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Death penalty article challenge

Your December 2008 article with its thinly-veiled attack on the death penalty (“Time for a Hard Look at the Death Penalty,” December 2008 Bar News) was wrong on every conceivable count:

- The fact that the death penalty may be imposed unevenly or imperfectly does not mean it should not be imposed at all.
- The proper comparison to determine racial inequity in its application is the minority percentage of capital defendants, not the general population.
- Death penalty cases are ruinously expensive not because of any inherent reason, but because opponents have obstructed its application (and they then cite expense as another reason).
- Whether the death penalty acts as a deterrent is beside the point; the point is that sometimes it is justice, which one would think is the object of the legal system.
- The U.N. does not yet have jurisdiction in Washington, or credibility anywhere. Opponents to a just death penalty are substantively and morally wrong. They would do better to show some concern for victims.

Richard P. Sybert, San Diego, California

Leying down the law

I respond to Mark Johnson’s article (“Equitable Interest Rates and IOLTA,” December 2008 Bar News) recommending that banks be required to pay higher interest rates on IOLTA accounts. IOLTA is a tax imposed on the public through banks by the Washington Supreme Court. The “comparability rule” is a tax increase. Taxes are legislation. The tax is unconstitutional because the court can not be a legislature and a court at the same time. Neither does the court have authority to have a policy on proper methods for delivery of legal services. That is also the province of the legislature. IOLTA is designed to subsidize Columbia Legal Services. The court cannot indirectly subsidize Columbia Legal Services because that creates a conflict of interest whenever Columbia lawyers argue in a Washington court. They are lawyers whom the court has endorsed in advance. The court does not have inherent power over the legal profession because courts have only powers delegated to them by the people through the state and federal constitution, and the state and federal constitution require that legislation and judiciary be separate institutions.

Roger Ley, Astoria, Oregon

Marriage equality equal time

We write to applaud the Board of Governors (BOG) of the Washington State Bar Association for its courage and its leadership in unanimously passing the recent resolution supporting civil marriage equality (November 2008 Bar News). As far as we know, the WSBA is the only state bar to pass such a resolution. QLaw is deeply appreciative of this visionary and courageous decision.
Formed in 2005, The GLBT Bar Association of Washington, or QLaw as we are widely known, is a professional association of gay, lesbian, bisexual, and transgender (GLBT) attorneys, legal professionals, and their friends. We have approximately 150 members in the state of Washington and elsewhere. QLaw serves as a voice for GLBT legal professionals and their friends on issues relating to diversity and equality in the legal profession, the courts, and under the law.

Given the nature of our organization, we have a unique interest in issues affecting access to justice. "Equal justice for all" is only an empty promise when justice is in fact not equal. Currently, the law does not accord equal treatment to same-sex relationships, the dissolution of the same, or the children of same-sex families. GLBT persons must expend significant financial resources to achieve something resembling the rights accorded to married persons. GLBT couples who resort to the court system when separating must deal with a patchwork of caselaw which is inconsistent at best, as the marriage laws which do not apply to same-sex couples. The BOG's decision has support among other groups in the legal community. Presidents of several minority bar associations signed a letter expressing their support of the recent resolution.

QLaw believes that the BOG resolution was appropriate and timely. Irrespective of one’s religious views about same-sex couples, making the laws more uniform and predictable by granting equal access to marriage to same-sex couples furthers the interest of equal justice for all persons. Our justice system depends on the rule of law, and the interests of equal justice are not served when the rule of law treats similarly-situated people in an inconsistent manner.

QLaw appreciates the BOG's careful and deliberative process, demonstrated by public fora and a “notice and comment period” to solicit input from WSBA members. Leaders of any organization are often required to make decisions it knows may be unpopular, in the interest of what is right both for the organization and for society at large. This was one of those times.

In conclusion, QLaw is simultaneously appreciative, proud, and at the same time humbled by what will no doubt be viewed as a watershed decision among state bar associations. We are thankful that our state bar supports a healthy debate and dialogue on controversial issues. QLaw applauds the Board of Governors for its unparalleled commitment to justice.

Dainen N. Penta, president, QLaw: The GLBT Bar Association of Washington

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I've followed with interest the dispute over the WSBA Board of Governors' endorsement of same-sex marriage. It appears from my desk that the underlying problem lies in the awkward attempt by western society to conflate two separate and distinct matters with one name: "marriage." Civil marriage and religious marriage, while similar, have goals that both differ and overlap, and rules which often differ more than they merge, and we err when we try to view them as if they were the same thing.

Historically, marriage was a uniquely religious matter, being supervised and controlled by the church, synagogue, mosque, or other religious community to which the parties belonged. Civil marriage is a relative newcomer to the scene (witness the travails of Henry VIII in obtaining a divorce), done for reasons which sometimes have little in common with those of a religious body. The compelling interest which the State has in regulating marriage has more to do with taxation, inheritance rights, custodial regulation, and property rights than with the joining of two souls in matrimony.

Religious marriage, on the other hand, will generally have far more stringent rules than a State could impose, as well as sometimes allowing leniencies that the State prohibits. For instance, different religions will require that both parties be of the same faith, or not; that a husband may have only one wife, or not; that divorce is never allowed, sometimes allowed, or sometimes actually required for various reasons; that a divorced person may remarry, or not; and, in at least one case, that a husband may divorce his wife by a simple recitation of divorce. Clearly, the State is on shaky grounds when it adds requirements based upon those of the currently-dominant religious belief, and that's part of the problem we're seeing now as social standards change and develop.

The problem arises when we presume that the State's interests in the regulation of marriage must be in accord with those of our own religious beliefs — regulations which currently tend to follow those of mainstream Christianity. This is generally the basis for arguments made against gay marriage. In fact, the legitimate interests of the State in marriage apply the same to same-sex marriages as they do to traditional marriages: taxation, property rights, inheritance, custody, marital privilege in court, etc.

There may be legitimate arguments made about the need for children to be raised by biological parents, but this isn't borne out by current law and social practice. If it were,
the State could require that pregnant women marry the father of the child if not already married, that couples could not divorce until all children were grown (if at all), and prohibiting putting a child up for adoption if both parents were alive. The fact is, we see biological parents doing a terrible job of raising children and single parents raising wonderful kids. The important thing isn’t the sex of the parents who raise the children, but, rather, that the children be loved and given good guidance as they grow.

No one is asking that any particular religion perform or recognize as valid same-sex marriages, just as there are marriages now which various religions won’t perform and/or recognize. As an Orthodox Jew, my religion doesn’t recognize intermarriages as valid from a religious perspective. Traditional Catholics don’t consider remarriage of a divorced woman as valid without an annulment. Many conservative churches won’t perform a marriage between a member and a non-member. These are all within the rights of those bodies, and I would strongly oppose any efforts to require them to do what they believe is wrong.

Nevertheless, just as it would be wrong for me to ask the State to impose halachic (Jewish religious law based upon the Torah and Talmud) restrictions and requirements on civil marriage, it’s equally wrong for anyone to demand that the State base its marriage laws on those of his or her religion. Civil law must be written for the good and the protection of all citizens; not just the majority. If marriage only affected one’s religious standing and rights, that would be one thing. However, the things affected by civil marriage are far more expansive than those of a religious marriage. Married folks are taxed differently. We have rights of inheritance that differ from those of unmarried folks. We have the right to determine care of an incapacitated spouse and our children and to be with them when hospitalized or institutionalized. We have the right not to be compelled to offer testimony against a spouse. We have the right to rent or buy property as a couple and to have employment and retirement benefits apply to our spouse. Why would we want to deny that to others who have relationships that are as stable and long-standing as our own?

We don’t have to approve of a particular relationship any more than we always approve of straight couples who tie the knot, but that doesn’t give us a right to block them from marrying. The Bar Association doesn’t (and shouldn’t) take positions on religious beliefs or requirements, but it’s reasonable for it to support the idea that civil law applies equally to all citizens and not just to those who hold to our own beliefs.

Lyle Roof, paralegal, Walla Walla

Is Marbury still intact?

I was happy to read the brief article by our current Bar President on Marbury v. Madison and the basis it laid for judicial review (“A Simple Little Case,” November 2008 Bar News). We need to dust off those decisions that lie at the heap of the pile of cases and controversies periodically, to look at the trunk of the tree to see if it will support the branches and dense foliage of the law.

The belief in the power of judicial review, though reassuring to lawyers that the old faith is intact, that the judicial branch does in fact have the final word on the Constitution, may be just that, an act of faith. Today Constitutional questions seem for the average attorney at the WSBA to have little to do with the daily practice of law.

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As we try to shake off this perception we try and maintain our faith in the power of that judicial system, and the erosion of Commerce Clause powers. We do not have a section “Letters” continues on page 54.
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French Renaissance essayist and philosopher Michel de Montaigne (1533–1592) wrote: “There were never in the world two opinions alike, no more than two hairs or grains; the most universal quality is diversity.” While diversity may be a universal characteristic of belief, it is not so with the legal profession.

The WSBA collects, on a voluntary basis, information on the gender, ethnicity, sexual orientation, and disability status of our members. As of November 1, 2008, the available information on the ethnicity of WSBA’s 32,939 members showed that of the 23,975 members who chose to provide the information (8,964 declined), 21,603 self-identified as Caucasian (90 percent). 400 members identified as being a sexual minority, 489 as having a disability, and, of the 25,321 who responded to the question on gender, 15,908 identified as male (63 percent) and 9,413 as female (37 percent).1

GR 12.1(a)(6), adopted by the Supreme Court, provides that one of the purposes of the WSBA is to strive to “promote diversity and equality in the courts, the legal profession and the bar.” (The language from GR12.1 is also incorporated into the WSBA Bylaws.) In addition, one of the WSBA’s Guiding Principles, as adopted by the Board of Governors, mandates that we work to “...promote diversity, equality and cultural understanding throughout the legal community....”

The WSBA is committed to fulfilling the charge of our Supreme Court and our guiding principle; Washington is one of only a few states with a full-time diversity program manager and one of two states that test Indian law on the bar exam.

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The WSBA has a highly energized Committee for Diversity, whose mission statement is to “...increase diversity within the membership and leadership of the WSBA; to promote opportunities for appointment or election of members to the bench; to support and encourage opportunities for minority attorneys; to aggressively pursue employment opportunities for minorities; and to raise awareness of the benefits of diversity.” Two WSBA governors, Brenda Williams and Lori Haskell, are liaised to the committee. The WSBA Board of Governors also has a Diversity Committee, chaired by Governor Williams.

Two of the 14 seats on the WSBA Board of Governors are reserved for lawyers who “...have the experience and knowledge of the needs of those lawyers whose membership is or may be historically underrepresented in governance... Under-representation and diversity may be based upon the discretionary determination of the Board of Governors at the time of the election of any at-large governor to include, but not be limited to age, race, gender, sexual orientation, disability, geography, areas and types of practice, and years of membership, provided that no single factor shall be determinative.” (See WSBA Bylaw III N.)

The WSBA’s website has a diversity webpage (www.wsba.org/wsbadiversity.htm) which provides information regarding minority and specialty bar leadership, links to the minority and specialty bar websites, information about diversity events, information about the WLI, and other resources germane to diversity.

For the current fiscal year, October 1, 2008–September 30, 2009, the WSBA’s budget will approach 20 million dollars. The cost for all diversity-related programs will be approximately $300,000, an estimate which includes both direct costs and indirect costs (a proportionate allocation of salary, benefits, and overhead).

With the kick-off event for the Middle Eastern Legal Association (MELAW) at Seattle University School of Law on January 30, Washington will have 16 minority bar associations. For a complete list to the offices of, and links to, the minority bar associations, go to www.wsba.org/lawyers/links/minoritybarassoc.htm.

Although the WSBA’s diversity programming is on the leading edge nationally and we have a vibrant and growing minority bar community, the reality revealed by the available demographic information is that our profession is still largely white and male. As a result, the public we serve is being denied varied and valuable perspectives, and numerous skills. Achieving a fairly diverse profession will require us to continue to invest in our commitment and commit to continued investment.

WSBA President Mark Johnson can be reached at 206-386-5566 or mark@johnsonflora.com.

1. Providing ethnicity and gender information to the WSBA is voluntary. These statistics are based on 73 percent of WSBA members reporting ethnicity and 78 percent reporting gender.
The litigation and arbitration of investment cases — investor claims against securities and commodities brokers; investment advisers; ERISA and private trustees; and sellers of stock, debt, and alternative investments for loss of capital — are on the rise again. Three broad trends, especially the current, ongoing credit and housing crises, have caused this to happen.

First, most large corporate employers and many public entities no longer provide defined benefit pension plans to their employees and instead provide or contribute to a variety of self-directed 401(k) and IRA retirement savings accounts and plans. This shift places the burden of investment research, investigation, and decision on people who may be completely unprepared to cope with it. Even highly skilled, well-educated executives and professionals may be ill-prepared to make investment decisions, especially if they assume their competence in their chosen field translates into skill in selecting investments.

Second, the increasing concentration of wealth in America has created a much larger class of individual investors with significant investments. Corporate compensation plans emphasize stock options, stock grants, and deferred compensation accounts that can make lucky employees wealthy at a surprisingly young age. The expansion of computing, the Internet, and biotechnology businesses over the past 20 years has created an entrepreneurial class that makes millions, but sometimes suffers major losses in reinvesting capital gains after their company, product, or invention has been sold.

Third, and most importantly, there has been a significant increase in the volatility of the financial markets. Volatility breeds litigation. Even during the booming 1980s and 1990s — the 1987 market crash, the commercial real estate bust of 1989–92, the 1998 “Russian Summer” currency crisis, and the credit crunch following the failure of hedge-fund long term capital management — each triggered a significant number of investment lawsuits. The March 2000 dot-com bust generated more than 20,000 claims nationwide.

In these unstable times, volatility in the financial markets breeds litigation. Examining these difficult cases offers strategies for settlement.
The current credit crisis is unrivaled since the 1930s, and has the potential to unleash even more investor cases. It has destroyed Lehman Brothers, Bear Stearns, and Washington Mutual, battered Wachovia and Morgan Stanley, and all but ruined AIG and Merrill Lynch. Although rooted in the residential housing bust, this crisis has spread because unregulated hedge fund, dark pool, and credit-swap transactions displaced open-market transactions. The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) were directed by Congress to regulate new financial instruments, but also loosened regulations on existing markets. The Federal Reserve took little note of vastly increased leverage at investment and commercial banks. There is so little transparency in the derivatives world that even the United States Treasury cannot tell us what the assets held by many surviving financial institutions are worth.

As a result, investments long thought of as “conservative” — mortgage-backed bonds, auction-rate securities, bank stocks, Fannie Mae and Freddie Mac common and preferred stock — have lost as much as 99 percent of their value.

No one knows where future losses will be incurred. We do know that investment failures become investment lawsuits. Investor claim filings are rising again. For example, FINRA Dispute Resolution Inc., the primary arbitration forum for claims against securities brokers, has logged a 46 percent increase in case filings for the first nine months of 2008 over the same period in 2007.

Investment cases tend to be difficult and expensive to prosecute and defend. Although securities brokerage and some bank-related cases are governed by pre-dispute arbitration agreements, the practical reality is that FINRA Dispute Resolution, Inc., and other financial arbitration forums have become alternate court systems with many of the same cost drivers — burdensome discovery, large volumes of documents to review and analyze, the need for expert witnesses, and frequent motion practice — as traditional courtroom litigation. The 15-day, $500,000 legal fee securities arbitration, once unheard of, is now common.

Difficult cases should prompt the parties to settle. Yet despite the costs and risks of these cases, settlement rates remain relatively low compared to personal-injury-insured claims. Approximately 95 percent of insured personal-injury claims settle prior to hearing, but only 57 percent of FINRA investor claims are resolved by settlement.

The Impediments to Settlement of Investment Cases

Why don’t more investment cases settle? Based on my own experience, and on the experience of fellow lawyers who regularly represent plaintiffs, defendants, or both in investment cases, I believe there are six primary impediments to settlement.

1. Difficulty in accurately defining and demonstrating damages

The courts have approved a wide variety of damage theories in investment cases: out-of-pocket loss, disgorgement of commissions, and the “properly managed portfolio” theory that adjusts damages up or down based on market movements during the time period when the plaintiff investor’s assets were managed by the defendant. Some statutes, such as the Washington Securities Act, provide an explicit formula for calculating damages — but the formula contemplates rescission of a single typical face-to-face sale or purchase of a security, not the behavior of an investment portfolio over time. All of the damage formulas for investment portfolio cases attempt to separate the damage caused by misconduct from the losses caused by market movement. They define damages by comparison to the hypothetical proper course of conduct that should have, but did not, happen: for example, the suitable, risk-appropriate investment portfolio versus the churned, unsuitable portfolio.

Damagecalculation issues become even more difficult and contentious in cases where complex options trading, or collaring a concentrated equity position, is involved. For example, in a case alleging a failure to collar, the parties’ experts will vehemently disagree on whether and when a collar strategy could be employed, the cost of collar strategy, the level of protection that could have been provided, and the damages that could have been avoided. Because portfolio damage calculations are inherently hypothetical and potentially so uncertain, the parties have difficulty defining a sensible range for negotiations.

2. Failure to recognize the emotional aspects of financial loss

Investment and financial cases are sometimes thought of as cold “numbers cases.” In reality, they involve surprisingly deep emotions on both sides. Investors who have suffered financial loss often have feelings of betrayal, personal inadequacy, shame, and fear. Stockbrokers and investment advisers and their firms frequently believe they are being unfairly penalized for market movements beyond their control. Investment-firm managers fear that agreeing to settle a case may result in adverse publicity, a stain on their supervisory record, or even end their careers. The emotions on both sides may prevent one or both parties from moving forward from the loss.

3. Hoarding information for perceived tactical advantage at trial

In any form of negotiation, case-assessment information must be exchanged between the parties, or the negotiation will decline into a sterile, probably fruitless, haggle. Yet the desire to hoard information in order to gain or preserve a perceived tactical advantage at trial inhibits both parties from exchanging information that might lead to settlement. This is especially true in securities arbitration, where discovery is somewhat limited, depositions are not taken, and wise lawyers on both sides gather as much information as they can from searching publicly available, but unexpected, data sources such as trade and service-mark applications, press articles, blogs, personal websites, court files, tax records, divorce filings, and testimony in other cases. The paradox is that by hoarding information for trial, counsel may diminish the prospect for settlements.

4. Failure to manage client expectations

Lawyers who defend investment cases frequently assert that the plaintiffs’ counsel routinely inflate client expectations, leading to unreasonable, rigid demands. Lawyers who represent investors say that financial-institution defendants habitually undervalue claims and fail to negotiate in good faith. The core of the problem lies in...
Both sides in investment cases fear that settlements may become precedents. Many cases involve the failure of a particular type of investment product — auction rate securities, illiquid limited partnerships, structured notes. Plaintiffs’ counsel fear that a less than optimum settlement in one case will hurt other clients they represent with the same types of investments ....

Lawyers on both sides failing to manage client expectations through early and candid discussion of the range of potential outcomes with the client.¹²

5. Reactive devaluation
Reactive devaluation is a psychological phenomenon that frequently creates a barrier to effective negotiation. Humans are cantankerous animals. Receiving a proposal from an adversary diminishes its value or appeal — especially when the information is coupled with the express or implied assertion that listener’s case lacks merit. Reactive devaluation lies at the heart of two of the most common stumbling blocks in negotiations: the irritation felt by the negotiators when each receives the “high-ball” and “low-ball” offers at the beginning of a negotiation, and the anger and fatigue that clients develop late in the process at what they perceive to be a string of insulting responses.

6. Fear of setting a precedent
Both sides in investment cases fear that settlements may become precedents. Many cases involve the failure of a particular type of investment product — auction rate securities, illiquid limited partnerships, structured notes. Plaintiffs’ counsel fear that a less than optimum settlement in one case will hurt other clients they represent with the same types of investments, often involving the same financial institution. Defense counsel heeds the client’s command that they not recommend even reasonable settlements if the ultimate effect is to “turn us into an ATM.” The result is stalemate — and as financial institutions’ balance sheets continue to be stressed, the problem will grow worse.

Strategies for Overcoming Impediments to Settlement of Financial Cases

1. Understand and be prepared to effectively present the economic basis for your damage claims or defenses.

The advocate’s best and most effective tool in settling investment cases is a detailed, accurate damage analysis based on sound legal theory and reflecting economic reality. For example, in an investment suitability case, effective damage presentations must rest on a detailed reconstruction of the investment portfolio, and incorporate reasonable assumptions about investment objectives, the appropriate comparison portfolio, and the performance of the market during the same time period. It is simply not persuasive to pump up damages by claiming, for example, that a client with substantial wealth, an acknowledged speculative investment objective, and a lengthy history of personally trading risky stocks on margin should, in retrospect, have held only short-term U.S. Treasuries during a market crash. Similarly, defense-suitability analyses based on the assumption that retirees of

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limited means can accept market risks that would make Warren Buffet tremble because they had a $1,000 per-month Social Security benefit will not persuade opposing counsel, the mediator, or the judge. In larger, more complex cases, it may be well worth the expense for the parties to bring their expert to the mediation to better articulate their damage claims and defenses.

2. Confront the emotional aspects of financial loss.
The emotions raised in investment cases do not simply go away. It is important for counsel on both sides to be prepared to deal with them. Counsel representing investors should discuss, assess, and understand their client’s emotional state prior to the negotiation. Has a friendship between the client and the investment adviser been ruptured? Has the loss caused a rift between spouses? Is the client so fearful of the future because of the loss that he cannot envision moving forward with his life?

Defense counsel should not ignore a plaintiff’s emotional distress — it will damage the chance to gain a reasonable settlement. For example, I represented a securities brokerage firm that had the misfortune to employ a salesman who secretly sold his customers an outside “prime bank” fraud and concealed the scheme from my client. I made a point of being polite and greeting the lead plaintiffs and their counsel at each court hearing, and taking pains in court arguments to acknowledge that plaintiffs were good people who had been defrauded — though not by my client. As part of the settlement negotiations, my client offered to pursue their former employee into bankruptcy and collect what it could for the benefit of the plaintiffs — a way of acknowledging their loss. The case settled with relative ease, at reasonable cost, and with courtesy and respect on both sides.

3. Use, don’t hoard, information.
Lawyers on both sides need to be realistic. Most investment cases eventually do settle — although settlement on the eve of trial is likely to be less satisfying and useful to the clients because of litigation costs. The chance that a particular piece of hoarded information is going to create a decision-changing surprise at trial is generally small. Moreover, the best types of information to use in settlement negotiations — objective facts, documents containing written admissions, or evidence from outside sources that contradict the opposition’s story — don’t lose their trial value by being disclosed in
Selective disclosure of information to the opposing parties in mediation is an effective form of advocacy. Sometimes the simplest bits of evidence can be effective: phone records can prove that a claimed phone conversation never took place. A tax lien against a broker’s house can demonstrate a need for cash — and a motive for excessive trading. Contrary testimony from a prior case may damage an expert’s qualifications and credibility. Creating uncertainty for your adversary by carefully using your hoarded facts moves the settlement range in your favor.

4. Overcome fixed client expectations by focusing on the reasonable settlement range.

Clients who are not prepared for the mediation process and arrive with fixed, high expectations often speak in the language of combat: we need to be aggressive, we need to crush them, we aren’t getting their expectations often speak in the language of combat to the language of range. This can be done through mediator suggestions and questions rather than an outright statement that “this case should settle between x and y.” Most importantly, by focusing both parties on defining an acceptable range for negotiation, the mediation dialogue begins to focus on problem-solving rather than the perception of victory or defeat.

5. Let the mediator use his or her tool kit to overcome reactive devaluation.

Every effective mediator has a personal tool kit he uses to break through impasse. The common purpose of all these tools — mediator questions about the facts, delivery of new evidence, blind bids into the box, suggestions for a reasonable settlement range, and the ultimate tool, the mediator proposal — is to minimize the reactive devaluation problem, because the information comes from a neutral, and hopefully credible, source. The respectful mediator will not use these tools without permission and agreement from counsel. Counsel, in turn, should give a bit of latitude to the mediator so that the ultimate gap — from the parties’ own best numbers, to the number that will settle the case — can be bridged.

6. Be honest — if you can’t settle the case for fear of setting a precedent, say so. But beware of what happens if verdicts or awards stack up. Assess the scope of the client’s problem and deal openly with the client.

Frankly, the true “message” case and the precedent-setting case don’t really belong in mediation. If your client wants to take the risk of drawing a line in the sand, the courthouse and the FINRA arbitration hearing room are the places to do it. But do make sure the client is fully informed of the risks of their position. In cases involving the structural failure of a financial product, a defendant may well want to consider the potentially adverse regulatory and reputation impacts as well as the immediate financial impact of risking the settlement course. In such cases, a proactive plan for early dispute resolution may save money, salvage an institution’s public image, and reduce exposure to future regulatory sanctions.

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NOTES
2. March 10, 2000, marked the end of the dot-com
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The following is taken from a speech and presentation given at the Annual Conference of Washington Superior Court Judges in spring 2008.

As a preface to my remarks this evening, let me say that although my vocation has been judging for about 35 years, my avocation is history, and a period in history that has always fascinated me is World War II — both the events leading up to it and its aftermath. I remember thinking at the time that the defendants looked rather unimpressive there in the courtroom without the benefit of their fancy uniforms and medals in front of these judges from the United States, the Soviet Union, Britain, and France. They also stood in stark contrast to the tall young American soldiers in their helmets who stood behind them, providing them courtroom security. At the same time, these defendants appeared to me to still be arrogant, in spite of their humiliating loss of the war, and, perhaps with the exception of Albert Speer, they all seemed totally unrepentant.

It was through this trial that the American public truly began to learn of the immensity of the crimes that had been perpetrated by the Nazi regime and came to understand that Hermann Goering, probably the most well-known of the defendants, in spite of his arrogance and his defense of the Third Reich at the trial, was somewhat of a pathetic figure due to a drug dependency, and that Rudolf Hess was at this time essentially a madman. Goering escaped the hangman — he took a poison pill shortly before he was to be taken to the gallows. Hess spent the rest of his life in Spandau Prison in Berlin.

While the International Tribunal was certainly not a show trial, the list of defendants was incomplete in that it did not include the chief architect of the Nazi regime, Adolf Hitler, and his propaganda minister, Joseph Goebbels; both of them had committed suicide in Hitler's bunker a few days before the war's end. Neither did it include the SS Chief Heinrich Himmler, who was then missing, and later was found to have committed suicide. The International Tribunal also proceeded without a defendant representing German heavy industry. The arms manufacturer Gustav Krupp had originally been named as a defendant, but the charges against him did not go forward because by this time he was quite old and was deemed mentally incompetent.

Something I didn't know much about until I was somewhat older was the series of trials that followed the International Tribunal. It was at these trials that the so-called secondary figures of the Nazi regime were brought to justice. The International Tribunal also proceeded without a defendant representing German heavy industry. The arms manufacturer Gustav Krupp had originally been named as a defendant, but the charges against him did not go forward because by this time he was quite old and was deemed mentally incompetent.

My interest in these trials is undoubtedly driven by the fact that it blends my interest in history with my vocation, the law.

It is these trials that I want to talk to you about today. To those in the audience younger than me, this may seem like ancient history, but what went on in Nuremberg six decades ago is clearly relevant to us today, at a time when we have individuals in the custody of our nation as a consequence of another war, and we are now faced with questions about what jurisdiction we have over them and how and where they should be treated.

I should note that although I was only between nine and 12 when the Nuremberg trials took place, I did follow pretty closely the news of the first of these trials, the International Tribunal. Our family was a newspaper reading family and we also subscribed to Life magazine, which was the great picture magazine of that day and it covered the trial extensively. I also have a vivid recollection of seeing newsreels at the movie theaters in my hometown of Olympia in which they showed glimpses of the International Tribunal at which 21 major Nazi figures were tried, including Reich Marshall Hermann Goering, the former Nazi party secretary Rudolf Hess, and Joachim von Ribbentrop, the foreign secretary of the Nazi regime. I remember thinking at the time that the defendants looked rather unimpressive there in the courtroom without the benefit of their fancy uniforms and medals in front of these judges from the United States, the Soviet Union, Britain, and France. They also stood in stark contrast to the tall young American soldiers in their helmets who stood behind them, providing them courtroom security. At the same time, these defendants appeared to me to still be arrogant, in spite of their humiliating loss of the war, and, perhaps with the exception of Albert Speer, they all seemed totally unrepentant.

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Something I didn't know much about until I was somewhat older was the series of trials that followed the International Tribunal. It was at these trials that the so-called secondary figures of the Nazi regime were brought to justice. Neither did I know that, in two of those trials, there was a real Washington state connection.

These secondary Nuremberg trials are actually more interesting and illuminating.
in many respects than the International Tribunal, which, by most accounts, got pretty tedious. That is so because the evidence introduced against the defendants in the subsequent trials was much more specific than it had been at the International Tribunal where the major figures were charged generally with crimes against peace and humanity, and for their membership in categories of groups or organizations that the Tribunal declared to be criminal.

The authority for the trials that followed the International Tribunal flowed from Law No. 10, which was passed on December 20, 1945, a few months after hostilities in Europe had ended, by the Allied Control Council for Germany. When we speak of the Allies we are, of course, talking about the four powers that were then occupying Germany — the United States, Great Britain, France, and the Soviet Union. The purpose of Law No. 10 was to establish “a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Tribunal.” This law provided that persons found guilty of any of the listed crimes might be punished by imprisonment or death, and it was anticipated that each of the four occupying authorities within its zone of operation was empowered to arrest and try persons suspected of having committed a crime or crimes as defined in the law.

In the United States Zone of Occupation in Western Germany, prosecutions were under the direction of Brigadier General Telford Taylor who, along with United States Supreme Court Justice Robert Jackson, had been responsible for preparing and presenting the case against the German High Command at the International Tribunal. Justice Jackson and General Taylor had exercised authority at the International Tribunal under direct orders of President Truman, but in October 1946 the office of chief counsel for war crimes was transferred to the Office of the United States Military Government.

The tribunals that would hear these cases were to have three or more members, and the chief counsel was empowered to determine the persons to be tried by filing indictments with the tribunal.

In all, there were 12 trials of the secondary Nazi figures at Nuremberg under the auspices of the United States Military Government, and all but one involved several defendants. At the conclusion of these trials, judgments were entered against more than 100 defendants. Thirteen of the defendants received the death penalty, eight were imprisoned for life, and the remainder of those sentenced served terms of imprisonment.

Significantly, 33 defendants were acquitted, which, I think, is a testament to the fairness of the hearings and our nation’s adherence to the principle that due process and fundamental fairness should be observed at all stages of the proceeding. If you are wondering, the presumption of innocence prevailed throughout, and the prosecution had to prove its case beyond a reasonable doubt.

Interestingly, the judges who served at these trials were, almost entirely, state judges. You might wonder why they didn’t use federal judges, since these trials were under the auspices of the United States Military Government. The obstacle to the use of federal judges, it turns out, was none other than the chief justice of the United States Supreme Court, Fred Vinson. He and other justices on the court were apparently upset that the International Tribunal had taken such a long time to run its course and that it had fully occupied the time of Justice Jackson for the duration of that trial. Consequently, the chief justice let it be known that federal judges would no longer be granted leaves of absence to serve on the Nuremberg bench.

The very able General Lucius Clay, America’s first high commissioner in the United States Zone of Occupation, was, as it turned out, successful in recruiting state judges, and I am proud to say that two were from this state. I would like to tell you a bit about these individuals and about their service at Nuremberg.

One of the judges was the then chief justice of the Washington Supreme Court, Walter Beals, an Olympia resident. The other was King County Superior Court Judge William Wilkins. Fortunately, these judges did not have to be concerned about forfeit-
ing their elected positions as judges if they served at Nuremberg. That was because the Washington Legislature passed a statute in 1941 which provided that when any judicial officer shall be ordered into active military service, the governor was to consider that this was an extreme necessity requiring him to grant the judge a leave of absence.

That is what happened here — Beals and Wilkins, who were Army reservists, were simply called to active duty by order of the Secretary of War and were granted leaves of absence by Governor Wallgren, all without prejudice to their right to resume their judicial positions at the end of their military service. Beals answered the call on October 1, 1946, and Wilkins in September 1947.

Now let me tell you about these judges and the trials on which they sat. Chief Justice Beals sat on case number 1, which is referred to as the “medical case.” There were 23 defendants in that case, 20 of whom were German physicians. Two judges from other states also served on this tribunal, but Justice Beals was the presiding judge.

Walter Beals was really quite an interesting person. He was a member of the University of Washington School of Law’s first graduating class, the class of 1901. Interestingly, his wife, Othilia, was a law school classmate, and she had the distinction of being one of the two women in that first graduating class from the University of Washington School of Law. Justice Beals had been a member of the Washington National Guard since 1909, and served on active duty in the First World War, rising to the rank of lieutenant colonel. He was decorated with the French Legion of Honor for his service in France and was one of the founders of the American Legion. Shortly after he returned home from the first World War, he became an assistant corporate counsel for Seattle and in 1926 was appointed to the King County Superior Court. Two years later, he was appointed to the Supreme Court, where he stayed until his retirement in 1951, except for his one-year hiatus at Nuremberg. Justice Beals remained in the Army Reserve after World War I, and he was a full colonel when he was called to active duty to serve as a judge at Nuremberg.

The indictment in the medical case or “Doctors’ Trial,” as it is called, was filed in the fall of 1946, and the trial commenced in Nuremberg’s Palace of Justice just before Christmas of that year. It was a very long trial because due process was strictly observed. The trial transcript runs more than 11,000 pages. Five-hundred-seventy exhibits were introduced by the prosecution. Twenty-two German defense attorneys presented 901 exhibits for their clients. Thirty-two witnesses testified for the prosecution, and 53 for the defense, including all of the defendants. The prosecution’s case in chief took 25 court days — the defense case took 107 days.

The principal charge against the defendants, of whom all held high positions in the medical service of the Third Reich, was that they had engaged in war crimes and crimes against humanity in that they committed murders and other “inhuman acts” on German civilians and nationals of other countries by using these persons in a series of what they called medical experiments. Needless to say, the evidence regarding the manner in which these experiments were conducted is very grisly, and I won’t go into it in any detail here other than to say it is very tough reading.

Underlying all of this was a showing by the prosecution that the medical profession in Germany, which prior to the rise of Adolf Hitler had been the finest in the world, had been totally co-opted by the Nazis. As a consequence, this once-proud profession was completely degraded and disgraced. As General Taylor said in his opening statement, these were experiments “in name only,” and they were senselessly and clumsily carried out with absolutely no value at all to medicine as a healing art.

The physicians among the defendants ran the gamut from the leaders of German scientific medicine who once had excellent international reputations, down to what General Taylor called “the dregs of the profession.” The most well-known defendant was Karl Brandt, who had been Adolf Hitler’s personal physician. He was a major general in the Waffen SS as well as holding a very questionable title as “Reich commissioner for health and sanitation.”

At the conclusion of the trial, Justice Beals announced the judgments of the court. Seven of the 23 defendants were sentenced to death and were executed, including Karl Brandt. Five received life sentences, and four received sentences ranging from 10 to 20 years. Seven were acquitted.

Being a judge at Nuremberg was a tough job, and I’m not just talking about having to be confronted with the most awful evidence one can imagine. Nuremberg had been badly destroyed by Allied bombing; as a consequence, there were shortages of food and fuel. Justice Beals, who was no spring chicken at 70, suffered physically, no doubt as a consequence of a heavy workload and the cold, damp hotel room in which he lived. Nevertheless, he performed his duties admirably, so well that General Clay tried to talk him into staying on as a judge for other trials. But in view of his deteriorating physical condition, Justice Beals declined the offer and returned to Olympia in 1947. By September of that year, he was back on the Washington Supreme Court hearing cases. In reading about the trial, it is readily apparent that Justice Beals was intent on not only doing justice in this case but also impressing on the German public the importance of an independent court system and adherence to due process. He later said: “I think the trials have been a healthy thing. The section of the court reserved for Germans
was well filled throughout the trial, to a large extent by classes of high-school and college students. The German lawyers especially liked the American court procedure we followed. We went upon the principle that defendants were presumed to be innocent until proven guilty.” Justice Beals died in 1960.

The other Washington judge, William Wilkins, sat on the tenth of these cases. The defendants were 12 executives of the Krupp industrial empire, which had been producing weapons since the late 1500s. As I indicated earlier, the patriarch of the family, Gustav, could not be tried because of incapacity, so his son, Alfried, who had been instrumental in running the armament works since his father had had a stroke in 1939, was made a defendant. The defendants were not charged with manufacturing arms — that was not a war crime — but rather with using slave labor in the Krupp factories and in plundering occupied territories for the benefit of their company. The trial began in late 1947 before a tribunal consisting of Judge Anderson of Tennessee, Judge Daly of Connecticut, and Judge Wilkins. William Manchester, the well-known historian, described the Krupp tribunal in his book *Arms of Krupp*, as follows: “Anderson was pale, his health was poor. Justice Daly, fifty-five, grave, bespectacled, and intent, stood at his right; Judge Wilkins, handsome and leonine, at his left.”

Judge Wilkins, in addition to being handsome, was also a very interesting person. Judge Wilkins, like Justice Beals, had served as an Army officer in France during World War I, during which time he saw considerable action. After the war, he went on to law school in Michigan. Following graduation, he came to Washington, where he entered private practice. He later joined the King County Prosecutor’s Office. In 1940, he was appointed to the Superior Court for King County, but his judicial service was interrupted in 1942 when he went back into the service, this time as a judge advocate general in the Army Air Corps. He got out of the service in 1945, only to be called up again in 1947 to hear the *Krupp* case. After that case was concluded, he returned to the United States and resumed his position on the superior court, retiring in 1972.

The *Krupp* case also took a long time to try, over six months, and it was not concluded until June 30, 1948. Alfried Krupp received a 12-year sentence, and all of his property was ordered confiscated. Ten other defendants received sentences ranging from six to 12 years, and one was discharged as having served sufficient time before and during the trial.
In 1951, much to Judge Wilkins’s chagrin, High Commissioner John McCloy not only commuted Alfried Krupp’s sentence, but restored to Krupp all of his properties. The Cold War was now very chilly, and it was apparent that our concern about the Soviet Union was influencing our relationship with Germany. Ironically, when Alfried Krupp died in 1968, he was reputed to be one of the richest men in Europe. Judge Wilkins died in 1995 at the age of 98, the last survivor of the 32 judges appointed to the Nuremberg trials.

Although no Washington judges were involved in case number 3, it is called “the justice case,” in which 16 defendants were charged with war crimes and crimes against humanity by abuse of the judicial process. It was this trial on which the movie “Judgment at Nuremberg,” starring Spencer Tracy, was based.

As Washingtonians, and Washington judges in particular, we can take pride in the fact that two persons from our state served as judges at these historic trials. What is the lasting effect of their service? It is hard to say, but I thought about that some time ago when I heard a piece on National Public Radio about the fact that the City of Nuremberg was having trouble getting tourists and business to come to that city because its name is so associated with Nazism and the trials. I have sympathy for the many good people who live in Nuremberg, because I don’t believe we share the guilt of our forefathers. On the other hand, we need to know the truth about our forefathers’ mistakes and wrongdoings so that we don’t repeat them. That point was made tellingly over 50 years ago by General Taylor in his opening statement at the medical case. I will close with what he said:

[L]arger obligations run to the peoples and races on whom the scourge of these crimes was laid. The mere punishment of the defendants, or even of thousands of others equally guilty, can never redress the terrible injuries which the Nazis visited on these unfortunate peoples. For them it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable; and that this Court, as the agent of the United States and as the voice of humanity, stamp these acts, and the ideas which engendered them, as barbarous and criminal.

Gerry L. Alexander is chief justice of the Washington State Supreme Court and can be reached at j_g.alexander@courts.wa.gov.
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*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)
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The right to seek redress for civil wrongs through the court system is a profound and deeply valuable aspect of the American system of justice. The right of self-representation in civil litigation forms a necessary and important role in our system of justice. The right to redress in the court system is not and should not be limited to those who can afford legal representation, or who are fortunate enough to secure pro bono counsel. And it makes great sense, given these values, to exercise some patience for those who are navigating complex legal waters.

Pro se participation in civil courtrooms is unique. More commonly, where specialized skills are required, pro se participation is not allowed (and can be prosecuted). When was the last time you saw a pro se pharmacist? Or pilot?

The right of open access also comes with a necessary and understandable cost. A pro se litigant’s lack of training may lead to delay, unnecessary motion practice, or even occasionally filing claims that do not have a legitimate basis in fact or law. This article does not concern these understandable costs inherent in granting access to those untrained in the law. It concerns a different type of problem that occurs when one can say, without hesitation, that a line has been crossed. It concerns the abusive or dishonest pro se litigant.

It is one thing to make a mistake regarding an archaic rule of procedure or to lack appreciation for the particular elements of a cause of action. It is another to tell lies. And it is another thing altogether to go on an outright attack, based on false claims and representations. Or to sue court staff and judges. Or to make the same false or
litigation. Gener-mlitigants. The difficulty

costs or social costs). The WSBA and the

rules generally are reluctant to impose

money fines that are substantial or that

come anywhere near approximating the

economic costs imposed by the vexatious

pro se litigant. And pro se litigants often lack

resources to pay. Washington courts have

recognized these difficulties and, recently,
have been employing their “inherent” power
to restrain abusive litigants by placing proce-
dural and substantive limitations on existing
and future filings. This tool, while it must be
used judiciously, offers numerous benefits
to litigants and courts and helps to preclude
the vexatious pro se litigant from socializing
litigation costs.

Defining the Problem

A litigator’s decision to file and prosecute
any civil lawsuit triggers tremendous
procedural machinations that may include
enormous public and private costs —
e.g., to the judicial system, to defending
litigants, and to taxpayers. The Rules of
Professional Conduct and the Civil Rules
recognize the tremendous costs of litigation
and, accordingly, require litigants to
limit court claims to good-faith assertions
of fact and meritorious legal claims. These
requirements are captured in Rule 11 and
are well-recognized in the inherent power
of the court. Both Rule 11 and the general
standards of practice assume as a starting
point that one is not lying or taking action
in an abusive manner.

These protections, however, often break
down in the face of pro se litigation and
especially serial pro se litigation. Gener-
ally speaking, vexatious pro se litigants are
immune from the downside risk of their
behavior. Far more often than not, savvy
vexatious pro se litigants will be able to
characterize themselves as “a victim,” the
“downtrodden,” a “community activist,” or
otherwise “seeking access to justice,” such
that courts are reluctant to hold them to
account for their behavior regardless of
whether the other participants seek such
relief (and many don’t, simply happy to
try to minimize defense costs). And, when
courts do attempt to hold such litigants
accountable, the sanctions imposed are
so trivial that it is merely a cost of doing
business to vexatious pro se litigants.

A recent editorial in the Olympian dis-
cussed the tremendous social costs associ-
ated with two vexatious litigants who have
filed, and lost, repeated lawsuits against the
Port of Olympia.1 At one point in time, the
Port faced challenges from these pro se li-
tigants in a federal court action, three actions
before the Pollution Control Hearings Board,
four superior court appeals, three appeals
before the City of Olympia hearing examiner,
and one case before the Washington State
Supreme Court. Many of these challenges
have been dismissed — as factually frivolous,
untimely, or procedurally and substantively flawed. Many have alleged the same losing claims over and over again.

In the meantime, the article reported, the Port’s costs and attorneys’ fees over the last two years rose to more than $400,000 in defense of claims with no basis in law or fact. These are just the Port’s costs. They do not include the costs to other defendants. The list of these “other defendants” is growing and now includes two judges from the Thurston County Superior Court, members of the court staff, City of Olympia staff, and a permittee.

In a recent case brought by two of these pro se litigants, a so-called “Original Action” was filed against two superior court judges in the Washington State Supreme Court, claiming the judges were denying them due process. Their claim was driven by wide-ranging allegations of misconduct, collusion, and fraud, attacking the integrity of the court. Suing a judge, of course, is a serious thing. One of the allegations was that the trial court had issued what the petitioners called an “extrajudicial” and “imperious” private correspondence. The word “imperious” means domineering or overbearing. The so-called private correspondence, it turns out, was a routine scheduling letter. And it was not private at all. It had been entered by the court in the record and, on its face, showed that it was sent to all parties and counsel.

The Supreme Court dismissed the Original Action as frivolous and an abuse of the right of access to the courts. At the request of the intervenor-permitee, the Court awarded money sanctions against both of the pro se petitioners. The Court also prevented future appeals from the same action in any Washington appellate court until the money sanction was paid. But here we see the reluctance of the Court to issue a sanction that fits the cost of the legal process initiated by these abusive litigants. Numerous private parties and the trial court judges had to retain counsel. Motions papers were filed. Argument was held. The Supreme Court wrote an opinion on the matter.

But the money fine of $500 per pro se litigant did not begin to cover the cost of the debacle and, apparently, was not much of a deterrent either. The litigants paid the fine and, within several weeks, filed several new actions against different trial court judges and numerous parties, including similar allegations. The end result? Virtually all of the expense of the frivolous claims and abusive tactics fell on opposing parties, the court, and, of course, local taxpayers.

Controlling Abusive Pro Se Litigation in Washington with Existing Mechanisms

Washington courts have a broad array of legal mechanisms for controlling vexatious or frivolous pro se litigation. First, Washington courts may award costs, including attorneys’ fees, against any party, including a pro se litigant, who files a frivolous-action under RCW 4.84.185 (the “frivolous action statute”). The frivolous action statute allows a court to award attorneys’ fees and expenses to the prevailing party against any “action, counter-claim, cross-claim, third-party claim, or defense” that is “frivolous and advanced without reasonable cause.” An award under this provision requires written findings by the judge that the claim is both meritless and brought for the purposes of delay, nuisance, spite, or harassment. Sanctions under the frivolous actions statute are assessed against the parties, not the attorneys, and should apply with equal force to pro se litigants.

Second, Washington courts may sanction vexatious litigants under Civil Rule 11 (CR 11) by imposing fees and other “appropriate” sanctions. CR 11 requires that every pleading, motion, and legal memorandum, including those filed by a pro se, must be signed to ensure that “it is well grounded in fact and is warranted by existing law or a good faith argument for the extension,
modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Under CR 11, Washington courts can, and do, impose the full costs of litigation on pro se litigants who pursue frivolous claims, and hold a pro se litigant to a reasonable-attorney standard.

Third, Washington courts also have inherent power to impose monetary sanctions, including attorneys' fees, on actions that are brought in bad faith. Bad-faith actions include actions that are "intentionally frivolous" and actions brought for the purpose of harassment. The court's inherent power is broader than CR 11 (which applies to pleadings and motions filed in court) and extends to pre-litigation conduct necessitating legal resolution; procedural bad faith, including vexatious conduct in the course of litigation; as well as substantive bad faith, including intentional filing of frivolous claims or claims based on improper motive. In order to support an inherent authority sanction, the court must make a finding of bad faith.

Beyond monetary sanctions, Washington courts have the inherent power to restrain vexatious litigants from abusing the right of access to the courts. Although few Washington courts have tested the limits of this power, the Court of Appeals, Division III, in Yurtis v. Phipps, recently utilized its inherent authority to prohibit a vexatious pro se from filing any further claims related to a particular transaction. Relying on existing precedent, the court in Yurtis concluded that there is no absolute and unconditional right to access the courts, and the "requirement that a litigant proceed in good faith and comply with court rules has always been implicit in the right of access." Courts can use this inherent power to permanently enjoin the filing of particular suits, or to prohibit the filing of motions altogether. To exercise such power, the court must make a finding of a pattern of abusive and frivolous litigation. The court should tailor injunctive relief narrowly to remedy proven abuses, and should not amount to a total denial of access to the courts.

The Court in Yurtis recognized that "every court of justice has the inherent power to control the conduct of litigants who impede the orderly administration of justice," and the "need for judicial finality and the potential for abuse of this revered system by those who would flood the courts with repetitive, frivolous claims which have already been adjudicated at least once."

Federal Responses to Vexatious Litigation

By contrast, the federal court system has developed a robust vexatious-litigation doctrine to curb abusive pro se litigation. Federal courts frequently issue "pre-filing" injunctions against vexatious litigants, requiring the litigant to seek leave of the court before filing any civil suit. It appears that federal district court judges, in particular, have had less hesitation in drawing some hard and fast boundaries to cabin abusive litigation.

The Ninth Circuit established a specific set of criteria under which district courts can issue pre-filing injunctions: (1) the court must give notice and an opportunity to oppose the order; (2) the court must have an adequate record to demonstrate an abuse of the judicial system; (3) the court must make a substantive finding that the litigation was frivolous or harassing; and (4) the order must be narrowly tailored to address the abuses at issue.

Utilizing this inherent power, federal courts have crafted a broad array of remedies:

- Requiring a pro se to seek leave of court before any new filings.
- Requiring a pro se to obtain legal counsel prior to filing any new civil actions.
- Permanently prohibiting future actions against particular defendants based on certain facts or legal theories.
- Requiring a pro se to submit complaint along with a copy of the injunction order and a list of all current actions pending before the courts.
- Requiring a pro se to post bond for costs of litigation prior to entering any new action.

These remedies must always be justified based on the facts and circumstances of each case.

Reinvigorating Washington's Vexatious-Litigation Doctrine

Despite significant authority to control vexatious pro se litigation, these tools remain significantly under-utilized. This may be due to an inadequate sense of appreciation of the enormous private and societal costs of abusive litigation. The wide procedural latitude afforded by Washington courts to pro se litigants may also inadvertently foster abusive litigation in some cases, leading to the kind of abuses described in the case of the Port of Olympia.

Raising Awareness

One mechanism for curbing abusive pro se litigation may come from raising awareness in the bar of the activities of vexatious litigants. Vexatious litigants often file the same kinds of cases, in a repeated fashion, in different tribunals, many of which never result in a published (or even unpublished) decision. A defendant faced with a vexatious pro se litigant may not even be aware that a pattern exists. The Washington State Bar Association could increase awareness of vexatious pro se activities by keeping a database of pro se activities. Although the Bar Association has no oversight over pro se activities, it can help attorneys and the courts deal with vexatious litigants by keeping track of the cases they file, the grounds of those cases, and the ultimate disposition of those cases. Such information would be invaluable in establishing the kind of pattern of abusive practice necessary to support aggressive injunctive relief against future filings. Superior courts similarly can facilitate this process by issuing written memorandums dismissing frivolous pro se actions. By raising awareness of the practices of individual pro se litigants, the courts can more appropriately respond to specific offenses based on the pattern of that pro se's practice before the courts.

Using Existing Tools

Courts can also reduce the impacts of vexatious pro se litigation by more aggressively using the frivolous-action statute. Concerns that a pro se will not be able to afford such costs should not be part of the consideration. Rather, failure to pay such fees can provide grounds for enjoining future litigation until such fees are paid. Although a court must balance the pro se's right to access, the Legislature has already determined that cost of frivolous actions should be borne by the proponent of a frivolous claim.

Washington courts also should not hesitate to impose costs where only a portion of a lawsuit is frivolous. A pro se litigant may have one legitimate claim that is filed along with a dozen other claims that lack any basis in law or fact or, worse yet, is based on outright falsehoods. For example, a pro se litigant might file a facially valid land-use appeal of a city permit decision, and include with that claim reckless or demonstrably false allegations of negligence against individual city employees. One claim is facially valid, the other claim is patently frivolous and included simply to harass city employees. As amended in 1991, the frivolous-action statute no longer requires consideration of the case as a whole, and allows an award of fees based
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on specific actions or defenses. Assessment of fees incurred for responding to frivolous portions of claims may significantly discourage tagging on additional claims.

Adopting the Federal Standards for Pre-Filing Restrictions
Washington courts should carefully consider meeting egregious violations with procedural or substantive restraints on future filings. Often, the only way to prevent opposing parties, courts, and taxpayers from bearing costs associated with frivolous litigation is to prevent suits from being filed in the first place. Although Washington has not developed the scope of its inherent power in great detail, the test outlined by the Ninth Circuit provides a framework that is consistent with Washington law, and would provide for restrictions tailored to the problems created by the individual litigant.

Consider Social Costs of Private Vexatious Pro Se Litigation
Finally, as to vexatious pro se litigants, Washington courts need to discard the “access to justice blinders.” It is one thing to relax (i.e., ignore) the applicable rules for a pro se litigant. It is quite another to do so for vexatious pro se litigants. When a pro se litigant files multiple actions, the court’s “leniency” is, in effect, a penalty to the other parties who follow the rules. The private benefits that drive vexatious pro se litigants (e.g., emotion, self-aggrandizement, attention, financial, etc.) simply do not outweigh the rights of others. Vexatious pro se litigants who cry “access to justice” when their behavior is challenged simply disregard the rights of other participants, the courts, and the public.

Conclusion
Certainly, not every pro se litigant filing a legal or factually deficient claim warrants strong reprisals from the courts. A pro se litigant who has filed numerous civil suits with false statements of fact or containing claims already dismissed, however, should not be entitled to such leniency. Every time a court grants a vexatious pro se litigant leeway, it not only encourages future non-compliance, but it extends a private benefit to the pro se litigant at the detriment of the other parties, the court system, and the public taxpayers.

Framed another way — given the American preference for judicial resolution of civil disputes, there are certain mistakes and errors a court should tolerate from pro se litigants as part of the costs of justice — e.g., mistakes of procedure, timing, or format. But there are other “errors” that should not be tolerated, not even once — e.g., filing a claim twice; filing a claim without a good-faith factual basis; or filing a claim for an improper purpose such as harassment, annoyance, or delay.

By responding to these abuses with swift action for real monetary sanctions, and where appropriate, pre-filing or other restraints, courts will send a clear message to litigants — abuse of the system will not be tolerated. Any other response only encourages abuse of the judicial system at the expense of others.

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NOTES
1. See editorial: “Activism must not cross the line to harassment,” the Olympian, March 9, 2008.
The Importance of Completing a Voluntary Form: Pro Bono Service Trends Since 2003

by Andrew A. Guy

by the time this article is published, all WSBA members should have received the annual license packet. In the press of our practices, there may be a temptation to skip any portion of a form whose completion is not mandatory, including the one relating to voluntarily reporting the hours of pro bono publico service performed in 2008. The purpose of this article is threefold: (1) to report the information gleaned from last year’s form, (2) to encourage all of us to report the pro bono services we performed in 2008 on the current license renewal form, and (3) to encourage the performance of higher levels of pro bono work in 2009.

Some background

In 2003, Washington’s Pro Bono Publico Service ethics rule, RPC 6.1, was amended to encourage lawyers to provide free legal services to low-income clients who otherwise would not have access to a lawyer. The rule’s guiding principle was stated in its first sentence: “Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay.”

RPC 6.1 defines pro bono service as either:

1. Rendering free legal service to low-income persons or organizations whose primary mission is to serve such persons [RPC 6.1(a)] or
2. Rendering free or substantially reduced fee legal services to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civil, community, governmental and educational organizations in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would otherwise be inappropriate, and participating in activities for improving the law, the legal system or the legal profession. [RPC 6.1(b)]

The rule includes an aspirational goal for each WSBA member to perform at least 30 hours of pro bono service per year. Lawyers who perform 50 hours or more in any calendar year and report that fact on the WSBA license renewal form receive a frameable certificate as a recognition award from the WSBA.

The WSBA and its Pro Bono and Legal Aid Committee extend their hearty thanks and congratulations to the 1,989 lawyers who reported that they performed 50 or more pro bono hours in 2007, including the 1,399 whose names are listed at the end of the this article, as well as the 590 members who chose to remain anonymous.

What the numbers show

Each year since the rule was amended, the WSBA has compiled the responses from the licensing packet form to track aggregate reported hours. It does not keep any records of individual attorneys’ reported hours, except as necessary to identify the attorneys who are entitled to receive recognition for their pro bono service.

The percentage of lawyers reporting pro bono hours has increased from 13

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percent of total Bar membership in 2003 to 20 percent in 2007. This represents a 69 percent increase in the number of attorneys reporting over that five-year period (from 3,678 in 2003 to 6,226 for 2007), while Bar membership has increased from 28,043 to 31,441, only 12 percent.

Of these, the total number of attorneys who reported that they met the 30-hour aspirational goal increased from 1,979 in 2003 to 2,907 in 2007 (a 47 percent increase), and the number who reported that they exceeded 50 hours of annual pro bono service increased over that four-year time period from 1,247 to 1,989 (a 45 percent increase). Included within the 50-plus figures are those members who chose to remain anonymous, a category that increased from 177 in 2003 to 590 in 2007 (a 233 percent increase).

During that same period, the number of total pro bono hours reported increased from 202,900 to 286,641 (an increase of 83,741 hours, or 41 percent). Of these, the hours reported for services to low income persons or organizations primarily serving them rose from 107,823 to 167,630 (a 59,807 hour increase, or 63 percent), and the total hours reported for other types of pro bono publico service increased by 23,934 hours, from 95,077 to 119,011 (a 25 percent increase).

So, is the rule working?
It is encouraging to see this increase in pro bono service hours being reported over the past four years. However, with only 20 percent of the Bar reporting, it is difficult to know how many hours of pro bono service are being provided by Washington lawyers. It may be that those who don’t report are not performing even 30 hours of pro bono publico service per year, but it is also quite conceivable that many lawyers simply don’t take the time to complete the form and that others may wish to remain anonymous and not receive any form of recognition for the work they do.

Anecdotal information suggests that some Washington lawyers have been motivated to render pro bono services due to the existence of the rule and its reporting form, which (by being included on the license renewal form) is a reminder of our professional responsibilities under RPC 6.1 to render such services. Some lawyers have indicated that they have been motivated to undertake pro bono work in part so they could honestly report that they had met the 30- or 50-hour goals, and not be left with the choice of either quietly ignoring the form or completing it and admitting that they hadn’t performed the minimum aspirational goal of 30 hours.

Some law firm pro bono coordinators report that in November of each year they obtain from their firm accounting departments a list of lawyers at their firms who have performed pro bono hours that are shy of their 30- or 50-hour goals. They then contact those lawyers to encourage them to perform more pro bono work before year-end, so as to be able to report success in meeting their goals.

All of this suggests that RPC 6.1 is having a positive impact in encouraging pro bono service by our Bar. However, to get a truer sense of what our profession is really doing to help low-income individuals access our justice system in Washington, we need to increase the response rate on the license renewal form. Those who wish to remain anonymous can do so by indicating that on the form (it’s no longer a separate form and has the member’s name preprinted on it.)

Increasing pro bono services
Of course, the point of RPC 6.1 is not to measure how many of us are willing to voluntarily report pro bono hours, but rather to encourage us to perform more pro bono work, so more persons who otherwise would not have access to a lawyer can get legal help. The rule tries to accomplish this partly through use of a carrot (providing recognition for performing over 50 hours per year) and partly through
use of a stick (establishing a minimum goal of 30 hours per year as a matter of professional responsibility).

Each of us can set a personal goal for 2009 to increase our pro bono service. Call it a New Year’s resolution, if you like. The unmet need remains high, and there are many opportunities to make a difference in the lives of those less fortunate than ourselves. Many of us are already involved with one or more legal services programs, but for those who are looking for opportunities to perform pro bono work, check out your local bar association for pro bono matters or go to www.advocateresourcecenter.org, which lists pro bono projects. Also, you can obtain information regarding volunteer opportunities with Northwest Justice Project’s CLEAR (Coordinated Legal, Education, Advice, and Referral) telephone service by calling 206-464-1519 and asking for Abby Goldy or Julie Rattray. Business lawyers can find good non-litigation referrals through Washington Attorneys Assisting Community Organizations, at contact@waaco.org.

As a profession, we are uniquely positioned to make the legal system available to those who need help but cannot afford to pay for legal services. As individual lawyers, we have the skills to make a profound difference in the lives of the pro bono clients we represent and to help make “equal justice for all” more than a slogan. We also have the opportunity to experience the personal satisfaction that comes with helping level the legal playing field for clients with meritorious cases who otherwise would not have representation. To achieve these objectives and to address the unmet needs of low income persons needing civil legal services, we, as a bar association, need to dramatically increase the levels of pro bono services being provided. To assist the WSBA, the Access to Justice Board, and other organizations with planning and to help inform the public as to what the bar is doing, we also need to keep track of the pro bono hours we work and report them on the license renewal form. For something this important, a New Year’s resolution is definitely in order.

Andrew Guy is a commercial litigation partner at Stoel Rives, LLP’s Seattle office, where he is the pro bono coordinator. He is a member of the WSBA Pro Bono and Legal Aid Committee, a trustee of the King County Bar Association, and a volunteer with the KCBAs Housing Justice Project and Community Legal Services.

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Developing Pro Bono Projects: The Washington Appleseed Center for Law in the Public Interest

by Sue Donaldson

American Lawyer has described Appleseed as “pro bono’s new frontier.” A non-partisan, non-profit national organization made up of a network of public-interest law centers, Appleseed is dedicated to building a just society — through education, legal advocacy, community activism, and policy expertise, and by addressing root causes and producing practical solutions. As part of the nation’s largest legal pro bono network, Appleseed Centers work both independently and collectively, bringing their own experiences to create local solutions that are nationally relevant. The Centers connect private practice lawyers, corporate counsel, law schools, civic leaders, and other professionals to tackle problems locally.

Washington Appleseed Center for Law in the Public Interest (www.waappleseed.org), part of the Appleseed network, shares the national mission, promoting systemic policy change, using pro bono attorneys and advocates. Washington Appleseed develops projects through a variety of approaches. Sometimes, through discussions with service providers or civic leaders, we identify an issue and begin doing background research on a “case statement” describing the issue and the problem. With the research and statement in hand, we then talk to firms about working on the project. At other times, we spend time with lawyers and interview them about their skills and about their interests in public policy areas and issues.

The Foster Pepper “Affordable Housing Fund” project is an example of the second approach. I interviewed lawyers on the Pro Bono Committee at Foster Pepper to learn about their work and how their expertise could be leveraged for the nonprofit sector. Attorney Jack Zahner mentioned that he often wondered why nonprofit housing developers didn’t utilize some of the tools of his commercial clients, such as the securitization of assets. Later that week, I had the opportunity to ask this question of a representative from the local YWCA.

The chief executive officer of the YWCA, Sue Sherbrooke, indicated that the strategic plan for the YWCA over the next 10 years was to increase its inventory of transitional, supported housing from the current inventory of 500 units to 1,000 units. She mentioned the challenge in the Puget Sound real estate market for flexible and nimble acquisition by nonprofits, given the mosaic of state, county, and city funds that needs to be assembled.

Foster Pepper attorney and then-Washington Appleseed board member Marc Greenough contacted Sue Sherbrooke and began scoping the project. Marc also involved Seattle-Northwest Securities Corporation, a client of Foster Pepper with whom Marc has worked on other financing projects. Then-Washington Appleseed Board Chair Brad Diggs also enlisted his firm, Davis Wright Tremaine. According to Marc Greenough, this project was the first time mezzanine financing had been used to benefit a nonprofit housing operator. It also promoted a long-term solution to a continuing problem rather than simply a...
temporary stop-gap measure. Specifically, the tax-exempt bonds were sold at a slight discount to market to socially responsible mutual funds. The taxable bonds were sold at a high discount (yielding roughly one percent) to individuals with whom the YWCA had an existing or prospective donor relationship.

The result? The YWCA obtained a revolving fund of more than $28 million for multi-family housing projects. This project was named by The Bond Buyer as one of 10 “Regional Deal of the Year Winners” for 2007. Washington Appleseed presented Foster Pepper and Davis Wright Tremaine with the 2007 Innovator Awards for Pro Bono Service for their work on this project.

The Heller Ehrman project was developed in 2006 through conversations with attorneys interested in pro bono work. They identified community and economic development in Seattle’s distressed communities as an area in which they would like to work. Washington Appleseed set up lunch meetings with leading organizations involved in this work in the Central Area, the Rainier Valley, and the International District. A work group was assembled consisting of Washington Appleseed board member Fred Corbit (then a Heller Ehrman attorney and now at Northwest Justice Project), Jay Lapin (then a Washington Appleseed board member), and Stephanie Miller (a recent University of Washington MAPS graduate and Central Area resident), Jennifer Burgess-Capoccia (then a University of Washington School of Law 3L) devoted 40 hours a week for 10 weeks staffing this project and the work group as an extern.

Much research was done and several projects were developed. Heller Ehrman drafted documents so that low-wage workers could buy condominiums from a local land trust. Previously, the land trust could only offer single-family residences to its clients. Commercial and municipally funded land trusts were also studied. Some of the strategies that Heller Ehrman developed to support low-wage workers in obtaining housing may also be used in other areas, such as the Methow and Yakima valleys. The work generated additional, similar projects on behalf of Habitat for Humanity and Columbia Legal Services.

More recently, several projects have been developed to help low-wage workers with medical-legal issues. Foster Pepper attorneys Joanna Plichta Boisen and Sven Peterson have worked with Seattle Children’s Hospital to create an advocacy packet and tool kit for parents of children with congenital craniofacial disorders. Miller Nash attorney Tom Olson, working with the Greater Washington Chapter of the National Multiple Sclerosis Society, attorney Patricia Kahn, Elizabeth Pelley of First Choice Health, and Seattle University School of Law students Danielle Cross and Tyler Rogers, created a booklet to answer legal questions about living with multiple sclerosis. Perkins Coie attorneys Elizabeth Lee and Elizabeth Dietrich are developing strategies for employers to provide health insurance for children being raised by employed grandparents.

At its annual awards luncheon in October, Washington Appleseed honored Michele Radosевич and Davis Wright Tremaine for the pro bono legal work that supported the legislative enactment of the Working Families Credit in the recent legislative session.

It is important to Washington Appleseed that we develop projects that speak to the passions of the attorneys who will be doing the work. We are interested in projects that enable lawyers to work with significant firm clients or other partners such as accounting firms. It is our intent to develop projects where firms will “do well”
as well as “do good.” Every day, we ask ourselves, “What would access to justice look like if every attorney in Washington State had the opportunity to contribute at least three hours a week in pro bono assistance to the needs of the under-served and under-represented?” We invite you to join us in this important work.

Attorney and former public official Sue Donaldson is the founder and former executive director of the Washington Appleseed Center for Law in the Public Interest. In September 2008, Marvin Stern was named executive director of Washington Appleseed. He can be reached at marvin.stern@waappleseed.org. The Legal Foundation of Washington will present the 2009 Charles A. Goldmark Distinguished Service Award at the 23rd Annual Goldmark Award Luncheon in February.

The Pro Bono Revolution: Fundamental Change in Pro Bono Culture
by Joanna Plichta Boisen

Revolutionizing the legal profession for the better is no easy task; being recognized as a catalyst for change that leads to the constructive enhancement of the way lawyers practice is even harder to accomplish. Except, of course, for law schools and law firms that believe in the importance of pro bono. Over the past decade, the Seattle legal community has experienced an exciting and fundamental change in the way law firms view, value, and promote pro bono. Many of today’s law firms maintain established pro bono programs, provide a broader range of opportunities for transactional attorneys and litigators alike, and exhibit strong support for corporate social responsibility initiatives. Once viewed as a professional obligation left to the discretion of the individual attorney, law firms now promote pro bono on a holistic level by hiring pro bono counsel to manage its pro bono programs, collaborating with corporate clients on pro bono initiatives, partnering with local law schools on pro bono projects, and supporting nonprofit organizations by providing direct legal advocacy. This progressive shift in law firm culture fosters the emergence of pro bono as a cornerstone to a well-rounded law firm and to the attorney as a frontrunner for access to justice on a larger scale.

Law firms have a stronger presence in the pro bono community today due, in part, to established pro bono programs with clear leadership. In addition to maintaining an active pro bono committee, almost every major law firm now has appointed a pro bono counsel or coordinator to head its pro bono program. In addition to working on cases, the pro bono counsel helps attorneys find qualifying opportunities that align with their skills and interests, which not only provides for meaningful work for the attorney and helps the nonprofit place meritorious cases, but also minimizes malpractice liability for the firm. Even some small and mid-size firms have or are considering the pro bono position, and the Pro Bono and Legal Aid Committee is discussing how to help corporate legal departments and law firms, regardless of size, institute the role.

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In addition to institutionalizing pro bono by hiring pro bono counsel, several new cutting-edge pro bono opportunities have emerged as well. Back in 1992, when Jake Larson, Foster Pepper’s pro bono chair and a partner in the litigation practice group, started his legal career, pro bono was an important part of an attorney’s responsibility, but it had a more circumscribed scope. “Pro bono was an adjunct of an attorney’s privilege to represent others in our courts, but back then, it meant representing an indigent individual in some legal scrape, or if it was an organized program, it meant working with a defender program, or a guardian ad litem program, doing death-penalty appeals, or something of that sort.” Now, according to Larson, law firms are thinking outside of the box and providing unique and exciting pro bono opportunities. “Especially the Appleseed of Washington-type programs that involve attorneys in non-litigation related pro bono projects and provide systemic change,” he said. This is not to say that it is any more or less valuable than individually-focused pro bono, “it just provides a different range of solutions for a wide range of problems,” said Larson.

As new opportunities increase, so too does the need for volunteers. The nonprofit community has become more comfortable asking attorneys in private practice to take cases and communicating its needs. According to Andy Guy, Stoel Rives’s pro bono coordinator and a member of the WSBA Pro Bono and Legal Aid Committee, this is because “there has been an increased communication generally of the plight of indigent clients in various areas of the law, such as immigration, housing, and domestic violence.” Information regarding emerging needs is (for example, and without limitation) documented in the 2003 Civil Legal Needs Study and is disseminated through a Seattle-area pro bono list-serve system, which facilitates referrals and educates lawyers as to the number, variety, and poignancy of pro bono matters with which indigent clients need legal assistance.

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**... today’s generation of law-school graduates care about pro bono — and want to maintain it in their scholastic and professional lives.**

The increase in pro-bono visibility has much to do with firms creating new positions, engaging in new projects, and being open to new possibilities. Today’s firms realize that supporting pro bono makes business sense. It is an important tool for collaborating with corporate clients on pro bono projects, reaching out to a diverse constituency of indigent persons, and marketing attorneys’ good work in the community.

It is also crucial for purposes of retention and recruitment. According to the Pro Bono Institute and the ABA’s Standing Committee on Pro Bono and Public Service, today’s generation of law-school graduates care about pro bono — and want to maintain it in their scholastic and professional lives. Based on the way firms view pro bono, law students expect that someday they will have the opportunity to engage in public-interest work in a corporate setting. Consequently, law schools across the nation have increased their social-justice efforts. “I believe that both law schools and many of the firms located in Seattle have heightened their pro bono-related efforts over the 28 years during which I’ve been practicing law,” said Guy. “Both U.W. and S.U. have developed clinical and other programs related to pro bono activities and have hired experienced public-service lawyers to head up access to justice programs,” he said. According to Guy,
the priorities of several individual faculty members and administrators have been instrumental in increasing the focus on pro bono and public service programs.

One such notable faculty member is Seattle University School of Law’s Dean Kellye Testy, a social-justice pioneer. Some of her innovative programs have changed the way law schools manage pro bono, putting Seattle University School of Law on the map as an access-to-justice leader. According to Testy, there has been a positive shift towards promoting pro bono in the law-school setting. “When I founded our Access to Justice Institute in 2000, it was the first of its kind in the country,” she said. “Since then, many law schools, including others in this state, have followed suit.”

Now, all three law schools in Washington, at the minimum, offer opportunities to get involved in pro bono work.

Diana Singleton, director of the Access to Justice Institute at Seattle University School of Law, believes that students were (and continue to be) an important driving force in promoting positive change in how pro bono is regarded at law firms and in the legal community. “While I was in law school, it seemed that students who were headed toward a public-interest career were the minority, and the term, ‘pro bono’ was not a part of one’s everyday vocabulary,” she said. “Now, social-justice-minded students are the majority, and ‘pro bono’ is as common as the word ‘latte,’” she said. Today, law students no longer ask, “Why should I do pro bono?” but instead, “How can I do pro bono?”

This important question is readily answered by law firms that embrace pro bono and law schools that emphasize its importance: There are many ways. Volunteer for nonprofits; get involved with your local bar association’s pro bono programs; or assist with law-firm pro bono initiatives. There is no better way to join the pro bono movement and become a catalyst for advancing social justice.

Joanna Plichta Boisen is pro bono counsel at Foster Pepper PLLC. She maintains a litigation and transactional practice providing pro bono legal representation to persons of indigent means, immigrants, women with low income, and 501(c)(3) nonprofit entities. She directs and manages the firm’s wide-ranging pro bono cases and projects, advises the firm on pro bono policy, chairs the Pro Bono Coordinators and Counsels in Seattle, and serves as a liaison to local public-interest organizations.

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Adults Can’t Tell When Kids Lie
The Board’s Work

by Michael Heatherly

Board of Governors’ Meeting December 5–6, 2008 — Bellingham

At its December meeting in Bellingham, the WSBA Board of Governors (BOG) took action on recommended revisions to the lawyer discipline system and on a potential overhaul of local court rules to improve consistency statewide in civil and family law litigation.

Regarding lawyer discipline, the BOG voted on recommendations from one task force and is scheduled to consider recommendations from additional task forces at the January 23, March 6, and April 24, 2009, meetings. Those recommendations requiring a change to court rules will have to be approved by the Washington State Supreme Court before they would go into effect.

The recommendations, which range from minor adjustments in the current program to the operation and funding of the discipline system by WSBA and the Supreme Court, originated with a 2006 review of the Washington lawyer discipline system by the American Bar Association Standing Committee on Professional Discipline. The review was voluntary and had been invited by the Washington State Supreme Court. Though not binding, the ABA’s recommendations carry weight because of the organization’s nationwide involvement in lawyer disciplinary issues. Recommendations from the ABA based on its review have now been evaluated by the BOG Discipline Review Committee, which divided the work among five task forces.

At the December meeting, the BOG heard the recommendations of Task Force 2, which dealt mainly with the functions of disciplinary hearing officers and of the Disciplinary Board. Not to be confused with the BOG Discipline Review Committee studying the overall issue, the Disciplinary Board is a regulatory board whose volunteer members act as the gatekeepers for disciplinary complaints, deciding whether complaints should be scheduled for a disciplinary hearing, dismissed, or resolved with an admonition. The Disciplinary Board also serves in an appellate capacity, reviewing discipline decisions issued by WSBA’s volunteer hearing officers. The BOG voted to endorse most of the recommendations submitted by the task force. Perhaps most significant was a recommendation to institute mandatory specialized adjudicative training for all hearing officers, together with the recommendation to reduce the size of the hearing officer panel from 66 to 50 in order to promote increased adjudicative experience.

Mr. Mendel received his bachelor of arts degree in Asian studies from Pomona College. He received his juris doctor degree from the University of Washington School of Law, master’s in Chinese studies from the University of Washington School of International Studies and received his LL.M. in taxation from the New York University School of Law.

fmendel@schwabe.com
206-407-1573

Mr. Mendel is an international corporate attorney with more than 12 years of experience promoting cutting-edge investments and diversification in Asia. A fluent speaker of Mandarin Chinese, Mr. Mendel will be a shareholder practicing primarily in the firm’s China practice group.

Prior to joining Schwabe, Mr. Mendel spent 12 years practicing in Beijing. Since 2000 he was with Morrison & Foerster LLP, and before that with Goodman, Phillips & Vineberg. His practice focuses on business transactions, particularly cross-border investments, venture capital financings, mergers and acquisitions, trade transactions and cross-border licensing.

Schwabe, Williamson & Wyatt is pleased to welcome Fraser Mendel to the firm’s Seattle office.
in 2006, reported that it has completed a review of the multitude of local civil and family law rules enacted in county superior courts throughout the state. The Task Force concluded that the proliferation of non-uniform local rules — which fill more than 1,700 printed pages in the 2009 Thomson-West book — creates vast confusion, particularly for attorneys who practice in more than one county. Task Force Co-chair the Honorable Charles Johnson, Washington State Supreme Court justice, told the BOG that the inconsistency in local rules constitutes an “impediment to access to justice.”

The BOG voted to extend the Task Force’s charter through December 2009 and authorize it to communicate with the courts and various judges’ organizations in an effort to build support for significant revision of the local rules, possibly including abolishment of local rules in favor of a uniform set of improved statewide rules, including a uniform set of family law civil rules.

In other business, the BOG:

- Approved an increase from $15 to $30 in the annual WSBA active-member assessment to support the Lawyers’ Fund for Client Protection. The fund’s reserves were almost completely depleted in 2008, largely by claims against a single lawyer involved in a wide-ranging financial scheme. An alleged financial scheme by another lawyer is expected to generate large claims in the 2009 fiscal year as well.
- Approved changes in the WSBA annual license-fee structure, beginning in 2010. Fees will continue to be due February 1 of each year. However, the current 30-day “grace period” will be eliminated, and the late penalty will be a flat 30 percent, rather than the two-tiered 20 percent/50 percent penalty imposed now. Meanwhile, the current graduated fee schedule — which has varying discounts for new members in their first five years of practice — will be simplified. Beginning in 2010, two levels of discounts will be available depending on length of time in the bar. New admittees passing the bar in the second half of a calendar year will pay 25 percent of the full active fee for that year, while those taking the exam in the first half of a year and those in their first two full calendar years after admission will pay 50 percent of the full active fee.
- Approved the bylaws and fiscal-year 2009 budget for the proposed new Civil Rights Law Section, which would replace the Civil Rights Committee. The initial budget projects $7,125 in revenue and $6,330 in expenses.
- Voted to sponsor legislation expected to be proposed in the 2009 State Legislature. The bills involve specific revisions to portions of the Washington Business Corporation Act, the Uniform Limited Partnership Act, the Procedure for Filing a Declaration of Completion of Probate, Military Parenting Plans, and Procedures for Automatic Restoration of Felons’ Voting Rights.

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

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The Defender Association Board of Directors

Application Deadline: January 8, 2009

The Defender Association, a nonprofit and local government contractor providing indigent defense to individuals in King County and the City of Seattle in felony, misdemeanor, juvenile, family advocacy, and civil commitment cases, sexual offender commitment, and appeals at all levels of the state courts, seeks one member to serve a three-year term on its Board of Directors. The incumbent is eligible to apply. The term will commence upon appointment and expire December 31, 2011. The board generally meets 10 times per year. Women and minorities are urged to apply. Please submit a letter of interest and résumé to: Bar Leaders Division, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101, or e-mail barleaders@wsba.org.

WSBA Chief Hearing Officer

Application deadline: January 15, 2009

The WSBA Board of Governors invites applications from members interested in serving as chief hearing officer (CHO) pursuant to Rule 2.5(f) of the Rules for Enforcement of Lawyer Conduct. The CHO, with support from the Office of General Counsel, is responsible for assigning hearing officers to cases, monitoring and evaluating the performance of hearing officers, establishing and supervising hearing officer training, hearing pre-hearing motions when no hearing officer has been assigned, and performing other administrative duties necessary for an efficient and effective hearing system. Applicants should be familiar with the disciplinary system and have excellent legal reasoning skills, management aptitude, appellate practice experience, judicial bearing, an impartial demeanor, and a commitment to public service. Candidates with experience as a WSBA hearing officer will be given the strongest consideration. The position is on a one-year independent contractor basis, with compensation to be determined. Interested members should submit a letter of interest, signed Authorization to Release Confidential/Non-Public Information Form (available at www.wsba.org/info/forms.htm), references, and résumé to: Office of General Counsel, WSBA, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 not later than January 15, 2009.

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, please 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 100 words or less.

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/forms.htm. The WSBA executive director must receive nomination forms by 5:00 p.m. on March 3, 2008. 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.

*The 7th Congressional District is divided into three sub-districts, East, Central, and West. These sub-districts are distinguished by zip codes, and each has one elected governor. For the coming year, the west sub-district (zip codes are 98013, 98070, 98106, 98107, 98116, 98117, 98119, 98126, 98133, 98136, 98146, 98160, 98166, 98177, 98195, 98199) will elect a new governor.

Submit Your Comments to the ELC Task Force

You receive a WSBA envelope and it’s stamped “Confidential.”

Any attorney who has received such an envelope knows that it may well contain a grievance filed with the WSBA. This triggers, at a minimum, review of the matter by the WSBA Office of Disciplinary Counsel. While most grievances are ultimately dismissed, there are mandatory procedures and rules that dictate the way in which grievances may be reviewed, investigated, and/or litigated. These are called the Rules for Enforcement of Lawyer Conduct (ELC, for short).

If you go through your entire professional career without participating in the discipline system, congratulations. But if you do become involved, the requirements of the ELC may have a direct and substantive impact on the process by which the grievance is resolved.
The WSBA Board of Governors has authorized and chartered an ELC Task Force to conduct a complete and systematic review of the ELC. That process is just beginning, and if you have any suggested changes or can identify problems that you perceive with the current ELC, we would like to hear from you posthaste (by February 1, if at all possible). We are structuring the task ahead of us, and the preliminary step is to identify the rules that need attention, amendment, correction, etc.

By way of background, the present ELC structure has been in effect for approximately six years. In 2006, by invitation, the ABA Standing Committee on Professional Discipline conducted a complete review of the disciplinary process in our state. Following issuance of the ABA report, the Board of Governors Discipline Committee, under the leadership of former Governor Doug Lawrence, performed an extensive review of the ABA recommendations and our current system. The proposals of that committee are in the process of being considered by the Board of Governors.

The ELC Task Force includes representatives from the WSBA Office of Disciplinary Counsel, outside attorneys experienced in representing lawyers in disciplinary proceedings, the WSBA Hearing Officer Panel, the Washington State Supreme Court, the Disciplinary Board, and others. While many Task Force members have developed lists of particular ELC provisions that need attention, we would welcome the input from any WSBA member in this regard. This process will be open to the public, and we anticipate some non-lawyer groups may chime in as well.

Comments, suggestions, or other input are welcome. Please e-mail them to either WSBA Governor Geoff Gibbs (Task Force chair) at ggibbs@andersonhunterlaw.com or WSBA Disciplinary Counsel Scott Busby at scottb@wsba.org.

Seeking Questionnaires from Candidates for Judicial Appointments

Deadline: January 29 for March 12 interview; 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 dates listed above. The JRC’s recommendations are reviewed by the WSBA Board of Governors and referred to the Governor for consideration when making judicial appointments. Materials must be received at the WSBA office by the deadline listed above. To obtain a questionnaire, visit the WSBA website at www.wsba.org/lawyers/groups/judicial recommendation or contact the WSBA at 206-727-8212 or 800-945-9722, ext. 8212, or 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 25.5(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, Washington State Bar Association, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539, or to bobw@wsba.org. This notice is published pursuant to APR 25.4(a).

2009 Licensing Information and Changes

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. One change to note: The form(s) were mailed the first week of December in a standard-size envelope. Instructions are available online at www.wsba.org/licensing.

February 2, 2009, Deadline. Payment may be made online; however, even if payment is made online, all active members must return the A1 licensing form, completed on both sides and signed on the back side.

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 at 800-945-WSBA (9722) or 206-443-WSBA (9722).

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 Continuing Legal Education Certification (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 MCLE 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 out 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.

For courses that you list on your C2/C3 form, 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 MCLE 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-
FYInformation

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.)


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.

C2/C3 Reporting Requirement. All ac-
tive members due to report are required to file a Continuing Legal Education Certification (C2/C3) form listing all CLE courses taken for credit compliance. The deadline for filing your C2/C3 form is February 1 (or the next business day, if February 1 is on a weekend) of the year following the end of your reporting period. Note:

- Your online roster is not a substitute for filing the C2/C3 form (APR 11.6(b)).
- The C2/C3 form is a declaration and must be signed and dated, and the city and state where signed must be identified.
- C2/C3 forms are included in the license packets sent in early December to all members due to report (which will be Group 2 members this year).
- All CLE courses listed on member rosters as of October 2008 are printed on the back of the C2/C3 form. If you took more CLE courses after your form was printed, and if they currently appear on your online roster and you do not want to handwrite them on the back of the C2 form, you may print a copy of your roster and attach it to your C2/C3 form. State on your C2/C3 form that the attached online roster printout is a true and correct statement of the CLE courses taken for credit compliance.
- You must verify that the credit hours listed on the C2/C3 and on your online profile correctly reflect the hours actually attended for each CLE. Online credits may be edited by clicking on the “edit” link next to each course. Credits on the C2/C3 may be corrected manually.
- The C2/C3 form should be filed by February 1 even if all the credits needed for compliance have not been completed.

**MCLE Credits.** All active members who have not completed their credits by December 31 of the last year of their reporting period, or who submit their C2/C3 reporting forms after March 1 of the following year (the end of the grace period after the February 1 deadline), must pay a late fee. The late fee for the first reporting period of non-compliance is $150 and increases by $300 for each consecutive three-year reporting period of noncompliance.

**Newly Admitted Members.** If you are a newly admitted member, you are exempt from reporting CLE credits for the year of your admission and the following calendar year. If you were admitted in 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 will be 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 now 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, courthouses, 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 pami@wsba.org.

**Thinking of Changing Your WSBA Membership Status? Consider Emeritus.**

**Training and Orientation: January 29, 2009**

As the 2009 WSBA licensing period approaches, you may be thinking of changing your membership status to accommodate your current career or lifestyle. If you no longer need your active WSBA license, here’s why you should consider emeritus status.

APR 8(e) creates a limited license status of emeritus for attorneys otherwise retired from the practice of law, to practice pro bono legal services through a qualified legal services provider. A qualified legal services provider is a "not-for-profit legal services organization whose primary purpose is to provide legal services to low-income clients." There are no MCLE requirements (although you may attend optional CLE seminars at no cost so that you are aware of changes in the law). The 2009 license fee for emeritus is $120. This is a significant savings in time and money if you are paying for an active license that you no longer need. Under most circumstances, emeritus attorneys can remain in emeritus status indefinitely without having to retake the bar exam if/when returning to active status. Most qualified legal services providers provide malpractice insurance for emeritus volunteers. There is no age requirement for emeritus attorneys. Volunteering for a "qualified legal services organization" allows you to control your own schedule. Most importantly, the emeritus program provides an opportunity for attorneys to give something back to their communities by helping those who are less fortunate.

One or more qualified legal service organizations are present in most Washington state counties. They include Columbia Legal Services, a statewide legal services program; Northwest Justice Project, a central statewide point of access for clients; specialized legal services programs (such as Northwest Women’s Law Center, Unemployment Law Project, and Northwest Immigrant Rights Project); and county volunteer attorney programs. These organizations offer a wide variety of volunteer opportunities such as direct representation, mentoring, advice clinics, self-help clinics, board membership, telephone advice, and document preparation. Emeritus also allows for pro bono services for criminal cases through some public defender agencies. Many of these organizations offer training for their volunteers. We will do our best to find a niche to fit your legal expertise, interests, and schedule.

An emeritus training and orientation session is scheduled for January 29 at the WSBA office in Seattle. This training is a requirement for changing to emeritus status and will provide an opportunity for you to meet representatives from qualified legal services providers. Travel expenses will be reimbursed. For more information about the emeritus program, registration for the training session, and the logistics of changing your WSBA status to emeritus, please contact Sharlene Steele, WSBA access to justice liaison, at 206-727-8262, 800-945-9722, ext. 8262, or sharlene@wsba.org. You can review APR 8(e) at www.wsba.org/lawyers/licensing/faq-rule8e.htm.

**Notice of Northwest Justice Project Public Meetings**

Year 2009 quarterly meetings of the Board of Directors of the Northwest Justice Project, a 501c(3) not-for-profit organization which
provides civil legal services to eligible low-income clients, will be held on the following dates: January 24, April 18, July 18, and October 17.

The Northwest Justice Project receives primary funding from the state and through the federal Legal Services Corporation and maintains 13-plus offices throughout Washington state.

These public meetings generally commence at 9:30 a.m. While they are usually held in Seattle for cost economy reasons, and to accommodate board member travel, specific meeting sites may vary from meeting to meeting based on space availability or other program purposes. All meetings are open, except that limited portions may be closed, pursuant to a vote of a majority of the Board of Directors, to hold an executive session. In such sessions, the Board reviews, considers and, in some cases, votes upon matters related to: 1) litigation to which the program is or may become a party; or 2) internal personnel, operational, investigative, and sensitive labor relations matters. Any such closed sessions will be as authorized by pertinent laws and regulations and will be duly noted, in summary form, in open session and corresponding minutes. Closed sessions will also be formally certified by the program’s executive director or general counsel as authorized. A copy of the certification will be maintained for public inspection at the program’s main office located at 401 Second Ave. S., Ste. 407, Seattle, WA 98104, and will be otherwise available upon request.

For specific meeting site information or the need for any reasonable accommodations for disabilities or non-English language assistance, please call Lisa Giuffré, 206-464-1519 or 888-201-1012.

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 January 12 clinic will be held from 10:00 a.m. to noon at the WSBA office and will focus on using Excel and PowerPoint. The January 15 clinic will meet from 2:00 to 4:00 p.m. and will focus on using Casemaker and other online research resources. For more information or to RSVP, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@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. January 13 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: The “Blues” or Depression?
Many lawyers are depressed but don’t realize it. Symptoms include sad mood, loss of pleasure or interest in activities, weight gain or loss, sleep problems, feeling restless or slowed-down, fatigue, trouble thinking or concentrating, and thoughts of death. Untreated, it can cause serious work dysfunction and more. Talk to your doctor or call the Lawyers Assistance Program at 206-733-5914, or 800-945-9722, ext. 5914.

Job Seekers 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 January 14 at the WSBA office. The group discusses where to look for jobs, how to grow your network of contacts, strategies for résumés and cover letters, and how to keep yourself organized and motivated. 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 rebeccan@wsba.org. If you would like to attend the meeting by telephone, please RSVP by January 13.

Problem Getting a Client to Pay?
Dispute with another lawyer or an expert witness? The WSBA offers two programs to aid in the resolution of disputes involving lawyers. These programs serve both members and the public. The Fee Arbitration Program focuses on fee disputes between a lawyer and his or her client. To participate, both parties must agree to be bound by the arbitrator’s decision. The Mediation Program provides a venue for parties to work together to resolve any dispute involving

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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.

Suspended

Todd S. Hammond (WSBA No. 32401, admitted 2002), of Salem, Oregon, was suspended for 30 days, effective October 20, 2008, by order of the Washington State Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of Oregon. This discipline was based on conduct involving charging and collecting an illegal fee. For more information, see Oregon State Bar Bulletin (August/September 2008), available at www.osbar.org/publications/bulletin/08augsep/baractions.html#disc.

Mr. Hammond’s conduct violated Oregon’s RPC 1.5, which prohibits a lawyer from entering into an agreement for, charging, or collecting an illegal or clearly excessive fee or a clearly excessive amount for expenses.

Joanne S. Abelson represented the Bar Association. Mr. Hammond represented himself.

Suspended

Jonathan Morrison (WSBA No. 31153, admitted 2001), of Port Orchard, was suspended from the practice of law for six months, effective October 24, 2008, by order of the Washington State Supreme Court following approval of a stipulation. This discipline is based on conduct in four matters involving failure to appear for court hearings, failure to communicate with clients, providing untimely notice to the clients, and charging excessive fees.

Between March 2006 and December 2007, Mr. Morrison engaged in the following conduct:

• Repeatedly failed to appear for court hearings in two matters, resulting in multiple continuances;
• Failed to advise clients in two matters that he would not be appearing on their behalf at court hearings, or provided untimely notice to these clients that he would not be appearing; failed to advise a client in one matter of his inability to represent him diligently due to his case load; and failed to respond promptly to a client’s requests for information about her case; and
• Retained fees in three matters when he performed little work that benefited the clients in these matters.

Mr. Morrison’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 1.5(a), requiring a lawyer’s fee be to be reasonable; RPC 1.16(d), requiring a lawyer, upon termination of representation, to take steps to the extent reasonably practicable to protect a client’s interests, such as refunding any advance payment of fee or expense that has not been earned; and RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Joanne S. Abelson represented the Bar Association. Mr. Morrison represented himself.

Reprimanded

James W. Kovac (WSBA No. 11498, admitted 1981), of Lynnwood, received a reprimand based on a stipulation approved by a hearing officer on August 8, 2008. This discipline is based on conduct in two matters involving failure to act with reasonable diligence, failure to communicate, charging unreasonable fees, and failure to protect a client’s interests.

Matter No. 1: Ms. "H" hired Mr. Kovac in March 2004 to represent her minor son on possible charges of weapons possession. She paid Mr. Kovac $3,000, which she understood would be held until charges were filed against her son and, if charges were not filed, Mr. Kovac would refund the money. Although Mr. Kovac ordinarily used a written fee agreement in matters such as this that provided that his fees were a "nonrefundable retainer," he did not execute a written fee agreement with Ms. H. Mr. Kovac contacted the police department and obtained copies of the police reports and other discovery. After speaking to the police officers involved, Mr. Kovac negotiated with the prosecution, resulting in no charges being filed against Ms. H’s son. Mr. Kovac did not immediately advise Ms. H or her son that charges were not filed against him regarding weapons possession. Mr. Kovac did not refund any of the

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.

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

Upcoming Board of Governors Meetings
January 22–23, Olympia • March 6–7, Seattle • April 24–25, Richland
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 margaret@wsba.org. The complete Board of Governors meetings 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 December 2008 was 0.437 percent. Therefore, the maximum allowable usury rate for January is 12 percent. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.

a lawyer, including those between a lawyer and a client, a lawyer and another lawyer, or a lawyer and another professional. Either party to a dispute may initiate fee arbitration or mediation. Both programs are non-disciplinary, voluntary, and confidential. For more information, visit the WSBA website at www.wsba.org/lawyers/services/adr.htm or call the ADR coordinator at 206-733-5923 or 800-945-9722, ext. 5923.
$3,000 he received from Ms. H.

In October 2004, Ms. H’s son was charged with a DUI offense. She contacted Mr. Kovac, who agreed to represent her in the DUI matter for $2,500, which Ms. H paid. At that time, Mr. Kovac also informed Ms. H that no charges were ever filed against her son in the gun matter. After receiving the $2,500, Mr. Kovac communicated directly with Ms. H’s son concerning his case and court dates. Mr. Kovac did not keep Ms. H fully informed about the status of her son’s DUI matter. Following an administrative hearing to contest the suspension of the son’s driver’s license resulting from being cited for DUI, notice of the son’s driver’s license suspension, as well as when and how he could reinstate his driving privileges, was mailed by the Department of Licensing directly to Ms. H’s son’s home address. Mr. Kovac did not immediately inform Ms. H or her son when the license was suspended, when the suspension period ended, or that her son could pay a fine and apply for reinstatement of his license.

In February 2005, Ms. H’s daughter was charged with a DUI offense. Ms. H paid an additional $2,500 to Mr. Kovac to represent her daughter on the DUI offense. Mr. Kovac communicated directly with Ms. H’s daughter concerning her case and court dates. Despite inquiries from Ms. H, Mr. Kovac did not keep Ms. H fully informed about the status of her daughter’s case.

In April 2005, Ms. H’s son was involved in a minor car accident and charged with driving without a license. Ms. H contacted Mr. Kovac concerning her son’s driving without a license charge. At that time, Mr. Kovac informed her of the suspension of her son’s license and of his failure to advise her that the suspension period had ended. Mr. Kovac agreed to represent her son without charge on the driving-without-a-license charge. He communicated directly with Ms. H’s son concerning his case and court dates; however, he did not keep Ms. H fully informed of the status of her son’s matter despite repeated requests from Ms. H. In July 2005, Mr. Kovac resolved the case by negotiating a plea to the reduced charge of negligent driving first-degree and Ms. H’s son was sentenced, thereby completing the case.

In August 2005, Mr. Kovac notified Ms. H that he had been suspended from the practice of law for nonpayment of dues because his check for licensing had bounced. He told her that he would arrange for other attorneys to cover her daughter’s and son’s cases until he was reinstated. In September 2005, Ms. H’s daughter waited in court for approximately five hours regarding a hearing to consider an agreement Mr. Kovac negotiated to continue the DUI matter, but no attorney appeared for her. Mr. Kovac arranged for a public defender (Lawyer D) to continue the hearing, and a continuance was granted. After Mr. Kovac arranged for another attorney (Lawyer E) to appear on Ms. H’s daughter’s DUI case, Ms. H then hired Lawyer E, who completed her daughter’s case and followed up on Ms. H’s son’s case for $1,500. In October 2005, Mr. Kovac was reinstated to the practice of law. In January 2007, Mr. Kovac agreed to refund Ms. H the agreed sum of $4,500. He paid Ms. H $975 in April 2007, and an additional $4,000 in June 2008, which accounts for interest in the delay of paying the agreed sum of $4,500.

**Matter No. 2:** In August 2000, Mr. “P” was charged with a DUI offense. A defense motion for deferred prosecution was granted, subject to completion of various conditions, with probation review set for September 2005. In January 2005, Mr. P engaged Mr. Kovac to represent him in a subsequent proceeding related to his original offense, paying him $1,500. Mr. Kovac opened a file on Mr. P’s matter, but misplaced the file and never followed up with Mr. P. In August 2005, Mr. Kovac was suspended from the practice of law for nonpayment of dues. Mr. Kovac believes he sent the required notices of his suspension to all clients, but it appears that Mr. P did not get the notice that Mr. Kovac had been suspended from the practice of law. In September 2005, a review hearing was set in connection with an order for probation regarding Mr. P’s DUI matter. Mr. P telephoned Mr. Kovac’s office repeatedly, but Mr. Kovac did not respond to Mr. P’s calls. Mr. P hired another lawyer to complete the matter because Mr. Kovac did not respond to his telephone calls. In September 2006, Mr. Kovac sent a letter to Mr. P returning the $1,500 previously paid.

Mr. Kovac’s conduct violated former RPC 1.3, requiring that a lawyer act with reasonable diligence and promptness in representing a client; former RPC 1.4, requiring a lawyer to keep a client reasonably informed about the status of a matter, to promptly comply with reasonable requests for information, and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; former RPC 1.5(a), requiring a lawyer’s fee to be reasonable; and former RPC 1.15(d), requiring a lawyer to protect clients’ interests upon the lawyer’s withdrawal from representation.

Randy V. Beitel and Nancy Bickford Miller represented the Bar Association. Kurt M. Bulmer represented Mr. Kovac. Kelby D. Fletcher was the hearing officer.

**Reprimanded**

Barbara E. Varon (WSBA No. 17041, admitted 1987), of Bellevue, received a reprimand based on a stipulation approved by a hearing officer on August 6, 2008. This discipline is based on conduct involving failure to obtain a client’s consent regarding limiting her representation, lack of communication, and failure to confirm a client’s termination of services prior to withdrawal of representation.

In December 2004, Ms. Varon was hired by a client to represent her in a dissolution proceeding. The dissolution was contested and the client felt she needed an aggressive, experienced lawyer. Ms. Varon’s telephone book advertisement stated that she was aggressive; specialized in dissolutions, both contested and uncontested; and had 19 years’ experience. The client relied on those representations in hiring Ms. Varon.

On June 14, 2005, a settlement conference took place. No settlement was reached and the case was scheduled to go to trial on August 29, 2005. Immediately after the settlement conference, Ms. Varon telephoned a friend of the client with whom Ms. Varon was authorized to communicate about the case. Ms. Varon informed the client’s friend that no settlement had been reached and the client’s case was therefore likely to go to trial. Ms. Varon told the client’s friend that she had limited dissolution trial experience and that she was going to withdraw from the case. Ms. Varon asked the client’s friend to communicate this information to the client.

On or about June 15 and 16, 2005, the client telephoned Ms. Varon three times and left messages to return her calls. Ms. Varon did not return the client’s telephone calls. Based on what Ms. Varon perceived to be the hostile nature of the client’s telephone messages, Ms. Varon formed the belief that the attorney-client relationship had broken down.

On or about June 20, 2005, Ms. Varon received a letter faxed from the client expressing her dissatisfaction with Ms. Varon’s representation and asking for her money back. However, the letter did not specifically state that she was terminating Ms. Varon’s services or ask Ms. Varon to no longer represent her. Over the course of the representation, the client had paid Ms. Varon approximately $13,000 in attorney’s fees. In response to the client’s letter, Ms. Varon faxed a letter to the client advising the client that she needed “an experienced trial attorney” and that she does “not feel as qualified as an attorney who routinely does trials.” Included with the letter to the client was Ms. Varon’s Notice of Intent to Withdraw, effective July 5, 2005, approximately six weeks before the trial date. Opposing counsel filed objections to Ms. Varon’s withdrawal, based on the need to protect discovery that had been provided to her. In response, Ms. Varon filed a Motion and Declaration for Order Permitting Withdrawal that stated the client had discontinued her services and that Ms. Varon was withdrawing at the client’s request. On July 25, 2005, Ms. Varon’s motion to withdraw was granted.

Ms. Varon’s conduct violated RPC 1.2(c), allowing a lawyer to limit the scope of her representation if the limitation is reasonable and the client consents after consultation;
RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; and former RPC 1.4(b), requiring a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Debra J. Slater represented the Bar Association. Steven R. Loitz represented Ms. Varon. Sidney Stillerman Royer was the hearing officer.

Admonished

Sean P. Cecil (WSBA No. 37575, admitted 2006), of Federal Way, received an admonition based on a stipulation approved by the Disciplinary Board on October 6, 2008. This discipline is based on conduct involving failure to communicate and conduct prejudicial to the administration of justice.

On December 13, 2007, Mr. Cecil engaged in intimate relations with a municipal court judge (Judge H). On December 14, 2007, Mr. Cecil appeared before Judge H for the municipal court video calendar. He represented two clients before Judge H that day. He failed to inform his clients of his relationship with Judge H or explain to them that this might affect their case. On December 17, 2007, Mr. Cecil again appeared before Judge H on six separate matters. He did not inform his clients of his relationship with Judge H or explain to them that this might affect their case. Later that same day, Mr. Cecil learned that Judge H had made their intimate relationship public. As a result, the presiding judge appointed new counsel for the clients. Mr. Cecil represented before Judge H on December 14 and 17, 2007, and the chief prosecutor conducted a review of the same cases. It was found that Mr. Cecil’s relationship with Judge H did not impact his clients.

Mr. Cecil’s conduct violated RPC 1.4, requiring a lawyer to promptly inform the client of any decision or circumstance with respect to which the client’s informed consent is required by these rules, to reasonably consult with the client about the means by which the client’s objectives are to be accomplished, to keep the client reasonably informed about the status of the matter, to promptly comply with reasonable requests for information, and to communicate.

Natalea Skvir represented the Bar Association. Mr. Cecil represented himself.

Non-Disciplinary Notice

Suspended Pending the Outcome of Disciplinary Proceedings

Shane O. Nees (WSBA No. 29944, admitted 2000), of Fairfield, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.2(a)(3), effective November 19, 2008, by order of the Washington State Supreme Court. This is not a disciplinary sanction.

Suspended Pending the Outcome of Disciplinary Proceedings

Richard L. Pope (WSBA No. 21118, admitted 1991), of Bellevue, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.3, effective November 25, 2008, by order of the Washington State Supreme Court. This is not a disciplinary sanction.

Admonished

William M. Hanbey (WSBA No. 7829, admitted 1977), of Olympia, received an admonition by order of a review committee of the Disciplinary Board on August 7, 2008. This discipline is based on conduct involving failure to diligently represent a client and failure to communicate.

In October 2006, Mr. Hanbey agreed to represent a client in an employment claim. In October 2006, Mr. Hanbey filed a notice of appeal. He also wrote a letter and attended a meeting with the client, but did not speak with her or return her calls after January 2007.

In April 2007, Mr. Hanbey received written notice of the September 2007 hearing date. The notice also included an August 24, 2007, deadline for submitting documents to be used at the hearing. Mr. Hanbey did not obtain or file any documents prior to the deadline. On August 22 and 23, 2007, the client called Mr. Hanbey to ask whether he was going to submit any documentary evidence to support her claim, but she could not reach him. She asked for a continuance of the hearing and retained new counsel.

Mr. Hanbey’s conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; and RPC 1.4, requiring a lawyer to reasonably consult with the client about the means by which the client’s objectives are to be accomplished, keep the client reasonably informed about the status of the 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.

Natalea Skvir represented the Bar Association. Mr. Hanbey represented himself.
An Introduction

Reversing the Decline of Public Schools: How Putting the Principal in Charge Helps Students Learn
January 22 — Seattle. 1 CLE credit. By Professor William Ouchi, Anderson School of Management at UCLA; www.washingtonpolicy.org.

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

February 13 — Seattle. 6 CLE credits pending. By the WSBA Solo and Small Firm Practice Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbcle.org.

Annual Paralegal Seminar

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Law Office Management

Managing Through the Current Economic Crisis
January 14 — Tele-CLE. 1.5 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbcle.org.

February 13 — Seattle. 6 CLE credits pending. By the WSBA Solo and Small Firm Practice Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbcle.org.

Mediation

Professional Mediation Skills Training Program
January 9—11 and 24—25 — Seattle. 34 CLE credits, including 2 ethics. By University of Washington School of Law; www.uwcle.org; 206-543-0059.

Four-Day Intensive Mediator Training Program
January 20—23 — Seattle. 37 CLE credits, including 7.5 ethics. By Alhadeff & Forbes Mediation Services; www.mediationservices.net; 206-281-9950.

Two-Day Advanced Mediator Training Program
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Real Property, Probate and Trust

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February 4 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbcle.org.

Solo/Small Firm

February 13 — Seattle. 6 CLE credits pending. By the WSBA Solo and Small Firm Practice Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbcle.org.

Tele-CLEs

Managing Through the Current Economic Crisis
January 14 — Tele-CLE. 1.5 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbcle.org.

Final Friday Brown-Bag Lunch Series: Select Topics in Real Estate Featuring Matt Davis
January 30 — Tele-CLE. 1 CLE credit pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbcle.org.

Administrative Law Update
February 5 — Tele-CLE. 1.5 ethics credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbcle.org.

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keeping up with the pressure of events and the recent prevalence of 5 to 4 Supreme Court decisions tells us more about who we hope will not die or retire than it does about the actual state of the law.

Since increasingly the comfort of the past views of fundamental doctrines is not available to us, we turn instead to what we believe we can control. We turn with confidence to the fine-tuning of lawyer conduct hoping that a grateful public will notice our earnest efforts. We hope then to be assured that however confusing may be the law itself, even at the highest Constitutional level, the public may be assured that we are pure of heart and that this purity will provide the assurance of a stable legal order. But I ask, can such control of the servants of the law long hide, from the people who would use our services, the chaos that lies beneath the power relations of the three branches of our government today? Is Marbury v. Madison as intact as we might hope? Have the political branches equal weight in constitutional interpretation? Are our ever finer tuned distinctions and the sheer mass of commentary on the law adequate to hide from ourselves that fires are burning in the hills above the Sacred City of the Law?

Thomas Mengert, Keyport

Witness litigation costs decrease

I completely agree with President Bastian’s call to reform of our civil procedure rules to reduce litigation costs (“Some Final Thoughts,” September 2008 Bar News). He correctly states that litigation costs could be decreased by implementing federal court procedural rules so that trial dates are set early and rarely changed; limiting the number of interrogatories allowed; and reducing the number and length of depositions allowed. These measures certainly would reduce costs without necessarily prejudicing litigants.

Additionally, however, our Association should explore new rules of procedure regarding expert witnesses. Expert witness costs continue to soar as experts are retained more frequently and on a wider range of topics. Although it is fine for an objective expert to assist a fact-finder in a complex factual issue, modern practice is that parties retain multiple experts who frequently will say whatever a party wants them to say — so long as they are paid. Having each party retain numerous hired witnesses to testify how a client needs them to testify is not necessary for and in fact undermines the effort to determine the just result of a dispute.

Other countries’ rules for expert testimony are quite different. In the Land and Environment Court of New South Wales, a party must first convince the court that an expert will benefit the court’s ultimate decision. If convinced, the court appoints a “court expert” agreed to by all parties. The parties share the costs of such an expert. If any party still wishes to call an additional expert, they must demonstrate that an additional expert will add useful information and bear the additional cost. The parties generally are able to agree on the court appointed expert, because failing to do so carries the significant risk associated with a potential unknown person appointed by the court. (See generally, Expert Witnesses — The Experience of the Land and Environment Court of New South Wales, by Justice Peter McClenann, Chief Judge, New South Wales Land and Environment Court.)

Revising our civil rules regarding experts would not only further reduce the parties’ litigation costs, but it would likely lead to more just results by reducing the extent of testimony from biased “hired guns.”

Ryan Brown, Kennewick

(Montgomery Purdue Blankinship & Austin PLLC takes pleasure in announcing that)

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I am obsessed with the recession.

I believe the plunging worldwide economy will revolutionize politics, economic theory, business practices, and the way we live our lives. To broaden my perspective, I tracked down the one fabulously wealthy person I know, Charles “Capital” Gaines, an old acquaintance I hadn’t seen in a while. Charles is so rich, Bill Gates owes him money. He lives so lavishly, his chauffeurs have chauffeurs. He has homes around the globe with a full staff and a supermodel stationed at each one.

Before I knew it, Charles’s helicopter was depositing me on the deck of his favorite yacht, the *Wild Asset*, somewhere in the Caribbean. “Michael, my old chap, it’s marvelous to see you,” said Charles, who is so posh he talks like that, even though he isn’t British. He escorted me to a state-room where a bottle of Dom Pérignon, a bowl of caviar, and a silver platter of crackers awaited. After some chit-chat, I got to the point.

“Charles, this recession is driving me crazy,” I said, troweling a bead of caviar onto a cracker, which I noticed was embossed with Charles’ initials. “It seems the world has turned upside down. I’m curious to know how it affects someone of your stature. How are you holding up?”

Charles looked stricken. “This will tell you all you need to know,” he said, grasping the champagne bottle and peeling away the Dom Pérignon label to reveal a Cold Duck logo beneath. “By the way, enjoy the caviar and personalized crackers,” he said. “It’s the last I’ll have of either for a while.” I immediately regretted bringing up the subject.

“Everyone thinks people like me are immune to financial difficulty,” he said. “Nothing could be further from the truth. All 12 of my homes are losing value, some by five, six figures a month. I’ve had to downsize staff. I only bring my stylist and masseuse on trips of four days or more. I’m seriously considering putting one of my Van Goghs on the market. We’ve scaled back to 200-thread-count bed sheets. It’s like sleeping on sandpaper.”

I patted Charles on the shoulder and topped off his goblet with a splash of Cold Duck. “Cuban?” I asked, taking my first draw and exhaling the smoke into the warm evening breeze. “Honduran. Let’s not talk about it,” replied Charles. “I must say, though, I appreciate your coming by to cheer me up. We always find a way to have a good time.” He opened his arms and we man-hugged awkwardly.

“Charles, I’m here for you whether you’re a prince or a pauper,” I said. This was an outright lie. I never even liked Charles. He was an arrogant, superficial egomaniac. But who else was going to cruise me around on a yacht and get me into parties with movie stars?

Twenty-four hours later I was in a drive-through lane, scouring the glove box of my Toyota for enough change to cover a Big Mac. I’m going to start hanging out at the yacht club lounge again, I decided.

Bar News Editor Michael Heatherly practices in Bellingham. He can be reached at 360-312-5156 or barnewseditor@wsba.org.
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trained by the DataMaster manufacturer, certified to administer field sobriety tests, she is a frequent speaker at CLEs relating to DUI defense. Thomson-West selected her to author the Washington DUI Practice Manual, and a piece on DUI Scientific Evidence in a treatise, Inside the Minds. Ms. Callahan is also the author of the The DUI Book, Washington Edition, to be released soon.

Ms. Callahan, both caring and aggressive, has received overwhelmingly favorable reviews from clients as posted on the firm’s website. Ted Vosk, Of Counsel to Callahan Law has distinguished himself as one of the most brilliant lawyers of our generation, taking the lead in the recent challenge to the irregularities in the procedures of the state toxicology lab.

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