form by</th>
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Some of the amendments affect all reporting periods, including (1) there is no longer an automatic extension until May 1, and (2) a member may earn no more than eight credits per day spent attending courses. See www.wsba.org/lawyers/groups/mcle/apr11review07.htm for more information.

**Credit Requirements for 2007–2009 and Later Reporting Periods.** The following credit requirements must be met by December 31 of the last year of an active member’s reporting period:

- At least 45 total credits of MCLE Board-approved CLE activities must be taken, which need to include a minimum of 22.5 live credits and six ethics credits. The courses must meet the requirements of APR 11, but they do not need to be taken in Washington state. Many courses are offered around the world which meet the requirements of APR 11.

- "Live" courses include classroom instruction, live webcasts (not pre-recorded webcasts), and teleconferences.

- "Ethics" courses, and segments of larger courses, must meet the requirements of APR 11 Regulation 101(g) to be considered for ethics credit.

- Pre-recorded self-study (A/V) courses cannot be more than five years old, except MCLE Board-approved “skills-based” courses. Pre-recorded self-study courses include the traditional audio-visual (A/V) media of video tapes and cassette tapes. They also include archived webcasts, DVDs, compact disks, and other media with a sound track of the MCLE Board-approved course presentation. Written materials should be included with these courses and reviewed prior to claiming credit. In addition, written materials must be purchased by each member, where required by the sponsor, prior to claiming credit.

- Six pro bono credits can be earned per year. Two of these credits are for approved annual pro bono training. Four pro bono credits may be earned each year if at least four hours of pro bono work was provided through a qualified legal services provider and if the two credits of required training are completed within the same calendar year.

**Carry-over CLE Credits.** Carry-over credits from the previous reporting period may be used to meet the requirements of
Starting with 2007, you will not report for this reporting period (2006–2008) even though you are in Group 2. You will first report at the end of the 2009–2011 reporting period. Members admitted in 2008 will not report until the end of the 2010–2012 reporting period. When you report at the end of your first reporting period, you may claim all CLE credits earned on or after your date of admission to the WSBA.

**MCLE Comity.** If you are an active member of the WSBA and your primary office for the practice of law is outside of Washington and if you are a member of the Oregon, Idaho, or Utah state bars (“comity” states), you may meet your Washington mandatory CLE requirements by providing proof of current MCLE compliance from your comity state bar. Only a Certificate of MCLE Compliance from your comity state bar (not a “Certificate of Good Standing”), sent with your WSBA C2/C3 form, will satisfy your MCLE requirements in Washington.

**MCLE System — Course Listing and Member Profiles.** Members may use the online MCLE system to:

- Review courses taken and credits earned.
- Apply for course approval.
- Apply for writing credit, pro bono credit, or prep-time credit.
- Search for approved courses being offered.

To access the MCLE online system and your member home page, go to the WSBA website home page at www.wsba.org. Click on the blue and black “Online MCLE System” box in the right column. Follow the instructions on the screen to reach your MCLE home page. If this is your first time logging on to the MCLE system, be sure to change your password after you log in to maximize security of your online MCLE information. Online help is available. If you have any questions about using the MCLE system or about the MCLE compliance requirements, see the online FAQs at www.wsba.org/lawyers/licensing/faq-mcle.htm, or contact the WSBA Service Center at 800-945-WSBA (9722), 206-443-WSBA (9722), or questions@wsba.org.

**In-House CLEs for 2007–2009 and Later Reporting Periods.** Starting with the 2007–2009 reporting period, there is no restriction on the number of in-house credits that a member may take. However, a lawyer who is associated with or employed by a private law firm or corporate legal department that maintains an office within Washington state may not apply to receive credit for a continuing legal education course sponsored by that private law firm or corporate legal department for which the sponsor did not submit a completed Form 1 (APR 11 Regulation 104(b)(2)).

**“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**

Hosted by the WSBA Law Office Management Assistance Program (LOMAP), this roundtable is useful for meeting other members and WSBA Lawyer Services Department staff who will answer questions on ethics, practice, and substantive law. We meet the second Tuesday of the month from noon to 1:30 p.m. February 10 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 800-945-WSBA (9722) or 206-443-WSBA (9722).

**LAP Solution of the Month: Stress Reduction**

Sometimes it’s tempting to reduce stress by over-doing food, alcohol, prescription drugs, sex, gambling — even work. These methods usually provide short-term relief and long-term pain, effectively giving you another problem to cope with down the road. Learn to reduce your stress without self-harm. If you need a hand, call the Lawyers Assistance Program (LAP) at 206-727-8268.

**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 February 9 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 February 12 clinic will meet from 2:00 to 4:00 p.m. and will focus on using Microsoft Word. For more information or to RSVP, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

**New Weekly Support Group for Job Seekers**

Unemployed? Discouraged — or trying not to be? Join us 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 Tuesday mornings from 10:30 to 11:45. Contact Dan Crystal, Psy.D., at 206-727-8267, 800-945-9722, ext. 8267, or dan@wsba.org if you are interested in this group or in other groups forming for senior lawyers and lawyers in transition.

**Job Seekers Monthly Discussion Group**

Looking for a job or making a transition?

Join us at the Job Seekers Discussion Group the second Wednesday of each month from noon to 1:30 p.m. The next meeting is February 11 at the WSBA office. The group discusses the nuts and bolts of the job search process, focusing specifically on informational interviewing and networking. Exchange information and ideas with other lawyers looking to make a change. Come as you are — no need to RSVP. Bring your business cards and practice networking skills. For more information, call 206-727-8269, 800-945-9722, ext. 8269, or e-mail rebecca@wsba.org. If you would like to attend the meeting by telephone, please RSVP by February 10.

**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.

**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.

**Facing an Ethical Dilemma?**

The WSBA Ethics Line can help members analyze a situation involving their own prospective conduct, apply the proper rules, and reach an ethically sound decision. Calls made to the Ethics Line are confidential, and most calls are returned within one business day. Any advice given is intended for the education of the inquirer and does not represent an official position of the WSBA. Call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

**Help for Judges**

The WSBA Judges Assistance 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.

**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.

**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.

**Upcoming Board of Governors Meetings**

- **March 6–7, Seattle • April 24–25, Richland • May 29, Yakima**

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 January 2009 was 0.325 percent. Therefore, the maximum allowable usury rate for February is 12 percent. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.
Advantages of advertising in Bar News:

► Bar News circulation is nearly 30,000.
► Nearly 75 percent of the WSBA's active members always or usually read Bar News.
► Washington state lawyers and judges read Bar News more than any other legal publication.
► Bar News is the only legal magazine received monthly by every practicing attorney in Washington state.
► Bar News is published 12 times a year with more than 750 pages reaching readers.

To place an ad, contact WSBA Advertising Manager Jack Young at 206-727-8260 or jacky@wsba.org.

CLE Calendar

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

WSBA Bar News CLE Calendar
1325 Fourth Ave., Ste. 600
Seattle, WA 98101-2539
Fax: 206-727-8319
E-mail: comm@wsba.org

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

Business Law

Bankruptcy: Chapters 11 and 7

Environmental Law

Hot Topics in Land Use and Environmental Law
February 25 — Seattle. 6.5 general credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Ethics

RPC Update
March 11 — Tele-CLE. 1.5 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Family Law

13-Hour Introductory Collaborative Law Training
February 6–7 — Seattle. 13 CLE credits, including 1.5 ethics pending. By the Collaborative Law Offices of Rachel L. Felbeck, Holly M. Hohlbein, and Joseph Shaub; 425-822-
0280 (Rachel), rachel@felbecklaw.com.

Nursing Home Litigation

General

Practicing Law in the Electronic Era
February 6 — Seattle. 5.5 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Change the Way You File Disability Claims and Appeals — Social Security Administration Workshop for Online E-Services
Seattle — February 12; Portland — February 23; Anchorage — March 3; Boise — March 16; Tri-Cities — March 19; Spokane — April 1. CLE credits applied for. By the U.S. Social Security Administration — no cost. Contact Kirk Larson at 206-615-2650 for registration and event locations.

February 13 — Seattle. 6.25 CLE credits, including 1 ethics pending. By the WSBA Solo and Small Firm Practice Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

WSTLA’s Annual Paralegal Seminar

PI Basics and More: A Seminar for Young Lawyers and Paralegals
February 25 — Seattle. 5.5 CLE credits, including 5 ethics. By WSTLA; www.wstla.org/cle/clecalendar.aspx or 206-464-1011.

Legal Practice Management

Brain Injury

Intellectual Property Law

14th Annual Intellectual Property Institute
March 12 — Seattle. CLE credits pending. By the WSBA Intellectual Property Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Labor and Employment Law

Employment Law Bootcamp
February 26 — Seattle. 6 CLE credits, including .75 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Law Office Management

February 13 — Seattle. 6.25 CLE credits, including 1 ethics pending. By the WSBA Solo and Small Firm Practice Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Litigation

Final Friday Brown Bag Lunch Series: Hot Topics in Litigation with Mary Elizabeth Schultz
February 27 — Tele-CLE. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Nursing Home Litigation

Trust and Estate Litigation
March 13 — Seattle. CLE credits pending. By the WSBA Real Property, Probate and Trust Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Mediation

Two-Day Advanced Mediator Training Program
February 4-5 — Seattle. 17 CLE credits, including 1.5 ethics. By Alhadeff & Forbes Mediation Services. www.mediationservices.net; 206-281-9950.

Four-Day Intensive Mediator Training Program

Real Property, Probate and Trust

Law of Adjoining Properties
February 4 — Seattle. 6 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Law of Adjoining Properties
March 6 — Olympia. 6 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Sixth Annual Trust and Estate Litigation Seminar
March 13 — Seattle. 6.5 CLE credits, including 1 ethics. By the WSBA Real Property, Probate and Trust Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Solo/Small Firm

February 13 — Seattle. 6.25 CLE credits, including 1 ethics pending. By the WSBA Solo and Small Firm Practice Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Final Friday Brown Bag Lunch Series: Business Strategies for Solos with Ann Guinn
March 27 — Tele-CLE. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Tele-CLEs

Managing Through the Current Economic Crisis
February 12 — Tele-CLE. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Final Friday Brown Bag Lunch Series: Hot Topics in Litigation with Mary Elizabeth Schultz
February 27 — Tele-CLE. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

RPC Update
March 11— Tele-CLE. 1.5 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Final Friday Brown Bag Lunch Series: Business Strategies for Solos with Ann Guinn
March 27 — Tele-CLE. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.
Disciplinary Notices

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

Kevin G. Healy (WSBA No. 16307, admitted 1986), of Seattle, resigned in lieu of disbarment, effective August 13, 2008. Kevin G. Healy is to be distinguished from Kevin M. Healy of Sacramento. In connection with his resignation in lieu of disbarment, Mr. Healy admitted that the WSBA could prove by a clear preponderance of the evidence sufficient violations of the Rules of Professional conduct to result in his disbarment, but did not admit any specific misconduct. The misconduct and violations described in the Statement of Alleged Misconduct (none of which is specifically admitted by Mr. Healy) are as follows:

At all relevant times, Mr. Healy owned, managed, and operated two limited liability companies. Between 1989 and 2007, Mr. Healy had attorney-client relationships with six individuals (including two married couples). During the course of and as a result of these attorney-client relationships, Mr. Healy learned that these individuals all had substantial assets. Beginning in 2006, Mr. Healy convinced one married couple to refinance their home to obtain $160,000 and invest that sum in his company. He later solicited an additional investment of $67,000 from the same couple. Mr. Healy convinced the couple’s son and daughter-in-law to also refinance their home to obtain $200,000 and invest that sum in his company. In 2006 and 2007, Mr. Healy solicited contributions in the amounts of $500,000 and $400,000 from two other clients or former clients, and a total of $300,000 from two other individuals. Based upon Mr. Healy’s representations, the two clients and two other individuals used their residences to borrow the money that they loaned to Mr. Healy. Mr. Healy convinced one client, who was a 92-year-old widow, to form a limited liability company for the sole purpose of inducing her to invest over $1,425,000 of her personal funds in his company by refinancing her previously un-mortgaged home and by liquidating her life savings.

Mr. Healy told the investors that he would use the investment monies to purchase and renovate properties between Seattle and Tacoma situated at or near a light-rail line. Mr. Healy documented the transactions in unsecured promissory notes (with the exception of one client, who received no documentation for his $400,000 loan). The promissory notes included provisions that Mr. Healy would make all principal and interest payments each month on the loans, would pay the principal of the loans off by certain dates, and individuals would receive additional cash. Mr. Healy told one client who wanted his loan secured by real property that he would receive a deed in real property to hold as part of the loan transaction. In April 2007, Mr. Healy gave the client a statutory warranty deed to an apartment building in Tacoma, but specifically told the client not to record the deed, thereby providing no security interest for the client.

Mr. Healy never informed these individuals that his company had substantial debts or of the risks involved in the investments, nor did he suggest that they seek the advice of independent counsel before investing their money. The terms of the investment transactions were not fair and reasonable. Mr. Healy told many of these individuals that their investments would be perfectly safe. He made such statements as “trustworthiness is the heart of this deal” and “I would not do this deal if I did not trust you and feel in turn that you trust me.” He declared in written statements that even his brother was refinancing his home to invest in the company.

Beginning in October 2007, Mr. Healy failed to make payments as required under the terms of his promissory note with one of the individuals. After January 2008, Mr. Healy had failed to make payments as required under the financial agreements with the other individuals. Mr. Healy owes debts to nine individuals, each debt ranging between $190,000 and $1,425,000.

The violations stated in the Statement of Alleged Misconduct constitute a violation of RPC 1.8(a), prohibiting a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessor, security, or other pecuniary interest adverse to a client unless the transaction and terms on which the lawyer acquires the interest are fair and reasonable, the client is advised in writing and given a reasonable opportunity to seek the advice of independent counsel, and the client gives informed consent; RPC 1.8(b), prohibiting a lawyer from using information relating to representation of a client to the disadvantage of the client unless the client gives informed consent; RPC 1.9(c), prohibiting a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, from thereafter using information relating to the representation to the disadvantage of the client or from revealing information relating to the representation, except as permitted by the rules; and RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.


Disbarred

Stanley L. Lippmann (WSBA No. 29661, admitted 1999), of Seattle, was disbarred, effective October 24, 2008, by order of the Washington State Supreme Court following approval of a stipulation. This discipline is based on conduct in a number of matters involving misuse of client funds and trust-account irregularities.

Between 2005 and January 2008, Mr. Lippmann engaged in the following conduct:

- Deposited $31,350 advance fees from a number of clients in different matters into his general business account and personal bank account rather than into an IOLTA account, and used substantial portions of those client fees for his own use before fully earning them;
- Disbursed $1,100 from his trust account before waiting for a client’s two $550 checks to clear the banking process;
- Disbursed advance fees to himself without first giving his clients reasonable notice of his intent to do so;
- Deposited $5,000 of a client’s advance fees in one matter into his general business account, rather than into an IOLTA account, and used substantial portions of those advance fees for his own use before earning them;
- Used $4,000 of a client’s advance fees for his own use before earning them in a second matter;
- Obtained an unsecured interest-free loan of $10,000 from a second client with no due date, on terms that were neither fair nor reasonable to the client, without giving the client written notice or reasonable opportunity to seek the advice of independent counsel, and without obtaining informed consent from the client;
- Obtained an unsecured interest-free loan of $2,000 from a client with no written documentation memorializing the loan, on terms neither fair nor reasonable nor fully disclosed in writing to the client, without giving the client written notice or reasonable opportunity to seek the advice of independent counsel and without obtaining informed consent from the client; and
- Charged and attempted to collect from a client $42,383.50 in legal fees on a contingent-fee case, after having withdrawn from the case, when the fee agreement made no provision for fees if representation terminated prior to resolution of the case.
Mr. Lippmann's conduct violated RPC 1.5(a), prohibiting a lawyer from making an agreement for, charging, or collecting an unreasonable fee or an unreasonable amount for expenses; RPC 1.8(a), prohibiting a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client, fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client, the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction, and the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction; RPC 1.15A(b), prohibiting a lawyer from using, converting, borrowing, or pledging client or third-person property for the lawyer's own use; RPC 1.15A(c), requiring a lawyer to hold property of clients and third persons separate from the lawyer's own property, which includes depositing and holding in a trust account funds subject to this Rule and identifying, labeling, and appropriately safeguarding any property of clients or third persons other than funds; RPC 1.15(b)(3), allowing a lawyer to withdraw funds to pay client costs and to withdraw earned fees only after giving reasonable notice to the client of the intent to do so, through a billing statement or other document; RPC 1.15(b)(7), prohibiting a lawyer from disbursing funds from a trust account until deposits have cleared the banking process and been collected, unless the lawyer and the bank have a written agreement by which the lawyer personally guarantees all disbursements from the account without recourse to the trust account; and RPC 8.4(a), prohibiting a lawyer from violating or attempting to violate the Rules of Professional Conduct.

Leslie C. Allen represented the Bar Association. Mr. Lippmann represented himself.

Suspended

Charles S. Ferguson (WSBA No. 18024, admitted 1988), of Seattle, was suspended for one year, effective November 12, 2008, by order of the Washington State Supreme Court following a default hearing. This discipline was based on conduct involving failure to act diligently, failure to communicate, failure to expedite litigation, trust-account irregularities, and failure to withdraw from representation when a condition impaired his ability to represent the client.

On May 13, 2005, Mr. Ferguson entered a notice of appearance on behalf of his clients, who were named as defendants in a Lincoln County Superior Court matter. The clients paid Mr. Ferguson an advance fee of $3,000 to represent them. Mr. Ferguson deposited the funds into his business account, and then sent billing statements to the clients as the funds were earned.

On June 5, 2005, the plaintiffs filed a motion for default. The plaintiffs had previously sent notice of the motion for default to Mr. Ferguson on June 3, 2005. Mr. Ferguson did not file an answer or respond to the motion for default. On June 21, 2005, an order of default was entered. On the same date, the court entered judgments in favor of the plaintiffs in the amounts of $309,867 and $261,808 plus costs. On June 24, 2005, Mr. Ferguson left a voicemail message for plaintiff's counsel acknowledging that he owed him an answer and that there was a motion for default set, and indicating that he would provide the answer by Monday. Mr. Ferguson never provided an answer and did not tell his clients about the order of default.

In January 2006, the plaintiffs sent Mr. Ferguson post-judgment interrogatories. In February 2006, the plaintiffs filed a motion for an order requiring that Mr. Ferguson's clients answer the interrogatories. The interrogatories pertained to execution of the default judgment. In March 2006, Mr. Ferguson answered the interrogatories. Every time the clients received any paperwork (approximately 11 times), they faxed the documents to Mr. Ferguson. Each time the clients contacted Mr. Ferguson, he would assure the clients that he was 'on top' of everything and not to worry. This representation was false.

In January 2007, Mr. Ferguson filed a motion to stay execution of the sale of his clients' property pending the filing of a motion to overturn the default. The court denied Mr. Ferguson's motion. The clients' property was sold by the sheriff as a foreclosure, in partial satisfaction of the judgments. Mr. Ferguson states that he had been ill, which caused his failure to file an answer or otherwise protect his clients' property.

Mr. Ferguson's conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; RPC 1.4, requiring a lawyer to keep a client reasonably informed about the status of a matter, promptly comply with reasonable requests for information, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; RPC 3.2, requiring a lawyer to make reasonable efforts to expedite litigation consistent with the interests of the client; RPC 1.14(a), requiring all funds of clients paid to a lawyer or law firm be deposited in one or more identifiable interest-bearing trust accounts and no funds belonging to the lawyer or law firm be deposited therein; and RPC 1.15(a)(2), prohibiting a lawyer from representing a client or, where representation has already commenced, requiring a lawyer to withdraw from representation of a client if the lawyer's physical or mental condition materially impairs his ability to represent the client.

Sasha Stonefeld Powell represented the Bar Association. Mr. Ferguson represented himself. Deirdre P. Glynn Levin was the hearing officer.

Mary H. McIntosh (WSBA No. 12744, admitted 1982), formerly of Mount Vernon, was suspended for 90 days, effective September 22, 2008, by order of the Washington State Supreme Court following approval of a stipulation. This discipline is based on conduct involving lack of candor to a tribunal and initiating improper ex parte contact with a judge.

In November 2004, an individual (T.D.) and his attorney (Lawyer B) brought an action in Skagit County against a trade association and its directors individually. The action, filed in Skagit County Court, was in its infancy in the spring of 2005, and little or no discovery had taken place.

Ms. McIntosh had previously advised one of the trade association's Board members (client) with regard to bringing a civil action against T.D. She had also previously been involved in a small-claim action and district court appeal involving T.D. By 2005, the relationship between Ms. McIntosh's client and T.D. had become very hostile, and T.D. bore a great deal of animus against Ms. McIntosh.

Without consulting his attorney, T.D. filed a Freedom of Information Act (FOIA) request with the Washington Department of Licensing (WDL) for records regarding Ms. McIntosh's client and for the recent audit of the client's business. T.D. neither called his attorney, Lawyer B, nor sought any advice or assistance from Lawyer B in the preparation of that document. On or about April 18, 2005, the WDL called Ms. McIntosh's client and indicated that, unless enjoined from doing so, they would be releasing the audit records to T.D. pursuant to his FOIA request. The client contacted Ms. McIntosh and requested that she prevent the WDL from releasing the audit records. Ms. McIntosh contacted the WDL and spoke with an investigator, who informed her that, unless an injunction was entered pursuant to RCW 42.17.330 (Court Protection of Public Records), the records would be delivered to T.D. on April 22, 2005.

During his conversation with her, the client indicated to Ms. McIntosh that he and his wife were leaving for China and would be unavailable. Ms. McIntosh was also scheduled to leave her office on vacation on April 21, 2005, and be gone until May 2, 2005. Ms. McIntosh was aware that her clients were, or would soon be, out of the country and unavailable for signatures on a complaint and pleadings in support of a Temporary Restraining Order (TRO) to block the release of the audit documents by the WDL. The client was also not available to provide the filing fee necessary to commence a separate action. Ms. McIntosh was aware that T.D.'s only available address of record was a post office box, making personal service on T.D. of a new summons, complaint, and other papers for a TRO very difficult.

On April 19, 2005, after reviewing RCW 42.17.330, Ms. McIntosh phoned Lawyer B. Ms. McIntosh decided to seek an injunction of the WDL in the already-filed action, although the injunctive
relief would be against a non-party to the lawsuit and the materials sought to be prevented from being turned over were not being sought through discovery in that action. Lawyer B knew nothing of T.D.’s (his own client’s) request to the WDL. During his phone conference with Ms. McIntosh, Lawyer B disclosed that he did not know how to get in touch with his client. He also informed her that T.D.’s FOIA request for her client’s audit records had nothing to do with the lawsuit in which they were involved as counsel for their respective clients. Lawyer B further stated that the Skagit County Court would not have jurisdiction to enter a restraining order against the WDL in the existing action, as the WDL was not a party to the causes of action which were before the court. He advised Ms. McIntosh that she should start a different lawsuit to enjoin the WDL.

Lawyer B was very knowledgeable of the animosity between his client and Ms. McIntosh’s client, as well as the extreme dislike his client (T.D.) had for Ms. McIntosh. Lawyer B knew he could not agree to the entry of a TRO. Ms. McIntosh nevertheless prepared a Motion/Declaration for an ex parte TRO in the existing action. In her declaration supporting her motion for a TRO, Ms. McIntosh implied that Lawyer B had agreed to the order, made misleading statements, and did not set forth the key fact that opposing counsel told her she was legally incorrect in seeking the TRO against an unrelated, unnamed party in the existing action. Ms. McIntosh, in the preamble to the TRO, also stated that Lawyer B “was notified of the defendant’s intention to obtain this order and expressed no objection so long as the hearing could take place after the defendant’s vacation.” Before entering the order, Ms. McIntosh did not fax a copy to Lawyer B to obtain his consent or agreement to the entry of the order or provide him a copy of the order and related pleadings.

On April 21, 2005, Ms. McIntosh went to the Skagit County courthouse at approximately 8:45 a.m. looking for a judge to sign the temporary restraining order. This was before the regular ex parte calendar. Ms. McIntosh flagged down a judge in the court administrator’s office and handed him the motion and order, telling him that Lawyer B had agreed to the entry of the order. She did not tell the judge that Lawyer B not only opposed the TRO being entered in the action, but also objected to an injunction being sought in that action as the action was unrelated to the FOIA request and therefore the relief her client ultimately sought. During her ex parte contact with the judge, Ms. McIntosh also neglected to inform the judge that it was her opposing counsel’s opinion that the injunctive relief she was seeking could not be entered by the Superior Court of Skagit County for those very reasons. The judge signed the order temporarily enjoining the WDL from releasing the records to T.D. Ms. McIntosh returned to her office, left her staff with instructions to mail a copy of the order to Lawyer B and to fax a copy of the order to the WDL, and left for the airport to catch her flight.

Upon learning of the entry of Ms. McIntosh’s order, Lawyer B moved to set it aside. Eventually, an order vacating Ms. McIntosh’s order nunc pro tunc was entered following a hearing on the merits of the respective motions.

Ms. McIntosh’s conduct violated RPC 3.3(g), requiring a lawyer, in an ex parte proceeding to inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse; and RPC 3.5(b), prohibiting a lawyer from communicating ex parte with such a person except as permitted by law.

Francesca D’Angelo and Joanne S. Abelson represented the Bar Association. Kenneth S. Kagan and John W. Murphy represented Ms. McIntosh. Donald W. Carter was the hearing officer.

**Suspended**

**Jeffrey G. Poole** (WSBA No. 15578, admitted 1986), of Everett, was suspended for one year, effective November 1, 2008, by order of the Washington State Supreme Court following an appeal. The suspension is to be followed by a two-year probationary period. For more information, see *In re Disciplinary Proceeding proceeding against Poole*, 193 E3d 1064 (2008). This discipline is based on conduct involving noncooperation with Bar Association investigations and trust-account irregularities.

In 2003, disciplinary action was taken against Mr. Poole concerning Mr. Poole billing clients at his current rates for work performed at a time when a lower rate was in effect. During the investigation, the Bar Association’s Office of Disciplinary Counsel (ODC) sent a letter on July 24, 2003, requesting that Mr. Poole provide all billing statements that included similar charges. Mr. Poole produced a total of five statements in response to the request. However, after the hearing in that matter, ODC discovered nearly 100 additional 2002 billing statements that contained charges for time over six months old. The hearing officer in the proceeding giving rise to the discipline reported herein later identified “at least” 29 specific bills that should have been produced in response to the July 2003 request.

Another prior disciplinary matter involved improper trust-account procedures. In August 2003, Mr. Poole received a reprimand and probation for this misconduct, and the probation included audits. Although he was required to cooperate with the audits, Mr. Poole failed to cooperate. In addition, during the audits, the auditor discovered some billing statements that fell within the July 2003 request in the previously mentioned disciplinary action that were not produced. The audits led to questions about a specific client’s (Client O’s) account, which was overdrawn by $540 for several months and showed unusual activity. The auditor requested Client O’s billing file. Mr. Poole refused to turn over the billing file as requested despite repeated requests by the auditor and later repeated efforts by disciplinary counsel to obtain the file.

In 2004, another grievance was filed against Mr. Poole involving Mr. Poole’s refusal to turn over Client O’s billing file and the shortage in Client O’s trust account. Mr. Poole did not respond to the grievance, nor did he respond to a 10-day letter under ELC 5.3(e) requiring a response. A noncooperation deposition took place on September 15, 2004. At the deposition, Mr. Poole claimed he was not producing the file because the request was intrusive and overly burdensome. Instead, he produced eight Client O billing statements. After a petition for interim suspension was filed against Mr. Poole, he produced Volume 3 of the Client O file before he was required to appear and show cause why the petition should not be granted. The petition was withdrawn.

Disciplinary counsel found additional bills in Client O’s file that were responsive to the July 24, 2003, request. Disciplinary counsel also found evidence of trust-account violations, including failure to maintain an accurate client ledger for Client O between October 2002 and September 2003, failure to keep all of Client O’s funds in trust between May 2003 and September 2003, and failure to provide accurate accounts to Client O regarding his trust-account funds between October 2002 and September 2003. Mr. Poole also knowingly disbursed funds before deposited items cleared the banking system. Although disciplinary counsel requested additional information, Mr. Poole did not respond. Disciplinary counsel issued a *subpoena duces tecum* commanding Mr. Poole to appear and produce responsive documents at the deposition. The deposition was canceled in February 2005 after Mr. Poole produced responsive documents.

Mr. Poole’s conduct violated RPC 1.14(a), requiring that all funds of clients paid to a lawyer or law firm be deposited into one or more identifiable interest-bearing trust accounts and no funds of the lawyer be deposited therein; RPC 1.14(b)(3), requiring a lawyer to maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them; 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(f), prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct (here, ELC 5.3(e) and ELC 13.8).

Mr. Craig Bray represented the Bar Association. Kurt M. Bulmer represented Mr. Poole at hearing. Richard T. Okrent represented Mr. Poole on appeal. Kimberly Ann Boyce was the hearing officer.

**Reprimanded**

**Gregory P. Cavagnaro** (WSBA No. 17644, admitted 1988), of Bellevue, was ordered to receive a reprimand on August 15, 2008, by order of the Washington State Supreme Court imposing reciprocal discipline in accordance with an order...
of the United States District Court for the Western District of Washington following approval of a stipulation. This discipline is based on conduct involving failure to withdraw from representation in violation of the rules, failure to disclose material facts to the court, and failure to properly supervise a non-lawyer assistant.

On May 3, 2005, clients met with Mr. Cavagnaro and his paralegal regarding filing a Chapter 13 bankruptcy petition. On that same day, Mr. Cavagnaro electronically filed on behalf of the clients a Chapter 13 bankruptcy petition and schedules with the United States Bankruptcy Court. At the time they filed the petition, the clients owned an interest in a property on which they resided. The property was their principal asset.

In December 2005, Mr. Cavagnaro obtained information revealing that a relative of the clients owned an interest in the property. Although the date on which Mr. Cavagnaro obtained the knowledge that the clients were actively involved in an adverse possession action is disputed, the bankruptcy petition schedules electronically filed by Mr. Cavagnaro were based on a petition and schedules the clients had previously filed in an earlier bankruptcy proceeding which had been dismissed by the court on motion of the trustee in that bankruptcy. The prior filings included information regarding an adverse possession action and the clients' counsel in that action. The schedules filed by Mr. Cavagnaro list the adverse possession action as pending. In February 2006, Mr. Cavagnaro learned that the clients had asserted third-party claims in the adverse possession action, and that those claims survived the settlement of the adverse possession action.

- Mr. Cavagnaro did not disclose to the bankruptcy court the existence, ongoing status, or settlement of an adverse possession action involving the clients' property or of the multiple third-party claims made by the clients within the adverse possession action.
- Despite receiving confirmation of settlement of the adverse possession action in February 2006, Mr. Cavagnaro did not seek or obtain the necessary bankruptcy court approvals for the clients continued participation in the adverse possession action, for the settlement of the action, and for quieting or reclaiming part of their property to plaintiffs in the adverse possession action.
- Mr. Cavagnaro did not inquire into the existence of title insurance and the representation of the clients by another law firm in the adverse possession action. Such inquiry would have led to the discovery that a title company had paid settlement proceeds of $230,000 to one of the clients' relatives, who paid most of those proceeds to the clients soon after receipt.
- Mr. Cavagnaro left his paralegal unsupervised prior to an important uncontested hearing in the clients' bankruptcy action and failed to contact his office prior to and following the hearing. During this time, Mr. Cavagnaro's paralegal engaged in actions (including giving the clients legal advice, filing several pleadings in the bankruptcy, and negotiating with counsel for one of the clients' unsecured creditors) without Mr. Cavagnaro's permission or knowledge.
- Mr. Cavagnaro failed to obtain the clients' original signatures on documents filed in the bankruptcy action.

Mr. Cavagnaro asserts that the clients denied him permission to make disclosure regarding the adverse possession action to the bankruptcy court. The clients dispute this, but do acknowledge that they forbade Mr. Cavagnaro from speaking to their attorneys in the adverse possession action.

Mr. Cavagnaro's conduct violated former RPC 1.15(a)(1), requiring a lawyer to withdraw from representation of a client if the representation will result in a violation of the Rules of Professional Conduct; former RPC 3.3(a)(2), prohibiting a lawyer from knowingly failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; RPC 5.3(a), requiring a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the non-lawyer assistant's conduct is compatible with the professional obligations of the lawyer.

Scott G. Busby represented the Bar Association. Leland G. Ripley represented Mr. Cavagnaro.

Reprimanded

James A. Gauthier (WSBA No. 15767, admitted 1986), of Kent, received a reprimand by order of a hearing officer on March 17, 2008. This discipline is based on conduct involving the production of documents containing false statements and the misrepresentation of the origin of documents produced in discovery.

In 2000, Mr. Gauthier represented a corporate client in a tortious interference lawsuit. The opposition made a discovery request for Mr. Gauthier's client's board of directors meeting minutes from 1997 to 2001. Mr. Gauthier's client prepared and submitted to Mr. Gauthier meeting minutes that contained two untrue statements: that the meetings took place in Mr. Gauthier's office and that Mr. Gauthier was present at each meeting. Had Mr. Gauthier read the meeting minutes before producing them, he would have known that they contained untrue statements. Mr. Gauthier was in a rush to deliver the responses to opposing counsel and did not read the contents of the meeting minutes provided by the client. Instead, Mr. Gauthier merely attached them to his answer and had them delivered to opposing counsel. When responding to the discovery request, Mr. Gauthier certified that he had read the responses, when in fact he had not read the documents attached and included in the responses.

In another lawsuit involving the same corporate client, opposing counsel served on Mr. Gauthier a discovery request for the production of his client's bylaws and all amendments thereto. Mr. Gauthier had prepared amended bylaws for his client in 1999, but his client informed him that the original bylaws could not be found. Mr. Gauthier assisted his client in recreating the original bylaws from memory. In September 2002, Mr. Gauthier submitted the recreated bylaws to opposing counsel without disclosing that they were a recent recreation from memory and not the originals.

Mr. Gauthier's conduct violated RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and RPC 8.4(d), prohibiting a lawyer from engaging in conduct prejudicial to the administration of justice.

M. Craig Bray represented the Bar Association. Leland G. Ripley represented Mr. Gauthier. David A. Summers was the hearing officer.

Admonished

Michael J. Davis (WSBA No. 25846, admitted 1996), of Tacoma, was ordered by a Review Committee of the Disciplinary Board to receive an admonition on October 17, 2008. This discipline was based on conduct involving failure to protect a client's interests. Michael J. Davis is to be distinguished from Michael T. Davis of Bellevue and Michael A. Davis of Scottsdale, Arizona.

In early 2006, Mr. Davis agreed to represent a client in an employment dispute. In February 2007, the client retained new counsel and asked that Mr. Davis provide her file to the new counsel. Although Mr. Davis promised to send the file, he did not. The Bar Association's consumer affairs coordinator left Mr. Davis messages asking that he return the file. In September 2007, the client filed a grievance asking that Mr. Davis return her file. He finally provided the file to the Bar Association's Office of Disciplinary Counsel on January 10, 2008. The file was in disarray because Mr. Davis had dropped it down a staircase.

Mr. Davis'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. Randy V. Beitel represented the Bar Association. Mr. Davis represented himself.

Non-Disciplinary Notice

Transferred to Disability Inactive Status

Denice L. Patrick (WSBA No. 11655, admitted 1981), of Lynnwood, was by stipulation permanently transferred to disability inactive status, effective December 9, 2008, by an order of the Washington State Supreme Court. This is not a disciplinary action.
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Jacob D. D’Annunzio
and
Robert J. Miller
have joined our firm.

Jacob is a 1998 graduate of Evergreen State College. He received his juris doctor degree from the University of Washington School of Law in 2004. Jacob was admitted to the Washington State Bar Association in November 2004.

Robert is a 1989 graduate of Suffolk University. He received his juris doctor degree from Seattle University School of Law in 1992. Robert was admitted to the Commonwealth of Massachusetts Bar in 1993 and Washington State Bar Association in November 1999.

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Experienced contract attorney loves legal research and writing. WSBA member with 28 years of experience writes trial briefs, motions, and memoranda, using UW Law Library and LEXIS online resources. Elizabeth Dash Bottman, 206-526-5777, bjelizabeth@qwest.net.

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Space Available

Kent: Spacious, elegantly furnished, newly constructed building or individual office(s). Secure building with gated parking. Highly visible location within walking distance of courthouse. Lease or month-to-month. 206-227-8831.

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Congenial downtown Seattle law firm (business, I.P., tax). Spacious offices, staff areas for sublease. Rent includes receptionist, conference rooms, law library, kitchen. Copiers, fax, DSL Internet also available. 206-382-2600.

Two offices in downtown Seattle (2nd Ave. and Spring) 33rd floor for sublease — includes reception, attorney library, two conference rooms. Also available (for small fee): parking, unlimited faxing, high-speed copier/scanner, Internet and IT service, telephone system. Offices perfect for solo attorneys or other professions. One — 14’8” x 11’9”, $1,000; Two — 14’8” x 16’, $1,300. Contact Stacy at 206-621-0600 to set up an appointment to view offices.

Will Search

Will or trust search for James Lynch Weissenfels who lived in Spokane County and died July 26, 2008. Contact Tami at 509-220-2516 or hansentnk@msn.com.
When I began as Bar News editor just over a year ago, I solicited article contributions from our readers. I am pleased to report an enthusiastic response.

In 2008, we published roughly 100 articles, not counting regular columns and staff-written material. Many of these pieces were contributed by readers who simply had good ideas for articles and sent them in. Some of these submissions were among the best things we ran.

We expect to publish fewer special-topic issues this year than in 2008, which means more space for contributed material. I thought this would be a good time to again invite your submissions and provide tips on how to maximize the chances of your work gracing our pages.

1. Keep Our Readership in Mind. We have approximately 30,000 readers. The only thing they all have in common is a current or past license to practice law. The person deciding whether to read your article might be a retired family law practitioner in Moses Lake, a 28-year-old deputy prosecutor in Spokane, or a Supreme Court justice. We look for articles with the best chance of catching the attention of as many diverse people as possible. Articles about general trends in law practice, fascinating personalities, or unusual adventures are of interest to everyone. Pieces about specific areas of law have a narrower natural audience, but their appeal can be broadened by emphasizing the practical aspect of the article and using real-life examples to illustrate points. If your article involves a limited area of law, try casting it as a primer on the subject (e.g., “Five Things Every Business Attorney Should Know About Antitrust” or “What to Do When Your Client Calls From Jail and You’ve Never Handled a Criminal Case in Your Life”).

2. Write About People. I have no doubt that the best-read section of Bar News is the disciplinary notices. Why? Well, morbid curiosity is part of it. But more fundamentally, it is the one place in the magazine guaranteed to tell true stories about real people. Look at the covers of magazines on a newsstand or the home pages of online publications and what do you see? Pictures and headlines about people doing things. As social animals, we’re fascinated by what other people are doing. Some of my favorite Bar News articles from last year were President Stan Bastian’s Q&As with notable Washingtonians (Governor Christine Gregoire, former U.S. Attorney John McKay, Gonzaga Law School Dean Earl Martin), Aaron Caplan’s piece on his experiences in 10 years as an ACLU lawyer, Michael Bond’s reflections on his first job as a Marine Corps lawyer, and Suzanne Parisien’s piece on why she kept going to work while undergoing cancer treatment. There must be thousands more stories like these waiting to be told.

3. Keep It Short. We accept articles of up to 3,500 words (roughly five solid pages of print). But I seriously doubt that many readers actually hack their way through pieces that long, no matter how good they may be. Most of us simply don’t have the time or attention span to read that much of something we aren’t legally required to read and aren’t getting paid for. If we really need to know 3,500 words worth of information on a subject, we’ll probably go to a library or online and research it for ourselves. On the other hand, it’s easy to read a well-written 1,500-word piece while eating lunch or riding the bus.

4. Talk to Us Before Writing Your Piece. Some of our submissions were originally written for another purpose, e.g., a speech, a CLE presentation, or publication in a law review. However, most are written specifically for Bar News. Talking to us before writing an article can save you a lot of time and trouble and make it more likely we will publish it. I enjoy talking to authors and I’m happy to discuss what would make your article more appealing to readers. If we have this conversation before you start writing, you can better plan your article and alert me to keep an eye out for it. It will also lessen the chances that I will extensively edit it or send it back to you for a substantial rewrite.

Bar News Editor
Michael Heatherly practices in Bellingham. He can be reached at 360-312-5156 or barnews editor@wsba.org.

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