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Washington State
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JULY 2009
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Mr. Hayne is a past President of WACDL and has chaired the Criminal Law Sections of the WSBA, WSTLA and KCBA. He has taught trial practice at the University of Washington and Seattle University Schools of Law, the National Institute of Trial Advocacy and the Trial Masters Program. He has been a featured speaker at over 80 CLE programs in the U.S. and Canada and has published articles in the Bar News, Trial News, Defense and Overruled magazines. Mr. Hayne is also a founding member of the Washington Association of Criminal Defense Lawyers, the National College for DUI Defense, and the Washington Foundation for Criminal Justice.

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Appealing as a right

I agree with my colleague Ryan McBride's assessment ["The Right to Appeal," June 2009 *Bar News*] that a lot of time and expense can be incurred establishing a right to an appeal from denial of a motion to compel arbitration. Practitioners should be aware that an appeal is now a statutory right with the enactment of the Revised Uniform Arbitration Act (RUAA), which provides "An appeal may be taken from (a) An order denying a motion to compel arbitration." RCW 7.04A.280(1)(a). The Washington Arbitration Act, to which the article refers, was repealed effective 2006, though it may still apply in certain cases. Having found myself recently defending a right to appeal an order denying a motion to compel, I determined in the future to assert an appeal of right in my notice of appeal and cite the RUAA and the case *Herzog v. Foster &Marshall, Inc.*, 56 Wn. App. 437, 44 (1989), which Mr. McBride discussed in his article. That would help tip off the Court of Appeals and potentially avoid the wasteful motion practice for the sake of the Court and the parties.

Averil Rothrock, Seattle

"Bailout" the easy way out

The recent decision of the Board of Governors to allocate a significant sum as a civil legal aid bailout though laudable in intent misconceives our responsibility individually and collectively as lawyers. It gives a false impression that we own the system of justice. It is precisely that public perception that makes attorneys as a class so often mistrusted and despised. Much of this is based on ignorance of our stringent ethical rules, self-financed enforcement apparatus, and many personal sacrifices in acquiring our skills and in dispensing them. Rather than address the very real structural problems of our legal system, the current aid approach implies a temporary budget shortfall rather than a pervasive and systemic problem. Once such a Rubicon is crossed, the WSBA will find it difficult to deny an ongoing role should the present crisis continue. We will also have missed an occasion to take a far more bold and imaginative approach to civil law reform.

Thomas Mengert, Keyport

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So, Gideon ... How's It Goin'?

The Constitutional Condition of Washington's Public-Defense System

WSBA President Mark Johnson

There is not a lawyer in practice who does not know the story of Clarence Earl Gideon, who, in 1961, requested and was denied counsel to represent him on breaking-and-entering charges in a Florida state court. Mr. Gideon was convicted and, thereafter, drafted a *pro se* petition to the U.S. Supreme Court which led to the Court's unanimous decision that the United States Constitution's Sixth Amendment right to counsel provision was obligatory on the states by virtue of the due-process clause of the Fourteenth Amendment, and, therefore, appointed counsel was required for indigent persons. (See *Gideon v. Wainwright*, 372 U.S. 335 (1963).) The scope of the right to counsel in state court criminal cases, which was not fully developed in *Gideon*, now includes the right to counsel at all "critical" stages of a prosecution in which an indigent person's liberty is at stake, including the initial appearance before a judicial officer, juvenile proceedings in which liberty is at issue, for an appeal (including after a guilty plea), and suspended sentences which might result in subsequent imprisonment. (See *In Re Gault*, 387 U.S. 1 (1967); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Halbert v. Michigan* 545 U.S. 605 (2005); and *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008). See also Washington State Constitution, Article 1 Section 22.)

Since *Gideon* is now 46 years old and safely ensconced in middle age, I thought it was time to check up on the condition one of our most important constitutional rights.

Counties Primarily Fund State and Federal Constitutional Obligations

Although it is our federal and state constitutions from which the right to counsel arises, it is largely left to our counties and cities to enforce the state's laws (they are required by state statute to prosecute misdemeanors and gross misdemeanors occurring in their jurisdictions RCW 39.48.180), and to bear the lion's share of the cost of criminal indigent defense. According to Joanne Moore, director of Washington State's Office of Public Defense (OPD), the state agency that oversees criminal indigent defense, **the ratio between county and state costs for indigent public defense for 2009 will be 79.5 percent paid by the county and 20.5 percent paid by the state. Washington is, in fact, one of only 18 states that provides less than 50 percent funding towards criminal indigent defense.** (See "Justice Denied — America's Continuing Neglect of Our Constitutional Right to Counsel," www.constitutionproject.org, p. 54.) "Justice Denied — America's Continuing Neglect of Our Constitutional Right to Counsel" is a report by the National Right to Counsel Committee published in April of this year by the Constitution Project and the National Legal Aid and Defender Association. The report's authors state that Washington is one of 18 states that provide less than 50 percent of funding for indigent defense; 28 states provide "full" funding (90 percent or more, with the exception of Wyoming at 85 percent) and four provide more than 50 percent. Two states, Pennsylvania and Utah, require the counties to fund the system entirely. (See "Justice Denied," *infra*, p. 54.) In this report, the authors describe the need for indigent defense reform as "dire," and identify inadequate funding leading to "astonishingly large caseloads" and other problems as "the single greatest obstacle to delivering 'competent and diligent defense representation'...." ("Justice Denied," *supra*, pp. 6–7, 50–64.) While the customary costs of providing for indigent defense are burdensome on our counties, a capital case can devastate a county's defense and prosecution budgets. In response to a question on the costs of a capital prosecution posed to prosecution and defense lawyers by the Death Penalty Subcommittee of the WSBA Committee on Public Defense, nine prosecutors responded that the additional cost of a capital case over a noncapital case was $217,000. Eight directors of public-defense agencies placed the additional cost at $246,000. (See "Making Good on Gideon's Promise — Report of the Recommendations of the WSBA Committee On Public Defense," pp. 55–56, March 2007.) Although a state statute, the Extraordinary Criminal Justice Costs Act was enacted in 1999 to help counties defray the cost of such prosecutions, payments under the Act have fallen far below full reimbursement. For example, when in 2003, King County submitted a $9.1 million reimbursement petition for 2002 expenses, with $4.9 million related to the Ridgway Green River murder cases, the Legislature granted only $766,000. (See "Report of the WSBA Blue Ribbon Panel on Public Defense," p. 15.)

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While it might not be fair to characterize counties as antiquated municipalities, they undeniably do not have the political preemi-

So, Gideon ... How's It Goin'? The Status of Washington's Public-Defense System

. . . the ratio between county and state costs for indigent public defense for 2009 will be 79.5 percent paid by the county and 20.5 percent paid by the state. Washington is, in fact, one of only 18 states that provides less than 50 percent funding towards criminal indigent defense.

nence they did when Washington became a state in 1889, and a nearly 80–20 county-state split of public-defense financing obligations is not fair to the counties or the accused.

Lawsuits Illuminate County-Based Funding Deficiencies

The problems inherent in county funding of a critical, democracy-defining constitutional right were brightly illuminated in October 2004, when the ACLU, Columbia Legal Services, and lawyers with the Perkins Coie and Garvey Schubert law firms filed a class-action lawsuit in Kittitas County Court against Grant County, alleging that the county breached its constitutional duties by operating a public-defense system that "regularly and systematically" deprived "indigent persons of the effective assistance of counsel" by, *inter alia*, "failing to ensure" that defenders were "qualified," failing to impose "reasonable caseload limits," failing to "provide adequate funds," failing "to provide representation at critical stages of prosecution," and failing to "protect the independence of the defenders." (See Complaint for Injunctive and Declaratory Relief, *Best, et.al. v. Grant County*, Kittitas County No. 04-2-00189-0, p. 3, prg. 3.)

The lawsuit, which was settled in November 2005, followed on the heels of a WSBA disciplinary proceeding against Thomas Earl and Guillermo Romero, the holder of the Grant County public-defender contract and a Grant County public defender, respectively. (*Id.*, pp. 9–11.) Mr. Earl was found by a WSBA hearing officer to have engaged in conduct involving fraud, dishonesty, and deceit, which caused serious injury to indigent clients. (*Id.*, pp. 9–11, prgs. 42–49.) Mr. Romero was found, *inter alia*, to have charged clients fees even though he had been appointed by the county to represent them and to have incorrectly advised a client that the denial of his motion to withdraw a guilty plea waived his right to appeal the ruling denying the motion to withdraw the plea. Both Mr. Earl and Mr. Romero were disbarred. (See http://pro.wsba.org/publicview-discipline.asp?usr_discipline_id=594 and http://pro.wsba.org/publicview-discipline.asp?usr_discipline_id=631.)

Mr. Earl's contract with Grant County was a flat-fee contract which required Mr. Earl to pay all costs of defense (investigators and experts) from the contract amount. Does anybody see a conflict there? In a federal civil rights and malpractice case arising from Grant County public-defense services, Felipe Vargas, an innocent former defendant who spent seven months in jail and who contended that Mr. Earl's contract created a conflict of interest and a disincentive to investigate, was awarded $3,000,000 against Mr. Earl. The contracts are now prohibited. (RPC 1.8(m).)

In settlement of the case, Grant County agreed to "maintain and operate a public defense system that provides effective assistance of counsel to all indigent persons charged with felony crimes in Grant County." The county also agreed to hire a full-time supervising attorney (whose duties are specified in the settlement document) qualified to handle Class-E felonies. In addition, the document specifies permissible caseloads, specifies required compensation, mandates a requisite number of investigators, requires reasonable compensation for experts, requires maintenance of a conflicts-check system, and requires compliance by the defenders with the WSBA-endorsed standards. (The settlement agreement is available online at www.columbialegal.org/~lumbia/files/bestsettlementagreement.pdf.)

Apart from the substantive improvements in the Grant County public-defense system resulting from the *Best, et. al.* case, the lawsuit was enormously important in highlighting the frailties of county-based funding of public defense.

Stretching Defense Dollars Through Administrative Excellence — Washington's Office of Public Defense

OPD was established in 1996 and is an independent agency of the judicial branch. OPD's directive is "to implement the constitutional and statutory guarantees of counsel and to ensure the effective and efficient delivery of indigent defense services funded by the state...." (RCW 2.70.005.) In addition, in Washington, indigent parents in dependency and termination proceedings have a right to counsel grounded in the liberty interest protections of the due-process clauses of both our state and federal constitutions, and OPD's responsibilities also include administering the state contribution to parental dependency and termination cases through its Parents Representation Program. (See *In Re Luscier*, 84 Wn.2d 135 (1974) and *In Re Myricks*, 85, Wn.2d 252 (1975).) Finally, OPD administers a public-defense improvement program pursuant to RCW Chapter 10.101, the Indigent Defense Services Act.

OPD's budget for the 2009–2011 biennium is $52.9 million, representing a cut of about $1.2 million from 2007–2009. Forty-three percent of OPD's budget is applied to funding counsel in parents' dependency and neglect proceedings, with 26 percent for trial defense, 24 percent for appellate defense, and 7 percent to administration. According to Ms. Moore, in approximately 240,000 prosecutions annually by cities, counties, and the state of Washington, the defendant is indigent and the appointment of counsel is required, a number which represents approximately 58 percent of all prosecutions.

Our 39 counties provide services through public-defense agencies (eight counties), hourly rate contracts, monthly flat-fee contracts, and on a per-case basis. The amount per capita spent by counties for indigent defense varies widely, as do caseloads and compensation. According to the OPD's "2008 Status Report on Public Defense in Washington State," Clark County spent $10.02 per capita on public defense in 2008, while

So, Gideon ... How's It Goin'? The Status of Washington's Public-Defense System

Spokane County spent $31.82. Felony caseloads for 2008 varied from 124–192 felonies per year, per attorney, and misdemeanors from 324–714 per attorney. While the eight counties that have public-defender agencies pay comparably to prosecutors, according to the OPD report, the rate of pay for defenders for the remaining counties (hourly, per-case, and flat-fee) "varies widely." The 2008 OPD status report describes Eastern Washington felony compensation ranging from $50–90 per hour and Western Washington from $40–80 per hour. For counties that pay on a per-case basis, felonies pay in Eastern Washington ranges from $533–600 per case and in Western Washington from $400–1,100 per case. Monthly flat-fee contracts for felonies range from $5,250 per month in Western Washington to $6,250 per month in Eastern Washington. The reported compensation is the gross payment; all overhead — office rent, staff, supplies, and malpractice insurance — must be paid by the lawyer. ("2008 Status Report on Public Defense in Washington State," Washington State Office of Public Defense, www.opd.wa.gov/reports/trial%20level%20services/090506_2008_sttsrprtonpblcdfns.pdf, pp. 9–12.)

In 2008, the Joint Legislative Audit and Review Committee found that OPD operated economically, efficiently and met its established goals. Ms. Moore has been both an effective advocate for increased indigent criminal defense funding, improvements in the delivery of services and a thrifty administrator of public dollars but OPD's funding, only half of which is allocated to criminal defense, is not a sufficient financial commitment by the state.

The Relationship Between Inadequate Funding and Wrongful Convictions

How important is adequate criminal indigent defense funding? Apart from our own experience in Grant County, in "Justice Denied," (*supra*, at p.44) the authors write: "Today, largely because of DNA, we know for certain that our criminal justice systems are not nearly as accurate as some have believed...." In support of the statement, the authors (*Id.* at 44–46) discuss two studies, "Exonerations in the United States 1989 Through 2003," *95 J. Crim. L. & Criminology* 523 (2005) and "Judging Innocence," *108 Columbia L. Rev.* (2008). In the former, the author studied 340 exonerations of innocent criminal defendants. DNA evidence exonerated 144, the reminder by other means. In total, the group spent 3,400 years in prison — about 10 years each. The study found that the most frequent causes of wrongful conviction were mistaken eyewitness identification (64 percent), perjury (43 percent), and false confessions in response to police pressure (15 percent). The study also found that 88 percent of the exonerations in rape convictions involved mistaken eyewitness identifications, whereas the author found only six exonerations in armed robbery cases. Since there are significantly more armed robbery prosecutions than rape prosecutions, the author concluded that: "If we had a technique for detecting false convictions in armed robbery cases that was comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations...." ("Exonerations," *supra*, at 531 cited in "Justice Denied" *supra*, at 45.) The latter study confined itself to 200 exonerations solely resulting from DNA evidence and found four primary causes (sometimes more than one in a single case) in the false convictions; 79 percent involved mistaken eyewitness identification, false forensic evidence was present in 55 percent, false informant testimony in 18 percent, and false confessions in 16 percent. (See "Judging Innocence," *supra*, at 88–91, cited in "Justice Denied," *supra*, at 46.)

Although a good result at trial is multifactorial and subject to many variables, adequate time to prepare and thorough investigation are lynchpins to success and it cannot reasonably be argued that "astonishingly high caseloads" and inadequate funding for investigators and experts are not contributing factors in imprisoning the innocent.

It should be noted that improvements are being made . . . numerous judges and lawyers have invested thousands of hours in analyzing and identifying frailties in the delivery of indigent criminal defense services . . . the WSBA Board of Governors voted to adopt updated Standards for Indigent Defense Services . . . .

OPD Studies Establish that a Modest Increase in Funding Results in Major Improvements

In 2005, the Legislature authorized $1 million to enable the OPD to conduct pilot programs for the purpose of testing the value of certain improvements to defense services. OPD designed three projects, each in compliance with the WSBA defense standards. Another $500,000 was appropriated in 2006. The programs were completed in 2008 and the findings published in March of this year. The OPD chose three sites: Grant County Juvenile Court, Bellingham Municipal Court, and Thurston County District Court. The pilot sites were chosen because of commonality of issues with respect to high caseloads, limited client contacts and unavailability of defense lawyers at arraignments, limited use of investigative and support services, and "constrained" pre-trial motion practice. (See "The Public Defense Pilot Projects," Washington State Office of Public Defense, March 2009, Bill Luchansky, Looking Glass Analytics, summary, p. 4.)

The pilot project funds were used for additional attorneys, paralegals, investigators, and social workers. The average annual cost of the Grant County program was $100,000; the average annual cost of the Bellingham project was $235,000; and the average annual cost of the Thurston County program was $330,000. The pilot projects confirmed the important improvements that result from increased funding, including lower caseloads, improved client communication and satisfaction, faster case processing, reduction in case filings, and an increase in deferred prosecutions and jury trials. (See "The Public Defense Pilot Projects," *supra*, at 6–13.)

Obviously, in a system short on funds, retrials are best to be avoided. The Supreme Court has published for comment suggested rule changes to CrR3.1(d) and JuCR 9.2(d) which, if adopted, will require trial courts, before assigning counsel in both juvenile and adult criminal proceedings, to "satisfy itself that proposed counsel has demonstrated the proficiency, ability and commitment to quality representation appropriate to the proceedings, pursuant to the Standards for Indigent Defense Services as endorsed by the Washington State Bar Association and approved by the Washington State Supreme Court." (See Suggested Rule Changes to JuCr 9.29(d) and CrR3.1(d) at www.courts.wa.gov/court_rules/?fa=court_rules.proposedruledisplay&ruleid=160 and www.courts.wa.gov/court_rules/?fa=court_rules.proposedruledisplay&ruleid=158.) The WSBA Board of Governors voted to support adoption of the rule changes at its Richland meeting in April.

Implementing Common-Sense, Cost-Effective Improvements

It should be noted that improvements are being made. Beginning with the publication of the "Report of the WSBA Blue Ribbon Panel on Public Defense" in May 2004 and continuing though the publication by the WSBA Committee on Public Defense of "Making Good on Gideon's Promise" in March 2007, numerous judges and lawyers have invested thousands of hours in analyzing and identifying frailties in the delivery of indigent criminal defense services. In September 2007, the WSBA Board of Governors voted to adopt updated Standards for Indigent Defense Services recommended by the WSBA Committee on Public Defense. The 18 standards address compensation, duties of counsel, caseload limits, expert witnesses, administrative costs, investigators, support services, reports of attorney activity, qualifications, training, supervision, monitoring and evaluation of attorneys, limitations on private practice of contract lawyers, substitution of counsel, disposition of client complaints, cause for termination of services, guidelines for awarding defense contracts, and non-discrimination.

In 2005, the Legislature passed the Indigent Defense Services Act (RCW 10.101 *et seq.*). The Act authorized in excess of $6 million for public-defense improvements by cities and counties (90 percent to the counties, 10 percent to the cities). Thirty-eight counties and 22 cities have applied for funds. The funds are used by the jurisdictions as they see fit, but they generally involve oversight, attorney compensation, caseload reduction, attorney representation at first appearances, and mandatory ancillary services. (See "2008 Status Report on Public Defense in Washington State," pp. 19–21.) Importantly, RCW 10.130 requires that counties and cities receiving the funds adopt standards for the delivery of the services using as guidelines the WSBA-adopted Standards for Indigent Defense Services.

Recognizing the additional pressures that

the current economic downturn will have on an already financially strapped system, in late 2008 and early 2009 and led by the deans of Washington's three law schools (Kellye Testy of Seattle University, Gregory Hicks of the University of Washington, and Earl Martin of Gonzaga University), the schools sponsored three forums to explore "more-efficient, fiscally prudent and constitutionally compliant ways to improve" the criminal defense system. (See "Providing Justice in a Fiscal Crisis: Joint Solutions Statement of Criminal Justice Summit Participants," February 9, 2009, Appendix B to "2008 Status Report on Public Defense in Washington State.") The participants in the summits included the deans, law professors, prosecutors and public defenders, judges, and lawyers in private practice.

The group reached a consensus on five recommendations for systemic improvements: (1) eliminating driver's license suspensions for failure to pay moving violation fines or for failure to appear in court (misdemeanor cases filed under RCW 46.20.340 (1)(c), Driving While License Suspended Third Degree, accounted for *32 percent* of all criminal filings in municipal and district courts, in addition to innumerable arrest warrants and jail time); (2) reduced prison sentences for offenders who do not present a risk to the community safety (approximately 30 percent of Washington's 18,000 prisoners are incarcerated for nonviolent crimes); (3) resolving more non-support cases on a non-criminal basis (a criminal filing triggers the right to counsel); (4) raising the felony property crimes threshold to $1,000 (the current threshold was set in 1975, resulting in more superior court felony filings); and (5) having misdemeanor and gross misdemeanor warrants expire after three years (old warrants clog the system). (See "Providing Justice," *supra*.)

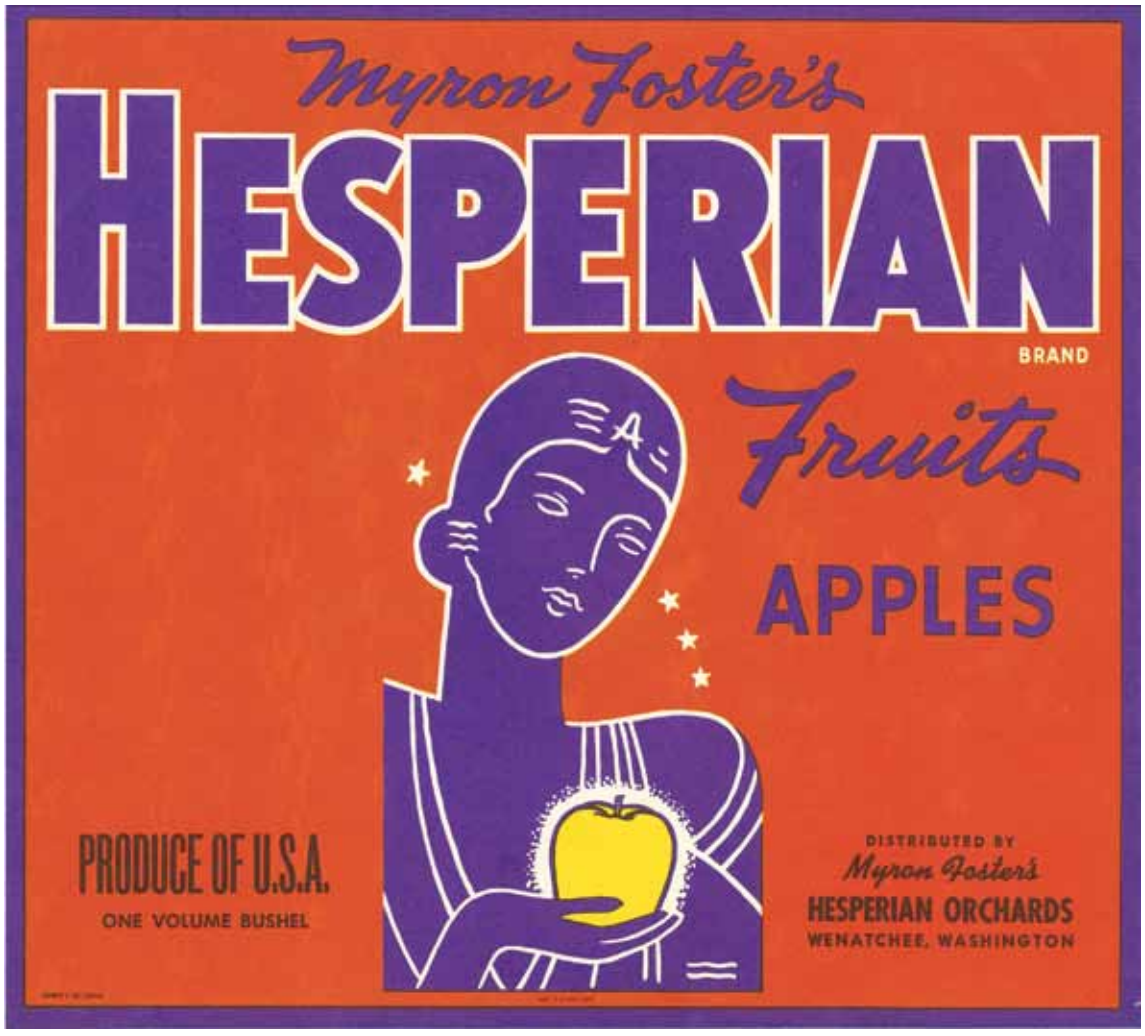
2013 — *Gideon* Turns 50

In 2013, it will be 50 years since the Supreme Court's decision in *Gideon v. Wainwright*. Washington's lawyers, judges, and legislators should set that anniversary as the target year for achieving at least 50 percent state funding of the criminal indigent justice system. The improvements being made in the system, such as caseload standards, will only place more pressure on county budgets. A defendant's state and federal constitutional right to effective counsel and an adequately funded defense should not vary based upon on the county in which he is arrested. The amount spent per capita on cases, the caseload and compensation of a defense attorney, and the investigative budget should not be subject to the vicissitudes of a county budget. Our 21st-century constitutional rights should not be financed through a 19th-century funding mechanism.

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

The Case of the Golden Apple

[*The 1958 Thorndike v. Hesperian Orchards, Inc. Trial*]



by Robert J. Henry

Fifty years ago next month, our Supreme Court decided *Thorndike v. Hesperian Orchards, Inc.*[1] The *Thorndike* decision quickly became the most frequently cited appellate decision in this state. At last count, *Thorndike* has been cited 486 times, and it is still turning up regularly in the advance sheets and unreported appellate opinions. For 50 years, this case has reminded us that an appellate court in this state will not substitute its judgment for that of the trial court on disputed issues of fact. This holding is now well-established, but in 1959 it was a seismic event which corrected a 65-year detour in the state's jurisprudence. Almost unnoticed, by this appellate decision the Supreme Court also concluded a fascinating commercial dispute involving Washington's famous apple industry.

The trial began on March 24, 1958, in the courtroom of Judge Lawrence Leahy. Judge Leahy was new to the bench, just beginning the 20 years he served as the solitary Superior Court judge in Chelan County. But he had practiced law in Wenatchee for many years, and presumably was well acquainted with the two lawyers, and perhaps their clients.

The plaintiffs were David Thorndike, an apple grower who lived three miles north of Oroville near the Canadian border, in Okanogan County, together with his two sons and a son-in-law. Each owned an apple orchard, and together they did business as "D.A. Thorndike & Sons." The Thorndikes were respected growers and had their own warehouse in Oroville. The elder Thorndike was the sole witness to testify in the plaintiffs' case in chief, and the transcript of his testimony shows that even the substantial skills of Elizabeth D. Walters, the official court reporter, could not entirely disguise his rough speech. Much like the complaint his lawyer filed, Thorndike told a simple story.

In July 1954, he signed a written contract with the defendant, Hesperian Orchards, Inc., a Wenatchee company. The contract provided that Thorndike and his sons would deliver their entire crop of Golden Delicious apples to the defendant. Defendant in turn promised to market the plaintiffs' apples in a pool with other growers, and to pay the plaintiffs for their apples "at the average pool price." Plaintiffs delivered 9,895 boxes of apples to defendant in the fall of 1954, and the following April defendant remitted a check for $36,810.76, which plaintiffs accepted and cashed. Only later, Thorndike testified, did they learn from other growers that they had been paid at a lower rate than the other growers in the pool. The complaint was filed in the Superior Court in Wenatchee on July 17, 1956, asking for an additional $13,592.16 plus attorney fees of $1,500.

The Thorndikes' attorney was A.J. "Jack" O'Connor, who practiced with his son Jim in a Wenatchee firm called, not surprisingly, O'Connor & O'Connor. He was born in Kentucky and graduated in 1910 from the University of Michigan Law School at the age of 21. He was first admitted to practice in Kentucky and later migrated west to Washington state. O'Connor practiced in Seattle and Brewster before he eventually settled in Wenatchee. His legal career was interrupted by service in the U.S. Army during World War I.

Fifty years ago next month, our Supreme Court decided Thorndike v. Hesperian Orchards, Inc. The Thorndike decision quickly became the most frequently cited appellate decision in this state. At last count, Thorndike has been cited 486 times, and it is still turning up regularly in the advance sheets and unreported appellate opinions.

When the trial began in March 1958, Jack O'Connor had just turned 69. He was a little hard of hearing, as the transcript reveals, but he was nowhere near the end of his career. He practiced law until he was 85 and kept his bar membership active until he was 90. During his legal career, Jack O'Connor was both prominent and respected, not only in Wenatchee, but throughout the state. In 1946–47, he served a term as president of the Washington State Bar Association.

The defendant Jack O'Connor sued was no mundane apple broker; it was the renowned Hesperian Orchards, one of the foremost purveyors of Golden Delicious apples in the United States. Even its name suggests the company's exalted status as a seller of the most desirable apples in North America. In Greek mythology, Hesperia was a legendary place at the western edge of the world, where a tree grew with leaves and branches of gold, and on those golden boughs grew apples of pure gold. The eleventh labor of Hercules was to find Hesperia and steal the golden apples from under the watchful eyes of the Hesperides, three fabled daughters of Atlas. The striking label which adorned each crate from the Hesperian Orchards in Wenatchee displayed this classical theme: a Greek goddess in blue on a red background, holding in her hand a single, perfect golden apple.

The marketing genius behind this estimable enterprise was Myron Foster, the foremost "apple man" of his time in Wenatchee, which then and now is considered the "Apple Capital of the World." Myron Foster was as well-known as his company, and his stylized signature appeared with the goddess and the golden apple on each crate. Though advancing in years, Foster testified extensively at the trial, including a lengthy explanation of the techniques he had personally developed for the handling, wrapping, packing, and shipping of these fragile apples so that they arrived on the East Coast in perfect condition, where they were highly prized in the gift-basket trade.

Leading his client through this testimony was Earl Foster, a Wenatchee lawyer who was also Myron's son. Born in Wenatchee, Earl attended Washington State College at Pullman before transferring to Harvard. He graduated in 1940, a classmate and football teammate of John F. Kennedy. Earl enrolled in law school at the University of Washington, but like so many of his generation, his education was interrupted by World War II. He served in the U.S. Army, and at war's end returned to law school, where he graduated in 1947 at the age of 30. After a short term with the Spokane County Prosecutor, he entered private practice in Wenatchee.

Throughout the trial, the star of the show was the Golden Delicious apple. All the witnesses found themselves describing its unique charms and challenges. Even plaintiff David Thorndike, against his best interest, admitted when asked that Golden Delicious apples "have to be handled carefuler."

This unique apple, so different in its golden yellow color from the other apple varieties of the day, was first discovered growing on a single tree in Clay County,

West Virginia, in the late 1800s. After years of local celebrity, the single tree was sold to Stark Brothers, the Missouri nursery company which had already made Red Delicious the most popular apple in the country. The West Virginia apple was renamed Golden Delicious, to take advantage of the marketing dollars already spent on Red Delicious, despite the fact that Red Delicious and Golden Delicious apples are genetically unrelated. From that time, all Golden Delicious orchards planted throughout the country are direct descendants by grafting from that single mutant tree in West Virginia.

At the trial, Myron Foster described his long association with these remarkable apples. He had first encountered them in Virginia, and when he returned to Wenatchee in 1925 to work for American Fruit Growers, he found that Golden Delicious apples had been harvested near Orondo as early as 1916. He soon began looking for a commercial market for the Golden Delicious apples grown near Wenatchee, but the problem, of course, was how to package and ship these delicate apples so that they did not bruise. Foster developed a number of techniques for handling the apples and, after years of experimentation, he came up with a cellulose packaging tray which held each apple separately, to avoid the bruising caused when apples are piled upon each other in a wooden crate.

By 1933, the "cell pack" had been perfected. That year, with the entire country mired in the Great Depression, Wenatchee apples were selling for 50 cents a box. But Myron Foster's revolutionary techniques and inventions allowed him to ship two rail carloads of extra-fancy Golden Delicious apples from his own orchards to New York City. There they sold for the astronomical price of five dollars a box to the "discriminating trade," such as bon-voyage gift baskets for steamship cruises and decorative fruit displays for hotel lobbies.

While the plaintiffs called only a single witness and then rested their case, the defendant had a different strategy. Fifteen witnesses were called to testify in the defense case over the next week, several testifying by deposition. For five days of the trial, Earl Foster assiduously developed his theme, the remarkable story of his father's promotion of the Golden Delicious apple, first as a profitable specialty of the New York fruit trade, but gradually growing to nationwide popularity. By 1956, Golden Delicious was second only to Red Delicious in Washington apple production.[2] Hesperian Orchards was purchasing apples from 75 growers. There could be no mistaking the remarkable job Myron Foster had done to make the Golden Delicious America's favorite fancy apple.

However, attorney Foster still had a problematical case, notwithstanding his client's reputation. The contract said Thorndike would be paid for his apples "at the average pool price," but he had been paid a lower price than the other pooled growers. Earl needed some sort of legal argument to refute this apparent breach of the contract. Early in the case, he filed an answer containing an affirmative defense intended to supply this need. The truth, it alleged, was that the plaintiffs delivered "an inferior grade and pack of Golden Delicious apples," in violation of the parties' agreement. These sorry apples arrived in the market in a "deteriorated condition." Notwithstanding this disappointing performance by Thorndike, Hesperian Orchards did its best and "marketed and disposed of said apples with extraordinary promptness." This poor quality, according to the an-

swer, led Hesperian Orchards to the course of action which became the cornerstone of its defense. The apples grown by Thorndike and his sons being inferior, they were segregated in a "particular sub-pool" comprising only Thorndike apples, and this sub-pool was "established as a grade of lower quality." These sub-pool apples "were necessarily sold at prices much lower than prices received for other Golden Delicious apples."

It is impossible to tell from the transcript how much this defense was based on reality. Certainly a number of witnesses testified to quality problems with the Thorndike apples. But proving that they were treated as a separate sub-pool was difficult. Thorndike and his sons testified that they believed their apples had been pooled with the other growers' apples. The defense, on the other hand, had offered testimony that this sub-pool was created with the knowledge of the Thorndikes. Perhaps, as is so often the case, both parties sincerely believed in the truth of their own case, which each saw through the prism of self-interest. Whatever the reality, Earl Foster staked his client's defense on the sub-pool argument and tried to prove that an employee of Thorndike named Goodman had agreed to this sub-pool arrangement, thereby effectively modifying or amending the contract. Regrettably, Mr. Goodman could not admit or deny this allegation at the trial, because he was deceased.

In addition to his father's reputation, Earl Foster had another advantage. His client was clearly the wealthier of the two litigants, and he indulged this luxury. The leisurely pace of the case, which took almost two years to reach trial, as well as his calling 15 witnesses to plaintiffs' one, show this tactic, but it is most apparent in attorney Foster's approach to discovery. Well into the case, he decided that there were important witnesses in Chicago and New York, apparently business associates of his father, whose testimony was vital to the defense case, so Foster noted a number of out-of-state depositions. O'Connor moved to limit this tactic by requiring that the depositions be taken on written questions. He pleaded the great expense to his client of live depositions; his motion noted that plaintiffs would have to pay a New York attorney as much as $350 to $500 merely to attend the depositions. It was in response to this motion that defense counsel uncharacteristically slipped out of the amiable civility which otherwise marked the case. Earl Foster argued that the plaintiffs ought to be able to afford these depositions because they claimed to have a collective net worth of $100,000.

On November 11, 1957, more than a year after the suit was filed, this motion was decided. Judge Leahy had been on the bench for just a few weeks, but he decisively ruled that the defendant could take the out-of-state depositions. Earl Foster then traveled to New York and Chicago and took the depositions himself. Jack O'Connor stayed home, perhaps sensing that the testimony of far-off apple brokers would have little impact at the trial. No one attended the out-of-state depositions on behalf of the plaintiffs.

This deposition testimony was undoubtedly boring at the trial, because each deposition was read verbatim, question and answer, into the record. But the testimony itself appears to reveal a flaw in the Foster defense strategy. A New York fruit broker named Philip Abromowitz, for example, testified by deposition for Hesperian Orchards. He said he was very familiar with the Thorndike apples, which were of very poor quality. However, all apples sold by Hesperian Orchards were shipped in Hesperian boxes, and each apple was individually wrapped in a Hesperian Orchards wrapper. To show that he knew which apples came from Thorndike's Orchards, Mr. Abromowitz testified that the apple boxes containing

Thorndike's apples had a red marking that set them apart. He also testified that every time he brokered apples marked with that red marking, he received numerous complaints from his customers. This testimony may have been true, but Judge Leahy must have wondered why a savvy New York apple broker would more than once buy apples in boxes whose markings revealed they were likely to be of poor quality.

Throughout the trial, the two lawyers, who undoubtedly knew each other well, addressed each other on the record as "Jack" and "Earl." Objections were addressed to each other, not to the judge. ("Just a minute. I am going to object to that, Earl.") Unlike today's judges, Judge Leahy did not seem concerned that the two attorneys addressed each other in the courtroom. Both attorneys maintained a high level of civility throughout the trial, marred by only a single incident of testiness. This occurred near the end of trial, when Myron Foster was under cross-examination. His son became quite protective, as lawyers sometimes do, urging the witness to read each document carefully and objecting to virtually every question. Finally, Jack O'Connor showed his exasperation:

> *Mr. O'Connor:* (interrupting) I do object to your running back and forth as though you had to protect your father, who knows more about the fruit business than you or I will ever learn.
>
> *Mr. Foster:* I agree with you on that.
>
> *Mr. O'Connor:* Well, why don't you sit down and let me cross examine him instead of interrupting every question as though he might say something that was wrong?
>
> *Mr. Foster:* I move the remarks be stricken, Your Honor. They have no bearing on the issue.

This colloquy drove Judge Leahy to his only display of impatience with counsel:

> *The Court:* I think counsel can proceed, and both counsel should refrain from conversations on the floor.

The testimony finally reached an end on April 1. Judge Leahy gave the lawyers 15 minutes to collect their thoughts and then heard closing arguments. It is unfortunate these arguments were not reported; it would be interesting to hear each attorney's summation of the testimony. When the arguments concluded, Judge Leahy deferred his decision: "Well, the Court will, as both counsel might imagine, take this matter under consideration and will at a future date give a memorandum decision." Seventeen days later, the court issued a three-page memorandum opinion.

So often in litigation, the attorneys carefully lay out detailed factual patterns and present complex and alternative legal theories and arguments to the court, only to have the judge decide the case on one or two simple facts. So it was here. Judge Leahy totally discounted the theory that Mr. Goodman had modified the contract on behalf of his employers:

> . . . the Court is not at all convinced that sufficient evidence was presented in this case to show that Mr. Goodman had or was held out as having authority from the plaintiffs to authorize him to agree to change such an important provision of the Marketing Contract (Exhibit No. 2) namely, the inclusion of all fruit in one common pool.

With that finding, Earl Foster's carefully constructed defense crumbled.

Judge Leahy also concluded that it was Hesperian Orchards, not the Thorndikes, which had primary responsibility for the grading and packing of the apples. The court granted judgment to the plaintiffs in the amount of $10,271.50. Despite the length of the trial and statutory authority for a reasonable attorney fee, Judge Leahy awarded the plaintiffs only $1,000 for their attorney fees.

Jack O'Connor prepared the findings and conclusions and a judgment. He also submitted a cost bill for the filing fee of eight dollars, a judgment filing fee of six dollars, and a witness fee calculated at a per diem of four dollars, plus ten cents a mile from Oroville to Wenatchee.

The judgment was signed by Judge Leahy on April 30, 1958, and it was recorded on "micro-film" by the county clerk the next day. Undismayed, Earl Foster promptly filed a notice of appeal and ordered a transcript of the entire trial. Three months later, Ms. Walters completed her work. The transcript was 731 pages, flawlessly typed on a manual typewriter, on 8½" by 13" onion-skin paper. The transcript was filed in Olympia, where the Supreme Court, for reasons unrelated to the quality of the typing, declined to read it.

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

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NOTES

1. Reported at 54 Wn.2d 570, 343 P.2d 183 (1959).
2. Bright, Al, *Apples Galore! The History of the Apple Industry in the Wenatchee Valley*, c. 1988, Directed Media, Inc., Wenatchee, WA.

Media-ese and Other Offenses

Lessons Learned from Journalists and the News Media

BY ROBERT C. CUMBOW

The term "Legalese" was coined a long time ago to refer to the verbose, often redundant, loophole-blocking language traditionally used by lawyers in drafting contracts. One of my aims in these occasional columns is to suggest ways that we can all do our jobs properly, and communicate in the clear, precise language our profession requires, while avoiding the opaque, often stultifying writing known as Legalese.

Law is not the only profession weakened by a reliance on complex and jargon-ridden verbal communication. The halls of academia are as much a hotbed of head-scratching obfuscation as a haven of learning. And technology-based professions such as engineering, medicine, and information science constantly face the challenge of communicating to the rest of us without collapsing into unintelligible jargon.

The one profession in which you would expect to find clear and purposeful use of language is journalism. News writing is, after all, the mother of simple, direct, concrete expression, punchy style, and straightforward who-what-when-where-why storytelling. Ernest Hemingway's tradition-shattering simplified literary style was based solidly in his experience as a news reporter.

Yet that very emphasis on brevity and simplicity has put the news media among the worst offenders in the practice of written English. This is important — and dangerous — because news reporting constitutes a large part of the reading that all of us do, and thus media style has a profound influence on the way we all speak and write. Journalists, above all, who make their living by the written word, should be the ones who get it right, the ones whose use of words celebrates the nuances of meaning that make the English vocabulary such a rich resource.

To be fair, a lot of journalists do write excellent, evocative, effective, adventurous English. But many more deliver the news to us in such lazy, sloppy, cliché-ridden verbiage that we can only wonder how they get and keep their jobs. To emphasize that lawyers aren't the only ones who need writing lessons, and to caution us all to write with thought and wit of our own and not just imitate what we hear and read in the news, I'm devoting this column to a handful of examples of the kind of writing that ought not to be allowed to spill over into our own.

Here's an excerpt from an item in the *Washington Post*:

> …[C]ompanies and celebrities ranging from Arsenal football club to actress Scarlett Johansson filed a record number of "cybersquatting" cases in 2008 to stop others from profiting from their famous names, brands, and events. The most common business sector in which complaints arose was pharmaceuticals, due to Web sites offering sales of medicines with protected names.

There are several problems here, the biggest of which is a violation of one of my pettest of pet peeves, the artificial spectrum. When a writer wishes to impress her readers with the diversity of a particular group, she often peppers her description with examples of members of that group, using a construction such as: "The meeting was attended by delegates from such far-flung locations as Vermont, Korea, Vanuatu, Zimbabwe, and Azerbaijan." This is a colorful and enchanting way of saying that the meeting's attendees came from a wide variety of places and backgrounds, and it makes the point in a way that amuses and stimulates the reader's imagination. By contrast, the *Washington Post* writer above chose the lazy fallback of the "ranging from ... to" construction. The writer paid no mind to the fact that the phrase "ranging from ... to" signals a specific limited range. Wanting to impress us with the abundance and diversity of celebrities and companies that have filed cybersquatting claims, the writer instead left us scratching our heads as to what might or might not be included in the "range" that begins with Arsenal football club and ends with Scarlett Johansson. Could that range include Nancy Grace? The American Red Cross? Ichiro Suzuki? Top Pot Donuts? We have no clue. From the writer's next sentence, we can assume that pharmaceutical companies do fall somewhere between British soccer teams and Ms. Johansson; but we can only guess whether that spectrum also encompasses shoe stores or circuses or Colonel Sanders. The point is that what the writer has suggested is not in fact a "range" at all. A better choice of words would have been "Companies and celebrities as diverse as ..." or "A wide variety of companies and celebrities, including ...".

Of course, a writer who really does wish to express a meaningful range can do so using known and recognizable parameters. A phrase such as "from Abercrombie and Fitch to Zinedine Zidane" would encompass both companies and celebrities and would suggest "A to Z," a familiar range that suggests the all-encompassing nature of the group the reporter was trying to define. A more meaningful effort was made by the writer who recently referred to economic impacts on newspapers "from the *Tampa Tribune* to the *Seattle Times*." By choosing newspapers from opposite corners of the country, the writer found a more colorful and concrete way of saying "papers all across the country" without suggesting that any specific range or group of papers was being defined. A skeptical reader might still have asked whether "from the *Tampa Tribune* to the *Seattle Times*" included the *Montpelier Times-Argus*; but at least the writer tried to define a universe using meaningful terms.

Have you ever noticed how the news media confuse succession with causation? Instead of telling us that a beloved movie star has died of cancer, they report that a he died following a long battle with cancer. But that tells us only what preceded his death, not what caused it. His long battle with cancer might have ended when he was run over by a garbage truck.

Another problem in my two-sentence excerpt from the *Washington Post* is classified under "pronoun trouble." In the phrase "profiting from their names, brands, and events," it's a safe bet that it's the "companies and celebrities" whose "names, brands, and events" are referred to, not the "others"; but a more careful writer would have avoided the ambiguity by structuring the sentence differently.

Before we let our anonymous *Post* writer off the hook, there is one more gaffe to note. In the phrase "due to Web sites offering sales of medicines with protected names," the word "offering" acts as a noun, so the phrase "Web sites" should be followed by an apostrophe. When a verb form ending in "ing" is used as a noun, it should be preceded by a possessive. "I couldn't understand him acting that way" should be "I couldn't understand his acting that way." This construction preserves the underlying logic of the language and avoids ambiguity as to whether it was "him" or his actions that were difficult to understand.

The *Post* article could have been improved and simplified by changing "due to Web sites offering sales of medicines with protected names" to "because Web sites often sell brand-name medicines." There is usually a better way of saying it, and often the better way is shorter.

Shortness, of course, is critical to news-

papers, because space is important, and because headlines have to convey the sense of a story as briefly as possible. One bad result of this is the Mediaspeak tendency to use a shortcut-word because of its brevity, while utterly ignoring its appropriateness — or lack thereof. Case in point: "czar." Because this handy four-letter word will fit almost anywhere, the media long since decided to use it as an all-purpose synonym for any type of leader heading practically anything. The news media have thus foisted off on unsuspecting Americans the notion that our nation has a Drug Czar, an Energy Czar, and, now, an IP Czar and a Car Czar. I'm sympathetic to the fact that these government officials' actual titles probably feature words like Executive, Deputy, Director, Advisor, and other such terms too long to fit comfortably into limited headline space. But that doesn't excuse "czar." The term "czar" refers to a totalitarian autocrat and is associated with oppression, not with equitable decision-making. It always amazed me that any editor ever thought that the term "czar" was appropriate to describe any job in the U.S. government. A "drug czar" ought to be someone who is a little bit higher up than a "drug lord," and probably has drug lords summarily executed on a daily basis. The name certainly doesn't fit a guy in a suit who is responsible for trying to decide what our nation's policies on drug enforcement ought to be.

But brevity controls, which is why our country is run by czars, and why almost no one recognizes the name Kaycee Anthony, but everyone knows who is meant by the phrase "tot mom." As if *every* mom weren't, at some time or other, the mother of a tot. This is also why our presidents, who once were inaugurated, had inaugurations, and celebrated afterward with an inaugural ball, are now described as having "inaugurals." Did you go to Washington, D.C., for the inaugural? No, you didn't, even if you thought you did; you went for the inauguration.

Once the news media get on to a word or phrase, right or wrong, they can't let go of it. I read recently in the *National Law Journal* that "a decimated job market has turned the tables on top law graduates." Unfortunately for those top law graduates, our job market is much worse than decimated. In a truly decimated job market, 9 jobs out of 10 would still be available. The term comes from the Roman military practice of executing one soldier out of every ten to punish an action attributable to an entire group rather than any identifiable individuals. This was a smart policy because it didn't reduce the fighting force by more than 10 per cent, and it ensured enhanced performance by the surviving 90 percent. Thus it was not the right word to describe today's law job market, or the January cuts at Cadwallader Wickersham & Taft that resulted in the dismissal of 7 of the firm's 11 London partners. Thanks to its Latin roots, English once had a single word that meant "reduce by ten percent" — a pretty handy thing for a language to have. Thanks to our news media, we now have just one more word that means "destroy," "devastate," "eliminate," or "wipe out," and the fine nuances of the word "decimate" have been lost to the general reader and writer, making our language the poorer. By the same process, the term "tragedy" has been cheapened to mean any regrettable event, rather than a complex literary form executed with great poetic skill and understanding of human motivation and emotion.

How often have you heard about someone who went nuts and shot about half a dozen people, then "turned the gun on himself"? The news media love to use this expression, presumably as a delicate way of avoiding reporting that the individual shot himself, killed himself, or committed suicide (a determination that evidently has to be left to the coroner). To me, a story about a shooting rampage that ends with "finally turned the gun on himself" is spectacularly anti-climactic. What happened next? Anyone can turn a gun on himself. That doesn't mean he actually pulled the trigger, or that he did so with sufficient skill to end his own life. I always get a picture of this hapless guy standing there pointing a gun at his own head while the cops grab him and haul him away. The end of the story is not where he pointed the gun next, it's whether he blew his brains out.

Have you ever noticed how the news media confuse succession with causation? Instead of telling us that a beloved movie star has died of cancer, they report that a he died following a long battle with cancer. But that tells us only what preceded his death, not what caused it. His long battle with cancer might have ended when he was run over by a garbage truck. Reporters seem terrified of concluding that anything was actually caused by something else. The same mentality that tells us with relish how a mass killer slaughtered half a dozen victims, then suddenly goes all delicate and says that he finally "turned the gun on himself," also seems to want to avoid telling us that an event resulted from a specific cause, and prefers to tell us only that one event followed the other. It is a classic error in logic

to conclude that because B followed A, B must have been caused by A (*post hoc ergo propter hoc*); but news writers continually urge us to draw such conclusions in the way they frame their reporting: "Five people are dead today following an outbreak of ebola in Gary, Indiana."

Another error in classical logic is "begging the question" — the fallacy of offering a proof that assumes the very thing one is seeking to prove. However, thanks to the news media, millions of speakers of American English now seem to believe that anything that raises a question, leads to a question, calls for a question, or calls something *into* question is a thing that "begs the question." Once again, we lose an important, uniquely nuanced phrase.

For people whose living depends on words, some news writers don't seem to be especially good at understanding what even the simplest words actually mean. A recent news headline reported that "threatening written, verbal communications to federal judges increased by 89%." The writer — and probably a lot of his readers (but I hope none of mine) — was apparently unaware that written communications *are* "verbal." The word "verbal" means "in words," and refers to communications that are written *or* spoken. It's amazing how many people these days think that "verbal" means the same thing as "oral." Pretty soon dictionaries — those wonderful codifiers of popular error — will tell us that the two words *do* mean the same thing, and our language will be further stripped of its once-great powers of precision and subtlety.

We who practice law aren't the media, but we hear, read, and are affected every day by the lazy language of news reporting, and media clichés and solecisms slip all too easily into our own prose. If we want our writing and speaking to stand out, and to win for our clients, we need to resist these slip-sliding trends in the public use of our language. You can do that by adopting these simple policies:

1. Think before you write.
2. Choose your words carefully. Ask yourself whether they actually mean what you want to say.
3. Review your writing critically — and rewrite, rewrite, rewrite.

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Death with Dignity

What Do We Tell Our Clients?

In April 2009, Bar News ran an article by Pamela Hanlon on Washington's new Death with Dignity Act. This article presents an additional view.

BY MARGARET DORE

A client wants to know about the new Death with Dignity Act, which legalizes physician-assisted suicide in Washington state. Do you take the politically correct path and agree that it's the best thing since sliced bread? Or, do you do your job as a lawyer and tell him that the Act has problems and that he may want to take steps to protect himself? I would hope the latter.

Not What the Voters Were Promised

The new Act was passed by the voters as Initiative 1000 and has now been codified as Chapter 70.245 RCW. During the election, proponents touted it as providing "choice" for end-of-life decisions. A glossy brochure declared: "Only the patient — and no one else — may administer the [lethal dose]."[1]

The Act, however, doesn't say this anywhere. The Act also contains potentially coercive provisions. For example, it allows an heir who will benefit from the patient's death to help the patient sign up for the lethal dose.

How the Act Works

The Act has an application process to obtain the lethal dose, which includes a written request form with two required witnesses.[2] The Act allows one of these witnesses to be the patient's heir.[3] Once the lethal dose is issued by the pharmacy, there is no oversight.[4] The death is not required to be witnessed by disinterested persons.[5] Indeed, no one is required to be present.[6]

A Comparison to Probate Law

When signing a will, having an heir act as one of the witnesses creates a presumption of undue influence. The probate statute states that when one of two required witnesses is a taker under the will, there is a rebuttable presumption that the taker/witness: "…procured the gift by duress, menace, fraud, or undue influence." RCW 11.12.160(2). The Act's lethal dose request process, which allows an heir to be a witness on the lethal dose request form, does not promote patient choice. It invites coercion.

No Mental Standard or Consent Is Required at the Time of Administration

Under the Act, an "attending physician" and a "consulting physician" are required to determine whether the patient is competent at the time of the lethal dose request.[7] The Act does not, however, require that the patient be competent or even aware when the lethal dose is administered.[8] There is also no language requiring the client's consent at the time of administration.[9] Without a requirement of competency, consent, or even awareness when the lethal dose is administered, the stage is set for undue influence and worse.

"Self-administer" Does Not Necessarily Mean that a Patient Administers the Lethal Dose to Himself

The Act does not state that "only" the patient may administer the lethal dose.[10] The Act instead provides that the patient "self-administer" the dose.[11] In an Orwellian twist, the term "self-administer" does not mean that administration will necessarily be by the patient. "Self-administer" is instead defined as the act of ingesting. The Act states:

> *"Self-administer" means a qualified patient's act of ingesting* medication to end his or her life . . . . (Emphasis added). RCW 70.245.010(12).

In other words, someone else putting the lethal dose in the patient's mouth qualifies as "self-administration."[12] Someone else putting the lethal dose in a feeding tube or IV nutrition bag would also qualify.[13] "Self-administer" means that someone else can administer the lethal dose to the patient.

In summary, someone other than the patient is allowed to administer the lethal dose. The Act contains no requirement that the patient be competent or even aware when the lethal dose is administered. There is no requirement that the patient consent when the lethal dose is administered.

Intentionally killing an incompetent person, or intentionally killing some other person without his consent, is homicide.[14] The Act, however, allows this result, as long as the action taken is according to the Act. The Act states:

> *Actions taken in accordance with this chapter do not, for any purpose, constitute suicide*, assisted suicide, mercy killing, or *homicide*, under the law. (Emphasis added). RCW 70.245.180(1).

The Right to Rescind Is Not a Substitute for Requiring Consent

The Act's proponents may counter that consent is actually required because patients have a right to rescind a request for the lethal dose "at any time."[15] A right to rescind is not the same thing as a right to consent when the lethal dose is administered. Consider, for example, an incompetent or unaware patient who obtained the lethal dose on a "just-in-case basis" and has not consented to taking it. He would not have the ability to rescind because he is incompetent, sedated, or simply sleeping. Without the right to consent, someone else would, nonetheless, be free to administer the lethal dose to him. Without the right to consent, the client's control over the "time, place, and manner" of his death is an illusion.

No Witnesses at the Death

If, for the purpose of argument, the Act does not "allow" a patient's death without consent, patients are, nonetheless, unprotected from this result, due to the lack of required witnesses at the death. Without witnesses, the opportunity is created for someone other than the patient to administer the lethal dose to the patient without his consent. Even if he struggled, who would know? The lethal dose request would provide the alibi. This scenario would seem especially significant for patients with money. A California case, *People v. Stuart*, 67 Cal Rptr. 3rd 129, 143 (2007), states: "Financial reasons [are] an all too common motivation for killing someone...."

No Liability for Administration Without Consent

Proponents may counter that the Act protects patients from wrongdoing due to provisions imposing civil and criminal liability in RCW 70.245.200. None of these provisions purports to prohibit administration of the lethal dose without the patient's consent. These provisions are instead concerned with the lethal dose request and general issues.[16]

Illusory Liability for Undue Influence

In connection with the lethal dose request, the Act purports to impose criminal liability for undue influence.[17] This purported liability is illusory because the concept of undue influence is too vague to be criminally enforced. (See *City of Tacoma v. Luvene*, 118 Wn.2d 826, 844-5, 827 P.2d 1374 (1992) (citizens must be given clear notice of prohibited conduct); and *Mays v. State*, 116 Wn. App. 864, 876, 68 P.3d 1114 (2003) (statute unconstitutionally vague where "reasonably intelligent people must guess as to its meaning").) As noted above, the Act specifically allows conduct that would normally create a presumption of undue influence (allowing an heir to act as a witness on the lethal dose request form). In addition, the Act's prohibition against undue influence is not defined and has no elements of proof.[18] Undue influence is also a traditionally equitable concept, which is "not susceptible of precise definition and must depend heavily on the facts of each case."[19] What elements would a prosecutor be required to prove for

the purported "crime" of undue influence? It's hard to say.

Official Cover

In the event anyone questions a patient's death, a meaningful response from law enforcement, generally, seems unlikely. This is because medical examiners, coroners, and prosecuting attorneys are required to treat deaths under the Act as "natural."[20] The death certificate is required to list an underlying disease as the official cause of death.[21]

What to Tell Clients

1. **Signing the form will lead to a loss of control**
   By signing the lethal dose request form, the client is taking an official position that if he dies suddenly, no questions should be asked. The client will be unprotected against others in the event he changes his mind after the lethal prescription is filled and decides that he wants to live. This would seem especially important for patients with money. There is, regardless, a loss of control.

2. **Prognoses can be wrong**
   The Act applies to adults determined by an "attending physician" and a "consulting physician" to have a disease expected to produce death within six months.[22] But what if the doctors are wrong? This is the point of a recent *Seattle Weekly* article: Even patients with cancer can live years beyond expectations.[23] The article states:

   > Since the day [the patient] was given two to four months to live, [she] has gone with her children on a series of vacations…. "We almost lost her because she was having too much fun, not from cancer" [her son chuckles].[24]

Conclusion

As lawyers, we often advise our clients of worst-case scenarios. This is our obligation, regardless of whether it is politically correct to do so. The Death with Dignity Act is not about dignity or choice. It is about enabling people to pressure others to an early death or even cause it. The Act may also encourage patients with years to live to give up hope. We should advise our clients accordingly.

Margaret Dore is an attorney admitted to practice in 1986. Her practice has included probate, guardianship, and appeals. She is the immediate past chair of the Elder Law Committee of the ABA Family Law Section. She is a former chair of what is now the King County Bar Guardianship and Elder Law Section. She is also a former law clerk to both the Washington State Supreme Court and the Washington State Court of Appeals. For more information on Ms. Dore, see www.margaretdore.com.

NOTES

1. I-1000 Pamphlet, "Paid for by Yes! on 1000."
2. RCW §§ 70.245.030 and .220 state that one of two required witnesses to the lethal dose request form cannot be the patient's heir or other person who will benefit from the death; the other witness may be an heir or other person who will benefit from the death.

3. *Id.*
4. See Entire Act, Chapter 70.245 RCW.
5. *Id.*
6. *Id.*
7. RCW 70.245.040(1)(a) and RCW 70.245.050.
8. The following Act provisions address the issue of competency in conjunction with the lethal dose request, not later. See: RCW 70.245.010(3); RCW 70.245.010(5); RCW 70.245.010(11); RCW 70.245.020; RCW 70.245.030(1); RCW 70.245.040(1)(a); RCW 70.245.040(1)(d); RCW 70.245.050; RCW 70.245.120(3) & (4); and RCW 70.245.220 (regarding the patient's appearing to be of "sound mind"). There is no provision that requires the patient to be competent or even aware at the time of administration. See Entire Act, Chapter 70.245 RCW.
9. The following provisions require that a determination of whether a patient is acting "voluntarily" be made in conjunction with the lethal dose request, not later. See RCW 70.245.020(1); RCW 70.245.030(1); RCW 70.245.040(1)(a); RCW 70.245.040(1)(d); RCW 70.245.050; RCW 70.245.120(3) and (4); and RCW 70.245.220. There is no provision that requires the patient to be acting voluntarily and/or give consent at the time of administration. See Entire Act, Chapter 70.245 RCW ("consent" not mentioned).
10. See Entire Act, Chapter 70.245 RCW.
11. See RCW 70.245.010(7); RCW 70.245.010(12); RCW 70.245.020(1); RCW 70.245.090; RCW 70.245.140; RCW 70.245.170; RCW 70.245.180(1); and RCW 70.245.220.
12. *Webster's New World College Dictionary* at www.yourdictionary.com/ingest defines "ingest" as: "to take (food, drugs, etc.) into the body, as by swallowing, inhaling or absorbing." Someone putting the lethal dose in the patient's mouth qualifies as "self-administration" because the patient will thereby "ingest" the dose.
13. Someone putting the lethal dose in a feeding tube or IV nutrition bag qualifies as "self-administration" because the patient will thereby "ingest" the dose.
14. Cf. RCW 9A.32.010 (defining "homicide"); RCW 9A.32.020 (regarding premeditation); and RCW 9A.32.030 (defining "murder").
15. RCW 70.245.100.
16. RCW 70.245.200 states:
    (1) A person who without authorization of the patient willfully alters or forges a *request for medication* or conceals or destroys a *rescission of that request* with the intent or effect of causing the patient's death is guilty of a class A felony.
    (2) A person who coerces or exerts undue influence on a patient to *request medication* to end the patient's life, or to destroy a *rescission of a request*, is guilty of a class A felony.
    (3) This chapter does not limit further liability for civil damages resulting from other negligent conduct or intentional misconduct by any person.
    (4) The penalties in this chapter do not preclude criminal penalties applicable under other law for conduct that is inconsistent with this chapter. (Emphasis added).
17. The Act states: "A person who coerces or exerts undue influence on a patient to request medication to end the patient's life, or to destroy a rescission of a request, is guilty of a class A felony." RCW 70.245.200(2).
18. See 70.245.200(2) and Entire Act, Chapter 70.245 RCW.
19. Reutlinger, Mark, "Washington Law of Wills and Intestate Succession," Washington State Bar Association, 2006, p.88.
20. "Instructions for Medical Examiners, Coroners, and Prosecuting Attorneys: Compliance with the Death with Dignity Act," Washington State Department of Health, revised April 8, 2009, at www.doh.wa.gov/dwda/forms/mesandcoroners.pdf.
21. *Id.*, RCW 70.245.040(2) and RCW 70.245.180(1).
22. RCW 70.245.040(1)(a); RCW 70.245.050; and RCW 70.245.010(13).
23. Shapiro, Nina, "Terminal Uncertainty — Washington's new 'Death with Dignity' law allows doctors to help people commit suicide — once they've determined that the patient has only six months to live. But what if they're wrong?" *Seattle Weekly*, January 14, 2009, www.seattleweekly.com/2009-01-14/news/terminal-uncertainty.
24. *Id.*

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Law Blogging

Washington Lawyers Find Blogs a Valuable Tool

by Michael Reitz

In June, *Bar News* published WSBA member Grace Healy's first-person account of her foray into blogging. We have since heard from other WSBA members who have ventured into the expanding world of law-related blogs. This piece by Michael Reitz surveys several of these efforts and addresses the effects of blogging on the practice of law.

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To blog or not to blog: that is the question. It isn't as if lawyers aren't busy enough — balancing the demands of job, family, social obligations, and charitable work. Why add a new, non-billable activity to one's calendar? Just ask the lawyers who are blazing a cyber-trail here in the Northwest.

Marketing Magic

Why blog? "Simple," says Greg Overstreet, a principal of Allied Law Group. "It's fun, it's good for business, and it allows me to advocate for a right I care very deeply about." Based in Olympia, Overstreet runs the firm's Open Government Blog (www.og-blog.com), reviewing news, legislation, and cases that involve the state's Public Records and Open Public Meetings acts. One of his primary reasons for the site is to "maintain the firm's profile among our client groups." The biggest surprise for Overstreet? "Our clients get hooked reading the blog."

Overstreet frequently gets calls from news reporters who need an expert quote for a specific dispute. Weeks later, he will hear from a potential client who read the newspaper story. The blog earns him a quasi-journalist status, with people sending tips and insider information about open-government issues from around the state. (A reporter once asked Overstreet to hold a story, telling him, "I can't get scooped by a blogger.")

D. Jill Pugh, of Seattle, agrees that blogging has a direct business benefit. "I easily get two or three clients a week because of the blog," she said. An employment lawyer running her own practice, Pugh maintains two blogs: the Employment Law Blog (www.employmentlawwa.com) and the Employee Handbooks Blog (www.djillpugh.typepad.com/employee_handbooks). Pugh began blogging

three years ago after recommendations from several marketing experts. She had yet to create a firm website, and saw a blog as an easy, low-cost alternative.

Blogging improves the visibility of Pugh's firm. "It's marketing magic for a solo practitioner — it's a way to compete with the big guy," she says. Writing about employment issues has created speaking engagements, media interviews, and other professional networking opportunities.

▶ Venkat Balasubramani, of Balasubramani Law in Seattle, started his Spam Notes blog (www.spamnotes.com) in July 2006, where he writes about privacy, data protection, and legal issues related to social networks. "I was doing a lot of spam cases and there were a ton of interesting issues that were not being covered by commentators," he said. "I followed the cases in this area pretty closely, and I thought it would be fun to share my insights."

Given the ubiquitous nature of the Internet, Balasubramani has formed connections with other lawyers, academics, and tech experts. "I enjoy the exchange that happens," he said. He tells the story of arguing a case before the Washington State Supreme Court that dealt with whether state campaign finance law prohibited campaign lies. (*Rickert v. Public Disclosure Commission*, 161 Wn.2d 843 (2007)). Some months later, he discovered that Justice Tom Chambers maintains a blog, on which Justice Chambers explained his concurring opinion in the case. "It's cool as a blogger to see a judge blog about a case you argued," said Balasubramani.

The discipline of posting fresh content forces these attorneys to stay abreast of developments in the law. Overstreet also relies on his blog as an archive. He once had five minutes to prepare for a presentation on why access to public records is important. He ran a search on his blog and came up with a dozen examples of information discovered through public records requests. "It's my own little filing cabinet," he said.

Enhancing the Image of the Profession

Legal blogs, however, offer more than individualized benefits. The new platform is good for the legal profession, says Kevin O'Keefe, a leading voice in the online law community. After practicing for 17 years, O'Keefe launched LexBlog (www.LexBlog.com), based in Seattle, which has created

hundreds of blogs for lawyers —from solos to the largest firms in the country. "Any medium that allows lawyers to break down barriers with clients and the public, and allows them to become more transparent and improve the image of the profession . . . these are wonderful things," said O'Keefe.

Balasubramani has written about the role of blogs in improving the legal profession. "More information is always better," he says, "and blogs are a great way to explain decisions and make the law more accessible." Blogs create public accountability, permit potential clients to evaluate lawyers, and can have a moderating effect on overzealous litigators. He calls the Internet "a giant Rule 11 committee." Given the slow death of traditional journalism, legal reporting and analysis increasingly will be entrusted to lawyers who write about their practice areas.

Attorneys in private practice are not alone in using this new communication tool: government lawyers also see the potential. In June 2007, Washington Attorney General Rob McKenna was one of the first to launch a blog in his capacity as the state's chief legal officer. The AG's blog, All Consuming (www.atg.wa.gov/allconsuming.aspx), took a bold stand (for government blogs, at least) by allowing user comments. As a result, the blog has become a gateway for residents to voice concerns to the attorney general. "The most effective blogs allow two-way communications," says Kristin Alexander, the AG's media relations manager, who does most of the blogging at All Consuming.

For example, last year All Consuming featured a short post about DISH Network dropping certain stations from its lineup. The blog was flooded with outraged comments and questions from readers. Interest was so high that Attorney General McKenna published a lengthy column addressing the background of the dispute, which largely resolved the complaints his office received.

Yes, But . . .

Blogging, of course, is not without its challenges. The most obvious is the time required to maintain an interesting, well-written, and accurate blog. "I'm a terrible blogger because I don't blog anywhere near often enough," says Pugh, only somewhat in jest. Her goal is one post a week — hardly effusive by most blogging standards — but even that quota can be burdensome for busy professionals.

Lawyers frequently ask about the ethical implications of blogging. Balasubramani has a simple rule of thumb: "I think common sense is probably enough to keep most law bloggers out of trouble, but this varies by practice area and by state."

Another potential issue is that lawyers who practice and blog in a specialized area may have occasion to mention their own cases. "I don't view the blog as a forum for communicating about my cases," says Overstreet.

O'Keefe monitors the issue of ethical restrictions on blogging, and he says most concerns are misplaced. Separate ethics rules are not required to govern each form of communication — phone, mail, fax, e-mail, or speeches — so he discounts the claim that blogs would require special treatment. As long as attorneys comply with existing rules, he says, "I don't see bar associations trying to rein in blogging."

Tips for Beginners

Despite the potential challenges, the rewards of legal blogging are enormous. "I enjoy writing," says Balasubramani, "so blogging is a fun diversion." "It's like coming to work in jeans when you're used to wearing a suit and tie," said Alexander. This satisfaction is one key to writing a good legal blog. Additionally, specialized knowledge is a critical element of most successful bloggers. Rita Kaiser is the reference services librarian at the King County Law Library, and in that capacity she monitors scores of blogs. In Kaiser's opinion, "A good legal blog is focused — the more specific to a particular area of law, the better it is."

O'Keefe suggests that lawyers need a paradigm shift on blogging. "Blogs are not products," he says. "At what point do we say lawyers should stop going to Rotary Club meetings or networking as people? At what point do lawyers stop taking clients to sporting events or using the phone?" In other words, lawyers should view blogging as one more method of networking. O'Keefe, who has trained hundreds of lawyers to blog, has advice for beginners. "A good blogger is a good listener, with an insatiable desire to learn, and is open to new ideas. Listen before you talk. If you're going to engage in a conversation with thought leaders, clients, and peers, you wouldn't walk into a room with a bullhorn."

Michael Reitz is general counsel of the Evergreen Freedom Foundation in Olympia. He blogs at www.wasupremecourtblog.com.

Faces of the New Economy

A Changing Practice in Changing Times

by Jeff Tolman

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She sat across the table from me, tears flowing while she attempted to remain under control. I wanted to hug her and say, "I'm sorry...so sorry." She and her husband had done nothing wrong. They had a house, two good jobs — he's a military officer, she's a project manager — student loan debt and a lifestyle not extravagant in any way. Then her company cut back and she became unemployed. Despite applying for positions she was unqualified for, qualified for, and over-qualified for, she remained out of work. One job plus her unemployment benefits were not enough to pay the bills. The mortgage and student loans were in arrears. Her husband was away, unavailable; bankruptcy would certainly kill his career. She didn't know what to do. Neither did I, her attorney. Finally, I recommended she go to her parents. Sure, they planned to leave her money when they died. She wouldn't need it then. Would they, could they, help now? As much as it hurt a 35-year old married person to ask parents for help, now, she had no choice.

▶ My business client called. For decades, I had done collection work for him with little dialogue except, "See if you can get my money." Now a customer owed him $8,900. A new discussion ensued. How long was the statute of limitations? Did I think the economy would be better by the end of the statute of limitations? What would it likely cost to sue on the debt? Even with a judgment, the debtor could file bankruptcy, right? Let's hold off awhile, maybe look at this in a year, or when the economy picks up.

▶ The widower, who I'd known for three decades, looked like he hadn't eaten or slept in weeks. His wife of 40 years had died and my client discovered she had been using credit cards he didn't even know about to pay bills and shop online. Was he responsible for these bills he knew nothing about? Why did she do this? How would he now pay the bills? Did I know of anyone looking for part-time help?

▶Our new receptionist is a 27-year-old furloughed commercial pilot, a first-time dad-to-be in June: my son, Chris. Like so many men and women, he is off his regular job due to company cutbacks, for a while answering the phone and helping clients feel comfortable and cared for in our office.

▶A new banker in town stopped by the office and introduced himself. Would we consider giving his bank a chance with one of our business accounts to show us their culture, helpfulness, and professionalism? Maybe. Then I looked at their pricing for business accounts. The bank charged for deposits — five cents per item, one-half of one percent when depositing cash. "What?!" I asked. "If I give you a hundred-dollar bill to deposit, I get credit for $99.95?" "Yes," he responded, "with loans so difficult to make now, we have to create income in other ways."

▶My friend who represents real estate developers put the dilemma in perspective: "My decision is whether I represent my old clients, knowing they can't pay me right now, or remind them I have bills, too, and work only when they can pay. I've decided to stick with them through these tough times, accounts receivables and all, as I would want them to stick with me if the tables were turned."

▶My new estate planning client was noticeably nervous. Unnaturally so. "Are you all right?" I asked. "You seem extraordinarily nervous right now. What is troubling you?"

"I *am* very nervous," she replied. "I'm afraid we will go through the exercise of acquiring information to draft the documents and, then, when you tell me the price, I won't have enough money to pay for them. At that moment I'll have to leave my dignity aside and, having taken your time, leave without documents I need. I am out of work for the first time in my adult life, having some medical issues, and know I need the documents. I'm just afraid I can't afford the documents."

"How about this?" I countered. "At the end of our discussion, I'll tell you what the rack rate for the documents is and you tell me what you planned to pay. We'll take the lower number. You get your documents and both of us keep our dignity." And we did.

▶ The Poulsbo Municipal Court Monday-night arraignment calendar was busy. Instead of the usual one theft charge per week, the calendar showed nine. One stealing for stealing's sake, or the excitement, or a compulsion, as often appeared on the calendar. Most, though, were attempting to steal food or clothes or, in one instance, an anniversary gift. Several of the defendants were not habitual criminals, just common, desperate folks; average folks who would now have a theft charge on their records.

It is a time we lawyers can, and should, and, I know, will, show our best side in this new, awful economy — that we are a personal, caring service profession, in good times and in bad.

▶I received a note from a Seattle law firm. It reported that to show the firm understood the economic troubles its clients faced, the firm hourly charges were being decreased 15 percent. The note further encouraged clients who could not afford the reduced rates to talk to the lawyers. These are temporary times, the firm noted, a time we want to show our concern for clients as each of us struggle through the new economy.

Many law firms are struggling. Collection work is down. Estates can't be closed until a house can be sold. Criminal defendants who would normally hire private counsel now seek the public defender. Homes aren't selling, so purchase and sale documents aren't getting drafted or reviewed.

In my eight dog years (which sounds a lot younger than being 56), I've never seen anything like the current economy. Not the uncertainty. Not the wariness. Not the desperation. So what can we do as lawyers?

Understand. Empathize. Do pro bono or reduced-fee work representing nontraditional pro bono clients: people who have always paid their bills until now; folks unemployed, but still with legal needs; men and women facing homelessness and bankruptcy for the first time — citizens who are facing new, frightening decisions. People like Richard LeMieux, who, in *Breakfast at Sally's*, chronicles his descent into homelessness, his journey from shopping at a local grocery store to begging for money outside its front door. It is a time we lawyers can, and should, and, I know, will, show our best side in this new, awful economy — that we are a personal, caring service profession, in good times and in bad.

Jeff Tolman is a partner with Tolman, Kirk & Franz in Poulsbo. Since 1981, he has served as district and municipal court judge pro tem. *He can be reached at 360-779-5561 or jefft851@aol.com.*

Snakes Alive!

A Primer on Civil Trial Practice

The true story of a case in Yakima County District Court from the early 1970s. Only the names are fictitious. The author, now retired, was involved in the case as a pro bono defense attorney.

by Neil Buren

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A hard-working mill employee, Sam Johnson, had just left his swing shift and driven home. It was probably around 11:30 on a dark and moonless summer night, and his wife and pre-teen children were at home. The neighbors were mostly in bed asleep, so it was quiet when Sam arrived at the rear of his house and parked his car just off the alley. As he stepped from his car, he looked to the area where his garbage cans were stored. To his shock, he saw a four-foot snake.

Sam mentally flashed on the thought of his son bringing out the trash as part of his daily chores, only to be nailed by this viper. But this was the city! Sam had never before seen nor even imagined such a critter in this area. Quickly, he recovered from his amazement and lunged for a 2 x 4 that was leaning against the fence nearby. As he clutched the board, he got within range of the varmint and dispatched the snake with a few deftly placed smashes. With the snake rendered harmless and capable of examination, Sam retrieved a flashlight. Did the creature have rattles of the kind common to rattlesnakes in the hills just outside of Yakima? Now able to see with the light, and to his utter surprise, Sam found that the snake was a common bull snake typically found in ponds, ditches, and orchards. The snake was harmless, but he had no way of telling that without the light.

Yakima in the 1970s was a booming community, with the Boise-Cascade mill producing lumber and plywood by the rail-car load. With seasonal fruit workers and GIs from the Yakima Firing Center, the town came alive on Saturday nights. Also developing into a level of notoriety was the Corral, a local bar that featured the go-go dancing of a gifted artist known as Fat Fanny. As shall be revealed, this dancer had a special companion.

Unknown to Sam Johnson, a next-door neighbor, Bill Smith, was a worker at the Corral. He was the bouncer assistant to Fat Fanny. One of Bill's duties at the bar was to feed and house Fanny's dance companion, the snake that would meet its fate near Sam's garbage cans. Sam did not know Bill, nor did he know his line of work. Nor, as it became clear, did he know that Bill

housed — and on occasion "exercised" — Fat Fanny's snake. Apparently, it was Bill's practice to allow the snake to slither freely in the grass in the yard near his home. The events near the rear of Sam's house took place on one such summer evening, when Bill's attention was somehow diverted as the snake roamed.

During this era, Fat Fanny was being escorted and wooed by a local barrister, Elmo Futchins. When Fanny and Elmo learned of the snake's demise, Fanny's heart was broken and Elmo, seizing upon the significance of the loss, went straight to his law office to prepare pleadings. He filed a summons and complaint against Sam in the district justice court and demanded a jury. He alleged that not only had there been a loss of companionship, but that the snake had a "special value" as a trained snake, i.e., it was a "performing" snake (capable of its own go-go gyrations, apparently). He alleged damages in the amount of $300. The claim asserted negligence in that Sam had failed to identify the snake as harmless and failed to exercise prudence when encountering it, thus "wrongfully causing the death" of the animal.

Sam, distraught, and without funds to hire an attorney (and apparently without homeowners' insurance), sought the bar association's pro bono legal aid after being served with process. Assigned to the case, I set to the preparation of the defense. The case was assigned to the courtroom of long-time Yakima jurist Forsythe J. Brady, who scheduled the matter for trial. On the appointed day, a six-person jury was seated and Elmo made his opening statement, strongly assigning carelessness to my client.

As this matter was early in my career, I was inexperienced in civil cases. Even though the matter seemed absurd, it was in the court and a jury was seated. Accordingly, I got an expert witness. Paul Vogel was a local stockbroker who owned a pet store on the side. Previously, I had consulted with him regarding the value of a common bull snake and whether such a animal could be trained. He assured me that there was no possibility of training a snake and that when kids brought this sort of critter to his store after finding them in local swamps, he would pay them the fair value of 50 cents. At trial, he was qualified as an expert and allowed to testify to the jury. Elmo mounted a fierce cross-examination, but was unable to shake the able testimony of the expert, and no contrary high-level evidence was produced.

Closings were made and Judge Brady instructed the jury. The jury retired to deliberate, and there was no request for overnight sequestration. Soon, laughter was heard through the door of the jury room, and in five minutes or so it was announced that there was a verdict. Upon reassembly in the courtroom, the jury returned a defense verdict. Sam was happy, and it is believed that Elmo and Fanny continued their relationship. Perhaps she went to Vogel's shop for a replacement. Judge Brady discharged the jury with the highest accolades for their service to the community.

This experience was extremely amusing in retrospect, yet it was uniquely a primer on civil trial practice. With jury selection, opening and closing, direct and cross, expert testimony and instructions, it was a good introduction for me as a young lawyer. Pro bono work can be a great place for learning the basics, and now, perhaps, with the reduced funding of free public legal services, beginning lawyers can again provide these services and learn simultaneously.

Neil Buren practiced law in Yakima from 1970 to 2008 after working as a King County deputy prosecutor and serving a tour in Vietnam as a U.S. Army JAG officer. He now enjoys golf, travel, and volunteer activities.

Blast from the Past

This is the premiere of a new department in* Bar News. *As the WSBA enters its 76th year, we thought it would be interesting to revisit what was on the minds of WSBA members from decades past. This article, from* The State Bar Review, *Volume II, Number 2, is reprinted as it first appeared in January 1936. You may find yourself thinking that these articles are as relevant today, or, perhaps, we've learned a great deal since then. Let us know what you think!

"The wise man must remember that while he is a descendant of the past, he is a parent of the future."

Herbert Spencer

British social philosopher, 1820–1903

Courtesy and Decorum in the Courtroom

A Lecture by Judge Malcolm Douglas Delivered to Class in Legal Ethics, University of Washington Law School, November 5, 1935

The time available this morning will permit me to discuss only one phase of trial ethics, namely, Courtesy and Decorum in the Courtroom, or what might be termed Courtroom Manners.

While courtesy is hardly ethics, it is closely akin to ethics. If you study the lives of distinguished lawyers and judges, you will find that as a general rule they were well-bred gentlemen. Either by nature or by self training, they were courteous to their fellow men.

Be not merely polite — be courteous. Courtesy is one thing and politeness is quite another. Some of the most polite lawyers I have known have been so lacking in other requisites of the profession that in my opinion they had no proper place in the courtroom at all. It is not of them that I am speaking.

By courtesy, I mean constructive consideration — the consideration that springs from a desire to be fair, to be upright, to be frank, to be magnanimous, to be kind, and to be noble.

Be courteous to witnesses, to adverse parties, to opposing counsel, to the court and to the jury.

You do not need the vaunted polish of a Lord Chesterfield, but if you wish to truly adorn your chosen profession, you should develop that civility which is the passport of good society everywhere and which stamps you as one of nature's noblemen.

These qualities may not be vital to success, but they will play a very important part in contributing to the happiness of a lawyer's life and that durable satisfaction which is derived from conduct consonant with the dignity of his profession.

The gist of what I want to impress upon you respecting the ethics of the trial can be boiled down to three little words. If you forget everything else I say this morning within five minutes after leaving the classroom, I hope that there are at least some among you who will remember these three words for the remainder of your lives and have occasion to invoke their guidance in many a famous trial. These three words are: "Be a gentleman!" Because more truly than it may be said of a king, a gentleman can do no wrong.

Choose for examples to emulate not those lawyers who by mere ability, aggressiveness and truculence may have gained a temporary notoriety as spectacular fighters. Rather choose those gentlemen of the bar who by their integrity, high-mindedness, courtesy and fidelity have won the esteem and admiration of their brethren and the public alike as true ministers of justice.

In selecting a motto to set the standard of his conduct, the young lawyer could do no better than to take the words of the poet:

> "Be Noble — and the Nobleness that lies in other men
> Sleeping but never dead
> Will rise in majesty to meet thine own."

But, you may say, these are glittering generalities. How are they to be applied in the rough and tumble of a lawsuit? In an effort to answer this natural query, I shall endeavor to draw upon my eleven years' experience on the Superior Court bench to point out certain pitfalls and to formulate certain commandments for the practical application of these principles to courtroom conduct. Like Woodrow Wilson, I have fourteen points:

1. Avoid Snarling, Wrangling and Contentiousness.
While an able lawyer must be a good fighter, he gains nothing by being an ill-tempered one. Judges and juries may sometimes enjoy the excitement of wordy encounters, but when the time comes for rendering the verdict or the judgment, they have more respect for and more confidence in the fair-minded gentleman than for him who deals in epithets and abuse.

2. Avoid a Truculent and Aggressive Air.
For every lawyer who carries a chip on his shoulder there is usually another who is ready to knock it off. The man who is looking for trouble seldom fails to find it. A trial lawyer should be a good sportsman, not merely a belligerent gladiator.

3. Refrain from Indulging in the Four B's —
Badgering, Browbeating, Bully-ragging and Bulldozing witnesses on cross-examination.

Nothing brings greater discredit and disrepute upon the profession. You don't have to be cross in order to be a good cross-examiner.

4. Do Not Make the Mistake of Regarding All the Opposition Witnesses as Perjurers.
—and all your own as upright and honest. You will be shocked to learn how frequently the judge or jury reaches just the opposite conclusion.

5. Never Ridicule or Abuse Opposing Counsel.
Your fellow lawyers should be your best friends. It should always be possible for you to do "As adversaries do at law, strive mightily, but eat and drink as friends."

6. Eschew the Raucous Voice.

Avoid fawning on the court or smirking and smiling with a knowing look at the jury. These are marks of insincerity which defeat their own ends because they are readily detected.

Mere shouting and bellowing never persuade. A well modulated voice is a joy to judge and jury. There are appropriate moments for passion and eloquence, but to be effective they must be used with restraint.

7. Be an Aid to the Court.
The better your case is prepared, the better the court's opinion will be. The better the opinion, the better the law, and the better the community.

8. When You Lose Your Case, Do Not Damn the Judge or Cavil at the Decision of the Court.
Criticism of the official conduct of the court tends to weaken the confidence of the public in the administration of justice and lessens the dignity that should clothe the ministers of justice. The lawyer should be the last to cast reflections on the court, and his own demeanor should be such as to create an atmosphere tending to encourage faith in the administration of justice and lend dignity to those charged with it.

But while deferential respect should always be extended to the court, both as a moral and professional duty, yet nothing more is required than a manly respect, not a servile submission. It is just as important to maintain the independence of the bar as to maintain the dignity of the court. When his duty to his client requires it, counsel need not shirk expressing firm and decided opposition to the views expressed, remarks made or course pursued by the court.

These things should be done with dignity and firmness in open court, however, rather than by denouncing the judge as a crook or an ignoramus in the corridor, where it can do no good and does do much harm. (See *Sharswood's Ethics*, p. 61 *et seq.*)

9. Be On Time When Attending Court.

When you are tardy, you waste the time of many people. If you are in court on a motion, the result of being late may be that the motion may go to the foot of the calendar and opposing counsel may have the major portion of an entire day wasted as a result of your discourtesy on a matter that could have been disposed on in ten minutes. Lord Nelson said: "I owe all my success in life to having been always a quarter of an hour before my time."

10. Be Sincere with Court and Jury.
Avoid fawning on the court or smirking and smiling with a knowing look at the jury. These are marks of insincerity which defeat their own ends because they are readily detected. As between the rude and insolent lawyer and the unctuous, fawning lawyer, who curries favor with the jury by ostensible solicitude for their comfort or tries by flattery to ingratiate himself into the judicial mind, the former is entitled to the greater respect. Everyone despises the "bootlicker," or what in collegiate parlance you now call "the apple-polisher."

11. Cultivate the Gentle Art of Making Friends.
A man who has no friends is poor indeed. Make friends with everyone in the courtroom. Know the clerk, the bailiff and the reporter by name — treat them with courtesy. Make friends with the judge, the opposing counsel and the adverse party. Do it in a manly way, remembering that the best way to make friends is to be one — that

> "Kind words are more than coronets
> And simple faith than Norman blood."

12. Shun All Appearance of Undue Familiarity with the Judge, Particularly During a Trial.
Do not enter his chambers except in company with opposing counsel, lest some ignorant party suspect that you are attempting to influence his decision by private conversation.

13. Cultivate the Use of Good English.
Nothing more quickly arrests the attention or captures the interest of judge and jury than a straightforward argument expressed in clear, simple and classic English. It at once marks the lawyer who uses it as one "to the manor born." Courtroom loungers

may prefer the language of the barroom, the gutter or the prize ring, but those who decide your cases for you will be more impressed by the language of Abraham Lincoln, Elihu Root and Newton D. Baker.

14. When in Doubt About Any Point of Courtroom Conduct, Remember That High Moral Principle is the Only Safe Guide, the only torch to light the way in darkness.

In this connection, however, I firmly believe that the three-word motto "Be a gentleman," with all the word implies, will furnish a dependable slogan under most circumstances which will arise during your trial experience.

While it may appear to many of you that I am giving undue attention to the mere amenities of life, I am fully satisfied that increasing emphasis on better courtroom manners would accomplish a great deal in bettering the administration of justice.

When you enter upon the practice of law, take good care that your conduct is not such that judges and fellow-lawyers will classify you among that small minority at the bar who make themselves notorious by their bad manners in the courtroom. Let your conduct rather place you among those who, I am glad to say, represent the great majority of the bar— those to whom their own honor and the honor of the profession spell more than money or success, who can robustly champion a client's cause without ever flinching or ever fouling, who distinguish themselves by their diligence and learning in the law, who are inherently loyal to the courts in which they practice, who can fight hard and yet fight like gentlemen, who win a deserved reputation for fidelity to private trust and public duty, and whose courtroom conduct is always such as to merit the approval of all just men.

While it may appear to many of you that I am giving undue attention to the mere amenities of life, I am fully satisfied that increasing emphasis on better courtroom manners would accomplish a great deal in bettering the administration of justice.

Daniel Webster declared:

> "Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness and the improvement and progress of the race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns is entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is, and must be, as durable as the frame of human society."

If you and I in our humble way do what we can to raise the standard of courtesy and better the traditions of our profession, have we not labored on this edifice with usefulness and distinction?

Breaking Up: Who Gets What When Lawyers and Clients Split?

BY MARK J. FUCILE

When a lawyer and a client end their relationship midstream, questions frequently arise over who gets what in the file. The Washington State Bar Association has a very useful ethics opinion — Formal Opinion 181 — that deals with handling client property and funds in this situation. Formal Opinion 181 offers practical guidance on the interplay between attorney lien rights and a client's need for a file, disposition of advance fee deposits, the parts of the file that a lawyer must return and the portions that the lawyer can retain, who pays for copying the file, and the "bad things" that can happen to lawyers who don't follow the rules. Formal Opinion 181, in turn, draws on precepts that are reflected in RPC 1.16(d), which governs withdrawal, and RPC 1.15A, which governs handling client property and funds. Formal Opinion 181 is available on the ethics opinion page of the WSBA website at www.wsba.org/lawyers/ethics/about.htm.

Lien Rights

When a lawyer and a client go their separate ways, one of the usual flashpoints is any unpaid fees the lawyer is due. Under RCW 60.40.010(1)(a), a lawyer may hold a client's file until the client pays the lawyer.[1] At the same time, RPC 1.16(d) requires a lawyer who is withdrawing (whether at the request of the lawyer or the client) to "take steps to the extent reasonably practicable to protect a client's interests[.]" Putting the two side-by-side, Formal Opinion 181 concludes that a client's need for the file "trumps" the lawyer's possessory lien rights. Therefore, if the client needs the file, Formal Opinion 181 counsels that the lawyer must turn it over, notwithstanding the lawyer's otherwise valid possessory lien rights. In many instances, this is also the "smart thing" for the lawyer to do. By turning the file over to the client, the lawyer is not waiving a possible claim for unpaid fees. But the lawyer will avoid a possible argument later by a disaffected former client that the lawyer's failure to promptly turn over the client's file somehow damaged the client's continuing ability to handle the matter involved.

Advance Fee Deposits and Flat Fees

On other occasions, a lawyer and a client may separate with the lawyer still holding part of an advanced fee deposit. In that instance, RPC 1.16(d) requires "refunding any advance payment of fee or expense that has not been earned or incurred" upon withdrawal. Under recently amended RPC 1.5(f)(2), which governs "flat fees," the client remains entitled to "a refund of a portion of the fee if the agreed-upon legal services have not been completed." (See *In re DeRuiz*, 152 Wn.2d 558, 574-75, 99 P.3d 881 (2004) (same holding prior to amendment).) Therefore, if the client has paid an advance fee deposit or a flat fee and work remains unfinished at the point the client moves elsewhere, the lawyer must return the unearned balance to the client.

Formal Opinion 181 offers practical guidance on the interplay between attorney lien rights and a client's need for a file, disposition of advance fee deposits, the parts of the file that a lawyer must return and the portions that the lawyer can retain, who pays for copying the file, and the "bad things" that can happen to lawyers who don't follow the rules.

What Must Be Returned?

Apart from financial issues, questions often arise upon withdrawal over exactly *what* must be returned to the client. Formal Opinion 181 succinctly summarizes the rule on file transition: "At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of [a] representation, with limited exceptions, must be turned over to the client at the client's request[.]" The limited exceptions normally include a lawyer's notes relating to the business relationship with the client, such as conflict checks and collection notes, that were not charged to the client, and general research memoranda, such as a memo prepared in another matter dealing with the same legal issue, that were not billed to the client.[2] Although Formal Opinion 181 does not address at length the *form* in which a lawyer's file is maintained, fairly read, it suggests that documents maintained in electronic form fall within its scope if not available in corresponding hardcopy form. By contrast, routine "metadata" embedded within an electronic copy of a document but not apparent in its hardcopy form does not appear to fall within its parameters unless it reflects material attorney-client communications or work product for which the client has a need. (See ABA Formal Ethics Op. 06-442 (2006) (discussing electronic metadata).)

Who Pays for Copying Costs?

When a client moves to a new lawyer, it is often prudent for the former lawyer to make a copy of the file to document where the matter stood when it left the lawyer's hands, should any questions arise later. Unless the engagement agreement with the client provides otherwise, the lawyer

Given that lawyer-client splits are often painted against the backdrop of disputes over case management, results, or payment, it doesn't take too much imagination to envision a disaffected former client asserting damage if a lawyer did not promptly release the client's file. A lawyer, therefore, may be buying into more trouble than it's worth in attempting to hang on to a client's file to enforce payment.

under Formal Opinion 181 must generally bear the cost of creating the lawyer's own "loss prevention" copy, because the principal benefit accrues to the lawyer rather than the client. By contrast, if the lawyer has already given the client copies of what makes up the file during the course of the representation and the engagement agreement requires the client to pay for an additional copy, then Formal Opinion 181 would permit a lawyer to charge a client for the costs of what amounts to a "second copy" of the file. Again, however, the client's need for the file "trumps" the lawyer's right to withhold the file pending payment of photocopy charges.

Consequences

Lawyers are subject to regulatory discipline if they mishandle the return of client files or funds at withdrawal. *See, e.g., In re Burtch*, 112 Wn.2d 19, 24-25, 770 P.2d 174 (1989) (failure to return client file); *In re Perez-Peña*, 161 Wn.2d 820, 831, 168 P.3d 408 (2007) (failure to return client funds). As noted earlier, however, lawyers face another danger by holding a client's file in an effort to force payment: the client may contend that the client's position in the matter involved was compromised as a result. Although violation of the RPCs does not give rise to civil liability in and of itself, Washington's appellate courts have held on multiple occasions that the professional rules may be used in proving a lawyer's breach of fiduciary duty. (See generally *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992).) The argument in the withdrawal setting is that a lawyer has a fiduciary duty to handle file transition in a way that doesn't harm the client. Given that lawyer-client splits are often painted against the backdrop of disputes over case management, results, or payment, it doesn't take too much imagination to envision a disaffected former client asserting damage if a lawyer did not promptly release the client's file. A lawyer, therefore, may be buying into more trouble than it's worth in attempting to hang on to a client's file to enforce payment.[3]

Summing Up

When a lawyer and a client split, tempers can often run hot as they tussle over unpaid fees, the client's file, and the many reasons that led to the parting. In that charged atmosphere, the lawyer needs to remain true to the lawyer's fiduciary duty to the client. Although sometimes difficult, that approach may save the lawyer significant grief down the road by insulating the lawyer from a claim by the client later that the lawyer's refusal to cooperate in the transfer of the client's file damaged the client. In short, this is an area where discretion can definitely be the better part of valor.

Mark Fucile, of Fucile & Reising LLP, handles professional responsibility, regulatory, and attorney-client privilege matters and law-firm-related litigation for lawyers, law firms, and legal departments throughout the Northwest. He is a past chair and a current member of the WSBA Rules of Professional Conduct Committee, a past member of the Oregon State Bar's Legal Ethics Committee, and a member of the Idaho State Bar Professionalism and Ethics Section. He is a co-editor of the WSBA's Legal Ethics Deskbook *and the OSB's* Ethical Oregon Lawyer. *He can be reached at 503-224-4895 and mark@frllp.com.*

NOTES

1. Lawyers also have "charging liens" for compensation due on settlements and judgments under RCW 60.40.010(d)-(e). See generally *Ross v. Scannell*, 97 Wn.2d 598, 603-05, 647 P.2d 1004 (1982) (discussing the distinction between possessory and charging liens).
2. Under *VersusLaw v. Stoel Rives LLP*, 127 Wn. App. 309, 329-35, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008, 132 P.3d 147 (2006), internal law-firm communications regarding potential claims by a client against the firm may be discoverable if the communications took place while the firm was still representing the client. See generally ABA Formal Ethics Op. 08-453 (2008) (discussing in-house ethics consultation).
3. Suing for fees later presents its own risks — principally in the form of a possible malpractice counterclaim that may be asserted by a client as a form of "leverage."

WSBA Board of Governors Meeting
April 24–25, 2009 — Richland

BY MICHAEL HEATHERLY

WSBA services will move further into the digital world under measures taken by the Board of Governors at its regular meeting April 24 and 25 in Richland. Changes will include video conferencing for WSBA meetings as well as online trust-account reporting, part of a switch to optional online license renewal for 2010.

Also in keeping with the high-tech theme, the April BOG meeting was the first to feature all-digital content in place of the traditional paper books distributed to BOG members and other attendees. Previously, the several hundred pages of background materials produced for each recipient were bound into an inches-thick book and delivered before each BOG meeting. To reduce cost and waste, the books have been replaced by digital files of all the material in Adobe PDF format.

At meetings, BOG members and other attendees will now read the materials from their laptop computers. For the April meeting alone, WSBA saved 54 reams of paper, saving $1,600 in costs and sparing approximately three trees. In addition, about 25 hours of staff time was saved by no longer having to print, bind, and distribute written materials.

The change to digital content has the additional benefit of making BOG meeting materials more easily accessible to all WSBA members. The materials are available for free download before each meeting at www.wsba.org/info/bog. An archive of past meeting materials is being kept as well. Free software to browse and search the material, and to add virtual highlighting and sticky notes, is also available via the WSBA website.

In other tech-related business, the BOG approved a proposal to install video conferencing equipment in a WSBA conference room and to have portable video conferencing gear available for use in other rooms at the WSBA offices. A maximum of $60,000 will be spent on the system from the WSBA capital reserve fund. The equipment will allow members of WSBA boards, committees, and task forces to participate in meetings without having to travel to the Seattle headquarters.

WSBA staff believe videoconferencing will reduce the cost of travel, lessen the time commitment required for committee members, and improve upon existing remote conferencing, which is audio-only and done by telephone. Remote videoconferencing participants will require a video camera, software drivers, and high-speed Internet access to use the system on their home or office computers.

Meanwhile, the BOG approved an amendment to the Rules for Enforcement of Lawyer Conduct (ELC), that will help pave the way for optional online filing of WSBA members' annual licensing renewal and fee payment, which is scheduled to go into effect this December. ELC 15.5 is the rule requiring members to disclose information regarding client trust accounts as part of the licensing process. The BOG approved amendments to the rule that will reduce the number and complexity of questions that must be answered. The amendment now must be approved by the Supreme Court.

The Board also took action on two matters relating to WSBA member insurance benefits. The BOG voted to renew the existing health and dental insurance plans and to add plans that include disability, long-term care, and life insurance. Regarding the health plan, the Board voted to continue the plan under the current terms, which will result in a nine percent premium increase for the coming year.

The independent firm that brokers the plan to WSBA addressed the possibility of replacing the modest flat-rate co-pay for pharmaceuticals with a charge based on a percentage of the pharmaceuticals' cost. Such a change would reduce the premium increase this year (to between 7.3 and 7.6 percent) and lower the risk that the insurance carrier might further increase premiums or drop the plan next year, they noted.

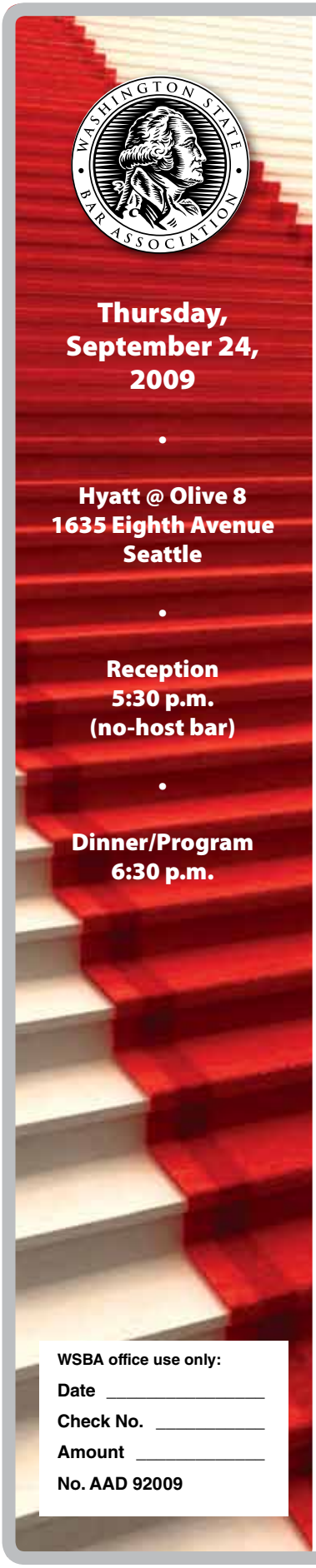
However, BOG members voted to maintain the current plan terms when they learned that the burden of increasing members' contributions for pharmaceutical costs would be borne mainly by a small number of insured persons with serious health problems requiring medication costing up to several thousand dollars monthly. The health and dental plans are used by relatively few WSBA members. The plan currently has 100 subscribers and covers 181 individuals. However, for members requiring particularly expensive treatment, the plan is the only alternative to costly state-affiliated high-risk programs. The WSBA members' insurance plans are separate from the coverage available to WSBA employees.

In other business, the BOG voted to appoint Seattle attorney David Summers as chief hearing officer, a non-employee position overseeing the volunteer panel of WSBA members who preside over lawyer disciplinary hearings. Summers succeeds James Danielson, who has held the position since it was created in 2003. Summers, a WSBA member since 1980, has served as a hearing officer in the program and has been involved in numerous other WSBA committees and activities. The BOG voted to compensate Summers $2,000 per month for his services.

The Board also voted to approve WSBA's appearing as an *amicus curiae* at the request of Spokane attorney Mark D. Kamitomo in a case involving alleged juror misconduct. Following a trial in which Kamitomo served as counsel, members of a Spokane Superior Court jury came forward to disclose that during the trial other jurors derisively referred to Kamitomo by fictional names suggesting they harbored racial prejudice against him. The trial judge concluded that the conduct established racial bias affecting the verdict. He reversed the verdict, a decision appealed by the defendants. The WSBA Amicus Curiae Brief Committee noted:

> [T]he issue of juror racial bias toward a lawyer for a party in litigation appears to be one of first impression, at least in Washington. There was strong feeling that this is an important issue for the WSBA to address, particularly in light of the various rules and policies address[ing] racial discrimination and diversity. The Committee believes that this is an issue of substantial interest to the WSBA and concerns the integrity of the judiciary and the bar. The Committee voted unanimously to recommend that the WSBA file an amicus curiae brief on the position that juror misconduct demonstrating racial bias toward a lawyer in a court proceeding may be grounds for a new trial.

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



Thursday, September 24, 2009

•

Hyatt @ Olive 8
1635 Eighth Avenue
Seattle

•

Reception
5:30 p.m.
(no-host bar)

•

Dinner/Program
6:30 p.m.

WSBA office use only:

Date _____

Check No. _____

Amount _____

No. AAD 92009

You are cordially invited to attend

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

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

Name _____ **WSBA No.** _____

Address _____

Phone _____ **E-mail** _____

Affiliation/Organization _____

Registration is $95 per person (table of 10 = $950). To make your reservation, please return this form (or a photocopy) with your credit-card information or check payable to WSBA. Space is limited, so please make your reservations early. Reservations and payment must be received no later than September 17, 2009 (refunds cannot be made after September 17). Seating will be assigned.

☐ MasterCard ☐ Visa No. _____ Exp. date _____

Name as it appears on card _____

Signature _____

_____ (no. of persons) X $ _____ (price per person) = $ _____ TOTAL

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

_____ ☐ beef ☐ chicken ☐ vegetarian

_____ ☐ beef ☐ chicken ☐ vegetarian

_____ ☐ beef ☐ chicken ☐ vegetarian

_____ ☐ beef ☐ chicken ☐ vegetarian

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_____ ☐ beef ☐ chicken ☐ vegetarian

_____ ☐ beef ☐ chicken ☐ vegetarian

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

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

☐ **If you need special accommodations, please check here and explain below.**

_____

_____

Opportunities for Service

Practice of Law Board — Four Positions

Application deadline: July 3, 2009

Four positions on the Practice of Law Board are open effective October 2009. These appointments will be for a three-year term.

The Board is established by General Rule 25. Nominations may be made by the WSBA Board of Governors and other people and organizations.

GR 25 provides that the purpose of the Board is to:

- promote expanded access to affordable and reliable legal and law-related services;
- expand public confidence in the administration of justice;
- make recommendations regarding the circumstances under which non-lawyers may be involved in the delivery of certain types of legal and law-related services;
- enforce rules prohibiting individuals and organizations from engaging in unauthorized legal and law-related services that pose a threat to the general public; and
- ensure that those engaged in the delivery of legal services in the state of Washington have the requisite skills and competencies necessary to serve the public.

The Board is composed of 13 members, at least four of whom shall be non-lawyers. The Board should represent the public interest in the delivery of legal services and should reflect the broad range of diversity of individuals who are part of or who use the legal system.

Persons interested in seeking nomination by the Board of Governors for appointment to the Board should submit letters describing their background and qualifications for membership to the address shown below. Applicants should have a demonstrated commitment to the Board's purposes as set out in GR 25. Members of the Board are not compensated for their services, but are reimbursed for necessary expenses consistent with the WSBA reimbursement policies. The Board sets its own meeting schedule, currently meeting the second Friday of each month.

Please submit a letter of interest and a résumé no later than July 3, 2009, to: Practice of Law Board, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101. Further information is available at www.wsba.org/practiceoflawboard. If you have questions, contact POL Board Administrator Julie Shankland at julies@wsba.org, 206-727-8280, or 800-945-9722, ext. 8280.

The Washington State Bar Foundation Board of Trustees

Application deadline: August 31, 2009

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

Northwest Justice Project Board of Directors — Two Positions

Application deadline: September 1, 2009

The WSBA Board of Governors is accepting letters of interest and résumés from members interested in serving a three-year term on the Northwest Justice Project Board of Directors (two positions). The three-year terms will commence January 1, 2010. Incumbents are eligible for reappointment, and a written expression of interest and résumé are required for incumbents seeking reappointment.

The Northwest Justice Project is a statewide not-for-profit law firm funded by the state of Washington and the federal Legal Services Corporation to provide free civil legal services to low-income people throughout Washington. Board members play an active role in setting program policy and assuring adequate oversight of program operations and must have a demonstrated interest in, and knowledge of, the delivery of high-quality civil legal services to low-income people. For more information, e-mail cesart@nwjustice.org or lisag@nwjustice.org. Please submit letters of interest and résumés to Bar Leaders Division, WSBA, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; or e-mail barleaders@wsba.org.

Civil Legal Aid Oversight Committee

Application deadline: August 31, 2009

The WSBA Board of Governors is seeking to fill one position to serve a term beginning on appointment and expiring June 30, 2012, on the bipartisan Civil Legal Aid Oversight Committee. Established in 2005, the Committee oversees the activities of the Office of Civil Legal Aid; reviews the performance of the director of the Office of Civil Legal Aid; and makes recommendations on matters relating to state civil legal aid services and funding. The Committee consists of 11 members, one of whom is appointed by the WSBA. The incumbent is eligible for reappointment. For additional information, see www.ocla.wa.gov.

Please submit a letter of interest and résumé to: WSBA Bar Leaders Division, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539, or e-mail barleaders@wsba.org.

2009 Licensing Information and Changes

Licensing suspensions. If any portion of your license fee or late fee remains unpaid, or if you are on Active status and haven't paid your Lawyers' Fund for Client Protection assessment or filed your A1 licensing form after two months' written notice of your delinquency, a recommendation for suspension has been submitted to the Supreme Court.

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

Verify your address in the online lawyer directory (http://pro.wsba.org). You are required to keep your contact information current; see Admission to Practice Rule 13.

WSBA-CLE Annual Member Appreciation Summer Sale — Online Purchases Only

July 1 kicks off WSBA-CLE's biggest sales event of the year! Buy online and save 50 percent on selected recorded seminar sets through noon on July 15, while supplies last. If 2009 is your MCLE reporting year, remember that one-half of your credits can be from recorded seminars. Visit the online store at www.wsbacle.org.

"Foundations of American Democracy" Civics Pamphlet Available

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

Monthly Lawyer Discussion Roundtable

Get ideas and support from new colleagues and WSBA Lawyer Services Department staff who will answer questions on ethics, practice, and substantive law. The discussion group meets the second Tuesday of the month from noon to 1:30 p.m. July 14 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).

LOMAP Rate Changes

The Board of Governors has approved changes to the billing rates for law office management consultation for the first time in 11 years. Effective August 1, 2009, the schedule will be:

- Up to two years from date of your WSBA admittance: $40 per hour
- More than two years from date of your WSBA admittance: $95 per hour
- Services to firms of six or more lawyers: $150 per hour
- Software demonstrations/support in the LOMAP Computer Lab: $20 per hour
- Free estimates of total fees are gladly provided
- Assistance by e-mail or telephone remains free of charge

See www.lomap.org for many free downloads and links to resources.

LOMAP and Ethics Traveling Seminars

Join us in Port Angeles on July 21, Port Townsend on July 22, Friday Harbor on August 19, Vancouver, Washington, on August 25, or Olympia on August 26. The cost is $99. Four credits are available, including some ethics credits. To register, call or e-mail Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

LAP Solution of the Month: Taking a Vacation?

If not, why not? All work and no play make you grumpy and inefficient. Vacations are good for you and your family, so plan now to get out of town. And turn off your cell phone while you're there! If you feel guilty about even contemplating time off, call the Lawyers Assistance Program at 206-727-8268, or 800-945-9722, ext. 8268.

Computer Clinic

The WSBA offers a hands-on computer clinic for members. Learn what programs such as Outlook, PowerPoint, Excel, Word, and Adobe Acrobat can do for a lawyer. Are you a total beginner? No problem. The clinic teaches helpful tips you can use immediately. Computers are provided, and seating is limited to 15 members. There is no charge, and no CLE credits are offered. The July 13 clinic will be held from 10:00 a.m. to noon at the WSBA office and will focus on using using a Mac in the law office. The July 16 clinic will meet from 2:00 to 4:00 p.m. and will focus on using Outlook and practice management software. For more information or to RSVP, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

Monthly Job Search Session

Join us July 8 to hear guest speaker Paul Anderson, of Prolango, who will address interviewing skills. These meetings take place the second Wednesday of each month from noon to 1:30 p.m. at the WSBA sixth floor conference center. Come as you are — no need to RSVP. Bring your business card (yes, you do need one). For more information, call 206-727-8269 or e-mail rebeccan@wsba.org. If you would like to attend the meeting by telephone, please RSVP by July 7.

Weekly Job Finders Strategy and Support Group

Unemployed? Discouraged — or trying not to be? We're taking names of lawyers interested in being on the wait list for a weekly

meeting of lawyers looking for work. The focus of this group is on setting goals, accountability, and maintaining motivation. This is an opportunity to trade job-search advice and offer each other support in this difficult process. The group meets on Monday or Tuesday mornings from 10:30 to 11:45. Contact Dan Crystal, Psy.D., at 206-727-8267, 800-945-9722, ext. 8267, or danc@wsba.org if you are interested in this group or in other groups forming for senior lawyers and lawyers in transition.

Facing an Ethical Dilemma?

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

Search WSBA Ethics Opinions Online

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

Speakers Available

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

Assistance for Law Students

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

Help for Judges

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

Learn More About Case-Management Software

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

Upcoming Board of Governors Meetings

July 24–25, Tulalip • September 24–25, Seattle • October 23–24, 2009, Pullman

With the exception of the executive session, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Contact Margaret Shane at 206-727-8244, 800-945-9722, ext. 8244, or margarets@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/info/bog/schedule.htm.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in June 2009 was 0.294 percent. Therefore, the maximum allowable usury rate for July is 12 percent. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.

WSBA Professionalism Committee Tip of the Month

Don't over-rely on e-mail as a means of communication. It is tempting to use e-mail almost exclusively to communicate with clients, opposing counsel, experts, and others. E-mail is quick and easy, and you don't have to actually engage in a conversation which might require a little more time and a little more engagement on a personal level. But that is also its downside — e-mail doesn't build relationships in the same way that an actual conversation can. So make sure you pick up the phone and speak to the client or opposing attorney enough to maintain and build a good working relationship.

The Lawyers' Fund for Client Protection Board meets quarterly to review applications for gifts from the Fund. The Board is authorized to make gifts less than $25,000 to eligible applicants. On applications for $25,000 or more, the Board makes recommendations to the Board of Governors, who are the Fund's Trustees. At their meetings on February 27 and May 15, 2009, the Board conducted the following business:

Kevin G. Healy (WSBA No. 16307, Seattle) — Resigned in lieu of disbarment 8/13/08

Healy owned and operated Domlex Destiny Five Group Limited Liability Company and Domlex Destiny Five Limited Liability Company. He represented that Domlex would purchase and improve residential properties in the Seattle-Tacoma area that were situated near the Sound Transit light-rail line. According to an explanation that Healy gave to his investors, some of whom were also his law clients, the project failed because promised financing did not come through. Healy was placed in involuntary bankruptcy by some former clients and investors. Because the potential scope of losses caused by Healy is unknown, the Board of Governors, at the recommendation of the Fund Board, is authorizing payments up to $25,000 at this time, with the balance of any approved payments to be withheld until the end of the fiscal year (September 30).

Application A: The applicant is the beneficiary of a trust established by her mother. Healy wrote the mother's will and the trust document in 1988. Healy and two others were named trustees. In 1988, the mother also executed a general and durable power of attorney naming Healy her attorney-in-fact. In October 2001, Healy wrote a revised trust document that he signed pursuant to the mother's power of attorney. In it, he was named the sole trustee.

The mother died in October 2001. Healy filed for probate of her estate. The will appointed Healy as attorney for the executor. Healy filed an inventory in the probate showing estate assets consisting of the mother's residence, valued at $308,300 "with no debt," and bank accounts in excess of $100,000. The total assets were listed as $413,185. The applicant says Healy told her that the estate assets were actually about $1,200,000. She says Healy told her that someone from California was buying the home. He never confirmed whether it sold.

The applicant says that in 2004, she contacted Healy to ask to borrow money from the trust, and that he told her not to ask. She says she tried to reach him a year ago but was unable to find him. She contacted one of the original trustees of the mother's trust, who told her that Healy had resigned from the Bar. He assisted her in acquiring documents from the probate, and learned that the house had been sold several years before. Healy never paid any of the estate or trust funds to the applicant and never accounted for them. The Trustees approved the Board's recommendation to pay the applicant $75,000.

Application B: Healy represented the applicant as personal representative of his grandmother's estate. In August 2006, Healy solicited funds from the applicant to be invested in Domlex. The applicant refinanced his home and gave Healy $400,000. A letter from Healy states that the applicant would receive $37,000 per annum on each of the first three anniversaries of the payment to Healy, and full repayment of the principal of $400,000 on the 40th month, and a cash payment on the 10th anniversary. According to the Statement of Alleged Misconduct signed in connection with his resignation from the Bar, Healy never informed the applicant that Domlex had substantial debts or of the risks involved in the investment.

Healy failed to make the lump-sum payment in October 2007, as required under the agreement. He continued to make mortgage payments through January 2008. The applicant tried to contact Healy but did not hear from him until February 28, 2008, when Healy called him and said that there was no more money in the LLC and that the applicant would need to make all future mortgage payments. He also told the applicant that he had filed a Chapter 11 bankruptcy, which was not true. According to the Statement of Alleged Misconduct, the applicant is owed at least $380,000. The Trustees approved the Board's recommendation to pay the applicant $75,000.

Stanley J. Lippmann (WSBA No. 29661, Seattle) — Stipulated to disbarment 10/24/08

Application A: Lippmann was paid $1,200 by the applicant in September 2007 to complete work on her marriage dissolution after the death of her first lawyer. This included obtaining a quit-claim deed on her house and a QDRO regarding her former husband's 401(k). Lippmann did nothing. As late as June 16, 2008, Lippmann sent an e-mail to the applicant saying that he was closing his practice and that hers was one of the last cases that he would be working on. She says that she reached him by phone in October 2008, and he acknowledged that he owed her a refund or a credit for services. He said he didn't have the money to repay her, but expected to by the end of the week. That was the last she heard from him.

In the disciplinary investigation that led to Lippmann's disbarment, the Office of Disciplinary Counsel obtained copies of Lippmann's trust and business account records, and there is no record of deposit of the applicant's payment to either of those accounts. The Board approved payment to the applicant of $1,200.

Bradley R. Marshall (WSBA No. 15830, Seattle) — Suspended 18 months 5/10/07

Applications A, B, and C: Marshall represented 15 longshoremen in a workplace racial discrimination case, including these applicants. For additional facts, see *In re Discipline of Marshall,* 160 Wn. 2d 317 (2007). This matter was previously reported in the November 2008 *Bar News*. The Supreme Court ordered restitution to the 15 longshoremen of $41,000 he overcharged for costs and $3,473.75 he charged in excess of his agreed fee, totaling $44,473.75. The Board previously approved payments of $3,176.70 to four of Marshall's former clients and approved payment of the same amount to each of these three former clients.

Darrell W. Marshall (WSBA No. 21600, SeaTac) — Disbarred 11/12/08

Marshall had a series of criminal convictions in various municipal and district courts, including deferred prosecution for driving under the influence, hit-and-run, and assault. The prosecutor later moved to revoke the deferred prosecution, and Marshall was found guilty on all counts — driving under the influence and driving with a suspended license; obstructing an officer; false reporting as a result of attempting to shoplift three bottles of wine; and indecent exposure for removing his clothes in a public park.

Application A: In August 2006, the applicant hired Marshall to represent him in a criminal matter. He paid $800 in three cash installments. A readiness hearing was set for 11/3/06. The applicant appeared but Marshall did not. Marshall never accounted for the applicant's $800 and did not return any portion of it. The hearing officer found that Marshall "charged and retained legal fees without performing meaningful work in the case" and ordered restitution. The Board approved payment to the applicant of $800.

Stephen J. Oelrich (WSBA No. 29263, Tacoma) — Suspended for three years 2/9/09; Disbarment recommendation pending

Application A: The applicant paid Oelrich $2,000 in March 2005 for representation in a child-support modification, to obtain a restraining order against his wife, and to defend him in a contempt action for his alleged failure to pay child support and medical expenses. The applicant was in the Army stationed in Virginia, so he and Oelrich communicated by e-mail. Oelrich told the applicant that he was working on his matters, but the hearing officer found that he neglected the applicant's

case and failed to communicate with him on important matters.

Oelrich drafted a petition for a restraining order, which the applicant signed. He never filed the petition. The applicant's contempt hearing was set for 4/11/05, but it was continued several times and finally set for 6/2/05. Oelrich requested another continuance because he was not prepared. The court granted the continuance, but ordered sanctions of $250 against the applicant. Oelrich did not advise the applicant of the sanctions. Oelrich filed the applicant's response late, and the court refused to consider it. The court entered various orders, including one that required the mother to provide documentation of daycare costs or the applicant's support obligation would be reduced $134.50 per month. Oelrich did not send a copy of the order to the applicant or adequately explain it to him. He did not seek reduction of the child-support payment when the mother failed to provide the documentation.

In September 2005, the applicant received a letter from the Division of Child Support (DCS) advising that his paycheck would be garnished for $1,098.49. The applicant contacted Oelrich, who assured him that he would take care of it. In October 2005, the applicant received a second letter from DCS. He again contacted Oelrich, who advised him that DCS could not garnish his wages and that he would take care of it that day. Oelrich did nothing. In December, the applicant received another letter from DCS that they would commence garnishing his wages in January 2006. The applicant hired a new lawyer. The Board approved payment to the applicant of $2,000.

Application B: The applicant paid Oelrich $1,000 in June 2005 for representation in a child-support action brought by his former wife. The applicant was in the Army stationed in Iraq, so all communications between him and Oelrich were by e-mail. The applicant was concerned that the extra pay he was receiving because of his deployment to Iraq might be used to increase his child-support obligation. His extra pay was scheduled to end in November 2005, when he would return to the United States.

The modification hearing was set for 6/24/05. Oelrich told the applicant that the hearing was "stricken" because he told the opposing attorney that he needed more time to respond. That was the last communication the applicant received from Oelrich. The hearing was reset for 7/22/05; Oelrich did not appear. A modification order was entered increasing the applicant's support obligation based on his deployment pay. A copy of the order was mailed to the applicant by the prosecutor. The applicant attempted to communicate with Oelrich without success. Oelrich never returned any of the applicant's money, never sent him a billing, and never accounted for the funds. The Board approved payment to the applicant of $1,000.

Fernando Perez-Peña (WSBA No. 4858, Seattle) — Resigned 2/8/08

Application A: Perez-Peña was hired by the applicants in March 2001 to pursue an immigration matter. They paid him $2,000. For various reasons, a few days later they told Perez-Peña that they had decided not to pursue the immigration matter and they requested a refund of their money. Perez-Peña said he would return $1,500 and charge $500 for the work he had done. He gave them a check for $1,500. However, the applicants could not deposit the check because their bank account was in the wife's maiden name. The applicants returned to Perez-Peña's office to obtain a new check. They allegedly became hostile and threatened lawsuits and WSBA complaints. Based on the threats and what he perceived as a lack of appreciation for his agreement to refund the money, Mr. Perez-Peña stopped payment on the check. He did not notify the applicants, and the check bounced.

After a series of hostile dealings, letters, and phone conversations, Perez-Peña agreed to give the clients a refund of $1,600 if they agreed to sign releases of liability. Perez-Peña ultimately agreed to go to his bank to obtain a cashier's check for the clients, and the parties met to exchange the documents. During the exchange, the wife allegedly tried to keep the check and grab the releases back from Perez-Peña. Perez-Peña pushed or hit the wife, who ended up with the check but tore the release document in half. Perez-Peña thereafter reported the check stolen, and it bounced. He was charged with misdemeanor assault, and a jury convicted him. He was given a deferred sentence. The Board approved payment of $1,392.75.

Thomas P. Sughrua (WSBA No. 14117, Seattle) — Disbarred 2/20/08

Application A: In January 2003, Sughrua filed a wrongful-death action on behalf of the applicant's mother's estate. Sughrua settled with one of the defendants, who sent Sughrua a check payable to him and the applicant for $10,000. Sughrua did not advise the applicant of receipt of this check. On 12/8/06, he endorsed the check in both his name and the applicant's name and deposited it to his trust account. Other than the bank statement, he maintained no record of these funds. He paid none of the funds to the applicant and instead misappropriated the applicant's funds to his own use. He stipulated to pay restitution to the applicant of $10,000, but his counsel advises that he has no means to pay. The Board approved payment to the applicant of $10,000.

Jonathan D. Sweigert (WSBA No. 20781, Kirkland) — Suspended 12/6/07; Disbarred 3/18/09

Application A: The applicant paid Sweigert $2,000 in September 2005 to bring an action to vacate a fourth-degree assault charge and to restore his civil rights. Sweigert said he would have the matter completed by the end of the year. In November 2005, Sweigert told the applicant a hearing would be held on 12/6/05. However, Sweigert had not filed any action with the court. Sweigert told the applicant that he did not need to attend the hearing. Later, Sweigert told the applicant that he had gotten the conviction vacated, but that he needed to have it "expunged." This was all false.

On 5/22/06, Sweigert e-mailed the applicant that the court clerk needed to retrieve his file from archives and that, when that was done, he would enter a final order. On 9/28/06, Sweigert e-mailed the applicant that the necessary paperwork had been completed and that he was waiting for confirmation that it had been processed. On 10/2/06, Sweigert wrote to the applicant and told him that all of the work on his case had been completed. This, too, was false. On 12/6/06, Sweigert told the applicant to meet him on 12/14/06 for a hearing at the Bellevue District Court. Then Sweigert told him the hearing date had been changed to 12/28/06. This, too, was false. In March 2007, the applicant wrote to Sweigert asking for an update and threatening to file a grievance with the WSBA. Sweigert repeatedly assured the applicant that the case would be resolved shortly. In fact, Sweigert took no action on the applicant's behalf and never returned the unearned fees. The Board approved payment of $2,000.

Application B: In September 2007, the applicant paid Sweigert $5,200 to represent him on a DUI charge and in a DOL license-suspension proceeding. Payment was made by charging $2,500 to the applicant's Visa card and $2,700 to his MasterCard. Sweigert said that he would request a DOL hearing, but he did not do so and the applicant's license was suspended. Sweigert did not tell the applicant that he had failed to request a hearing or that his license was suspended.

The arraignment on the DUI charge was set for 10/10/07. The applicant appeared but Sweigert did not. A pre-trial conference was set for 11/7/07. The applicant had a business trip scheduled for that date, so Sweigert told him he would get the conference continued. Sweigert did not appear at the hearing and did not request a continuance. As a result, a bench warrant was issued for the applicant's arrest. On 11/16/07, the applicant e-mailed Sweigert asking when the new hearing date was. Sweigert did not respond. On 12/6/07, Sweigert was suspended from practice. He did not tell the applicant that he was suspended. Sweigert never refunded the fees. The applicant was able to receive a refund of $2,500 by Visa. MasterCard did not make any refund. The Board approved payment of $2,700.

Application C: The applicant hired

Sweigert in April 2007 to represent him in a claim for a work-related injury. This was two months before the statute of limitations would expire. He paid $300 in cash for the filing fee and gave Sweigert a check for $1,700 as an advance fee deposit. The Office of Disciplinary Counsel reviewed Sweigert's trust-account records for the relevant period, and Sweigert had not deposited the applicant's funds into his trust account. The applicant regularly telephoned Sweigert, but Sweigert rarely responded. When he did, he told the applicant that he had filed the case and everything was proceeding. In fact, Sweigert never filed the applicant's lawsuit, and the statute of limitations ran. He did not tell the applicant when he was suspended from practice. He did not return the applicant's funds. The Board approved payment of $2,000.

Application D: The applicant was represented by Sweigert on an assault charge in 2006. In July 2007, she paid Sweigert $2,000 to have her criminal record expunged when her probation ended in February 2008. The applicant was living in Massachusetts, so all communication with Sweigert was by telephone. She called Sweigert many times but never reached him. He was suspended before the applicant's probation ended. He did not advise her of his suspension and he did not refund her fees. The Board approved payment of $2,000.

Application E: The applicant paid Sweigert $4,000 in August 2007 to represent him on a driving-under-the-influence charge and a license-revocation proceeding. The DOL set a telephonic hearing date of 10/18/07. Sweigert told the applicant that he would take care of the hearing and that the applicant did not need to participate. Sweigert did not do so, and the applicant's license was suspended.

On 10/24/07, just before the pretrial conference on the DUI charge, Sweigert called the applicant and said that he could not attend the conference. He told the applicant to request a continuance. It was reset for 11/30/07. On that date, Sweigert sent the applicant an e-mail that he could not attend and that the applicant should request another continuance. It was reset for 12/10/07, and the court said there would be no further continuances. On 12/6/07, Sweigert was suspended from practice. He did not advise the applicant. On 12/10/07, Sweigert told the applicant he could not attend (he did not tell him of his suspension), and to request another continuance. The court denied the continuance and set the matter for trial on 1/18/08. The applicant then called Sweigert several times requesting a refund of his fees. He sent a certified letter on 1/13/08 requesting a refund. Sweigert never replied and never refunded the fees. The Board approved payment of $4,000.

Application F: The applicant paid Sweigert $3,000 in October 2007 for representation on a fourth-degree assault charge. A pre-trial conference was set for 11/29/07. Sweigert told the applicant that he would appear at the conference and that the applicant did not need to attend. Sweigert did not appear, and a bench warrant was issued for the applicant's arrest. Sweigert did not tell the applicant that a bench warrant was issued, and he did not tell the applicant that he was suspended from practice on 12/6/07. The applicant called Sweigert many times, but Sweigert did not return his calls. In March 2008, the applicant learned of the warrant. He hired a new lawyer. Sweigert did not refund the applicant's fees. The Board approved payment of $3,000.

Application G: The applicant hired Sweigert in July 2007 for representation on a DUI charge. The agreed fee was $3,000. Other than a check for $1,000, the applicant has no receipts or other documentation for the cash payments. A pretrial conference was set for 10/4/07. Sweigert did not appear. It was reset for 12/13/07. Sweigert told the applicant he would attend that hearing. On 10/12/07, the applicant was charged with driving on a suspended license. Arraignment was set for 11/5/07. Sweigert told the applicant he would represent him on that charge and that the applicant did not need to attend the arraignment. Sweigert did not appear at the arraignment, and a warrant was issue for the applicant's arrest.

Sweigert did not tell the applicant that his license to practice was suspended on 12/6/07 and that he would be unable to represent him at the hearing. The applicant appeared and the hearing was continued to 2/28/08. On 2/12/08, the applicant was arrested at his home on the bench warrant. He spent the next two days in jail. The applicant employed new counsel. Sweigert never refunded any of the applicant's fees. The Board approved payment of $1,000.

Application H: The applicant hired Sweigert on 12/28/07, while Sweigert was suspended from practice. Sweigert agreed to represent her on a DUI charge and at a license-suspension hearing. He said his fee would be $3,500. He did not tell the applicant that he was suspended from practice. The applicant gave Sweigert a $300 cash down payment, for which he gave her a receipt. On 1/11/08, the applicant paid an additional $550. Sweigert said that he would appear at arraignment with the applicant on 1/25/08. Just before the hearing, Sweigert sent the applicant a message that he could not attend the hearing because he had the flu. She attended herself and pleaded not guilty. The next court date was set for 2/29/08.

On 2/8/08, the applicant gave Sweigert a $500 money order. He told the applicant that he would appear at the next court date. The license suspension hearing was set for 2/26/08. Sweigert told the applicant that she did not need to attend. Sweigert did not attend the hearing, and the applicant's license was suspended. The applicant called Sweigert repeatedly but he never returned her calls. He did not refund any of her funds. The Board approved payment of $1,350.

Application I: The applicant's parents paid Sweigert $4,500 to represent their son on an October 2007 DUI charge and to file an appeal of the applicant's license suspension. Sweigert told the applicant that, pending appeal of the license suspension, he could legally drive. Sweigert did not file an appeal and the applicant's license remained suspended. Sweigert did not tell the applicant that his license to practice was suspended on 12/6/07, and that he would be unable to represent him further.

On 12/24/07, the applicant was arrested and charged with a second DUI, and he was charged with driving on a suspended license (DWLS). Sweigert agreed to represent him on the new charges for an additional $4,000 despite being suspended from practice. He told the applicant that the DWLS charge was a mistake, that his license was not suspended, and that he would take care of it. The applicant's parents paid Sweigert an additional $2,000. Shortly thereafter, the applicant's mother received a call saying that Sweigert wanted to pay the applicant's $1,020 phone bill using the mother's credit card, which she authorized.

The first court date on the October DUI charge was set for 1/16/08. Sweigert told the applicant that he did not need to appear because Sweigert would be requesting a continuance. Neither Sweigert nor the applicant appeared, and a warrant was issued for the applicant's arrest. A court date on the December DUI charge was set for 2/13/08. The applicant went to court, but Sweigert did not appear. The applicant called him several times from the courthouse, but never reached him. The court granted a continuance, but the applicant was arrested on the warrant and his father had to post bail to get him out. The Board approved payment of $4,020.87.

Application J: In November 2007, the applicant paid Sweigert $2,500 for representation on a felony drug-possession charge. Arraignment was set for 11/20/07. Sweigert agreed to appear at arraignment, but failed to do so. It was continued to 11/27/07. The applicant went to court again, but Sweigert again failed to appear. It was continued to 12/4/07, and the same thing happened. According to the applicant, Sweigert would have excuses, such as that he was in trial in another court or he had a car wreck. The arraignment was continued to 12/11/07. On 12/6/07, the Supreme Court ordered Sweigert's interim suspension. The Board approved payment of $2,500.

Application K: The applicant hired Sweigert on a contingent-fee basis to represent him regarding personal injuries he received in an assault by a drunken person at a comedy club. There was no written fee agreement as required by the Rules of Professional Conduct in contingent-fee cases. Sweigert told the applicant he needed $1,500 to hire a "restaurant and bar expert." The applicant says he told Sweigert that he didn't have the money, "so he convinced me to put it on a credit card." Over the next year,

Sweigert was difficult to reach. He would tell the applicant that he was busy working on other cases, had been out of town, or was putting together a demand package for the applicant. In December 2007, the applicant sent him an e-mail asking for the status of his case. He says Sweigert responded on 12/27/07 that he would be in touch in the next few weeks. He did not tell the applicant that he was suspended. The Board approved payment of $1,500.

Application L: The applicant paid Sweigert $1,000 in August 2005 regarding a wrongful-termination lawsuit. He says that for a period of three years, Sweigert told him that he was trying to set a mediation date and was discussing a possible settlement with the applicant's former employer. In June 2008, Sweigert's secretary told the applicant that Sweigert was in the process of being disbarred. The applicant made several attempts to contact Sweigert to retrieve his paperwork. Sweigert made an appointment to meet with and return his files, but he did not show up. The applicant wrote, "In the end I realized that Mr. Sweigert had done nothing on my case and everything he had told me was completely untrue." The Board approved payment of $1,000.

Application M: The applicant paid Sweigert $3,000 in September 2006 regarding a garnishment arising from an identity theft. He says Sweigert said he could take care of it in a couple of months. He said that if they could not resolve it, he would seek a court order. The applicant says that after about a year he tried to contact Sweigert, because he was continuing to receive garnishment notices. When he could not find him, he contacted another lawyer, who told him that Sweigert had been suspended from practice. There is no evidence that Sweigert did anything on the applicant's case. The Board approved payment of $3,000.

Other business: The Committee reviewed 28 additional applications that were denied for lack of evidence of dishonest conduct, as fee disputes or claims for malpractice, because restitution was made, for unjust enrichment, or were deferred for further investigation.

Restitution: Before payment is made, the applicant must sign a subrogation agreement with the Fund, and the Fund seeks restitution from the lawyers. Because in most cases those lawyers have no assets, the chief avenue of restitution is through court-ordered restitution in criminal cases. Prosecuting attorneys cooperate with the Fund in getting the Fund listed in restitution orders. As of March 31, 2009, five lawyers were making regular restitution payments to the Fund totaling $4,927 since October 1, 2008.

The committee chair is Seattle attorney Sims Weymuller. WSBA General Counsel Robert Welden is staff liaison to the committee.

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.*

Reprimanded

John M. Petshow (WSBA No. 18144, admitted 1988), of Clackamas, Oregon, was ordered to receive a reprimand, effective May 7, 2009, 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 approving a stipulation. This discipline was based on conduct involving lack of diligence, failure to communicate, and a conflict of interest. For more information, see the *Oregon State Bar Bulletin* (May 2009), available at www.osbar.org/publications/bulletin/09may/baractions.html.

Mr. Petshow's conduct violated Oregon's RPC 1.3, prohibiting a lawyer from neglecting a legal matter entrusted to the lawyer; RPC 1.4(a), requiring a lawyer to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and RPC 1.7(a), prohibiting a lawyer from representing a client if the representation involves a current conflict of interest.

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

Non-Disciplinary Notice

Suspended Pending the Outcome of Disciplinary Proceedings

Dennis K. Pflug (WSBA No. 11930, admitted 1981), of Seattle, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.2(a)(3), effective May 18, 2009, by order of the Washington State Supreme Court. This is not a disciplinary sanction.

Non-Disciplinary Notice

Suspended Pending the Outcome of Disciplinary Proceedings

Jo Nell Walker (WSBA No. 24526, admitted 1994), formerly of Vancouver, Washington, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.2(a)(3), effective May 21, 2009, by order of the Washington State Supreme Court. This is not a disciplinary sanction.

Sebris Busto James

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Adam S. Belzberg

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Adam joins the firm from Littler Mendelson, where he represented employers in employment matters. He is a member of the Oregon State Bar and the Washington State Bar.

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Denise W. Derricott

has joined the firm as an associate.

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as a new associate with the firm.

Mr. Stowe is a 1997 graduate of Gonzaga School of Law and practices civil litigation in Washington and Idaho.

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Emmelyn Hart-Biberfeld,
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Information must be received by the first day of the month for placement in the following month's calendar.

Business Law

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

Ethics

No Longer a Child, Not Yet an Adult: Ethical Issues in Adolescent Healthcare
July 24–25 — Seattle. By the Treuman Katz Center for Pediatric Bioethics at Seattle Children's Research Institute; www.bioethics.seattlechildrens.org.

The Ethical and Professional Dimensions of Your Career Choices
July 30 — Seattle. 3 ethics credits. By AWARE™ (Association of Women Attorneys with Real Experience); awaregroup@gmail.com.

Family Law

Vulnerable Adult Protection Toolbox
July 31 — Vancouver, WA. 6 CLE credits, including 1 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

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

General

Breakfast at the Bar: Collaborative Law
July 7 — Seattle. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

Bork and Other 4-Letter Words: Confirmation of Judge Sotomayor
July 15 — Tele-CLE with online PowerPoint. 2 CLE credits, including .5 ethics pending. By Rubric CLE; 206-714-3178; www.rubriccle.com.

Washington Defense Trial Lawyers Annual Convention
July 16–19 —Winthrop. 6 CLE credits pending. By WDTL; 206-749-0319; www.wdtl.org.

WSAJ Annual Convention
July 30–August 2 — Seattle. 10 CLE credits, including 2 ethics. By WSAJ; 206-464-1011 or www.wstla.org/cle/clecalendar.aspx.

Health Law

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July 29 — Seattle/live webcast. 6 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

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Senior sales representative — Corporate Legal Software. Serengeti Law, the legal industry's highest-rated and most widely used e-billing and matter-management system, is seeking individuals with at least three years' legal experience for the position of senior sales representative. Sales representatives at Serengeti oversee the entire sales cycle from lead generation to contract renewal. All demonstrations are conducted via telephone and the Internet to senior-level staff and attorneys at corporate law departments. Candidates must demonstrate a strong legal and technology proficiency, as well as excellent communication and relationship-building skills. Prior experience in sales is a plus. Note: No travel is required and this is not a commissioned position. If you would like to apply for this job, we encourage you to provide a résumé to the following address: hr@SerengetiLaw.com.

Quality practice opportunity — Small AV-rated Tacoma firm with a diverse practice focusing on plaintiffs' personal injury and divorce work seeks litigation associate. We are looking for an attorney who is seeking a long-term relationship in a stable, friendly work environment dedicated to the ethical and passionate practice of law on behalf of each of our clients. Minimum of four years of experience preferred. Must be able to work independently, and must have an existing case load. This unique opportunity to develop and grow a practice, and may be an ideal opportunity for a solo practitioner to join our firm. Please submit a résumé and cover letter to Managing Member, 6915 Lakewood Dr. W, Ste. A-1, Tacoma, WA 98467. E-mail replies will also be accepted, and can be directed to Chuck@AH-Tacoma.com.

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

The Wenatchee office of Ogden Murphy Wallace, PLLC, a collegial mid-sized office located in sunny Eastern Washington, is seeking a litigation attorney. The ideal candidate will have a minimum of two years of experience. Strong research and writing skills, superior academic credentials, and the ability to work closely with multiple attorneys and staff in the firm's team approach to delivery of client services are required. Please submit your cover letter and résumé to mtanner@omwlaw.com.

Unique opportunity at a mid-sized downtown Seattle plaintiffs' litigation boutique that regularly tries cases. Seeking an attorney with a minimum of two years of experience, with some work in the Washington state court system. Federal court experience a plus. Applicants must have strong writing, research, and analytical skills. Salary offered will be competitive with top Seattle firms, depending on experience. Please submit cover letter and résumé to the following confidential e-mail: seekingattorney@gmail.com.

Smith Freed & Eberhard, P.C. is seeking attorneys with minimum two years of litigation experience. We are a growing insurance defense firm and are currently looking for attorneys experienced in personal injury and business litigation. Excellent research, writing, and analytical skills; attention to detail; and the ability to work professionally with clients, associates, and staff are a must. Oregon Bar is required and Washington Bar is a plus. We pay a competitive salary and benefits and provide a team-oriented environment. For further consideration, please send a cover letter, résumé, writing sample, and three professional references to hr@smithfreed.com.

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Established firm seeks experienced family law associate attorney. Must have at least five years' recent Washington experience. No applications considered without five years' experience. Salary $60 to 85K DOE plus benefits. Send résumés to Lori @ Tario & Associates, P.S., 119 N. Commercial St., #1000, Bellingham, WA 98225, or lgillies@tariolaw.com, or 360-733-7092.

Workers' compensation claimant firm seeks experienced associate to assume existing caseload. Qualified candidate must possess workers' compensation claimant experience and excellent client-relations skills. Experience in Social Security disability practice and personal injury litigation would be helpful. Excellent growth potential. Mail résumé to: WSBA *Bar News* Classifieds, Job Code #715, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539.

Services

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Experienced patent attorney available for contract work. Patent application drafting; background research. Biotech/medical device/chemical. Reasonable flat fee. Contact Stan Sastry, Ph.D., J.D., 425-357-6241.

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Career counseling for legal professionals: Jeff Minzel has 14 years of experience providing one-on-one career counseling to legal professionals. Common topics include networking, résumés, cover letters, interview strategies, follow-up, non-legal opportunities, etc. Jeff owned and operated a nationwide legal-staffing company and has helped hundreds of legal professionals find employment. Sessions are $125 per hour. Please call 206-619-6119 or e-mail Jeff@Minzel.com to set up a session.

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

Office space, newly refurbished office in Shoreline. Office rent — $510 monthly. Free DSL (wireless), free fax, free conference room, and parking. Photocopy available at cost. Call 206- 859-3400 or Melissa at 425-275-6530.

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

Training

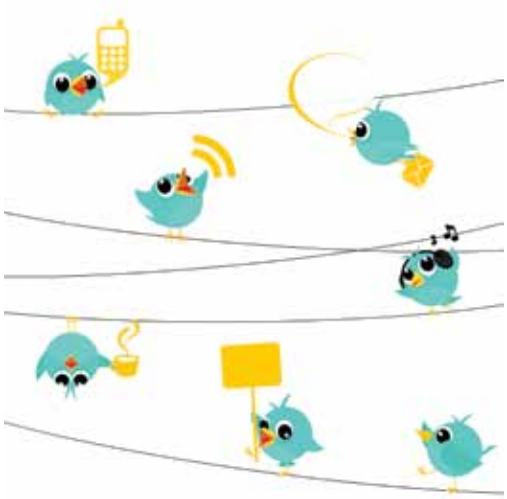
Mediation training programs — Upcoming dates for 2009. Four-day intensive — Sept. 22–25 and Nov. 17–20. Two-day advanced — Sept. 16–17. Alhadeff & Forbes Mediation Services, www.mediationservices.net or 206-281-9950 for more information.

To Place a Classified Ad

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

Deadline: Text and payment must be received (not postmarked) by the first day of each month for the issue following, e.g., August 1 for the September issue. No cancellations after the deadline. Mail to: WSBA Bar News Classifieds, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539.

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



All A-Twitter

Previously in this column I have referred briefly and derisively to the Twitter phenomenon. In the spirit of lawyer-like full disclosure, I hereby reveal that I have a Twitter account and read posts daily, although I submit few of my own. I have come to believe that Twitter has survived the fad stage and joined the array of modern communication tools. Accordingly, I am venturing to bring the Bar Beat, and by extension all of *Bar News*, into Twitterland. I have established a Twitter identity of "barbeat" and invite you to follow me on Twitter.com.

For the uninitiated, Twitter is a social networking service. What distinguishes Twitter is that it relies entirely on microposts, messages limited to 140 characters (yes, 140 characters, not 140 words). Via e-mail or text message, users post their notes — commonly called "tweets" — to Twitter.com. Other Twitterers who have chosen to "follow" the user get instant access to the stream of messages, again via e-mail or text message. Users also can send private replies or messages to one another.

Early Twitterers enlightened each other with tweets along these lines:

"Egg salad for lunch again. Tired of it."

"Just saw [trendy new movie]. Went to restroom, missed best part."

"Off to bed now."

The problem was that Twitter pioneers, like most early adopters of technology, were pasty, Mountain Dew-drinking nerds who would have had trouble coming up with 140 characters' worth of interesting conversation, even in person. (I say this with full knowledge that these people now rule the world and the rest of us just work here.)

But soon representatives from the opposite end of the social spectrum emerged to bridge the Twitter nerd gap. Celebrities, jocks, politicians, and others with too much to say were thrilled to discover another way to share their humanity with us. This elevated the level of tweet discourse about this much:

"Egg salad for lunch again. Tired of it. FIND ME IN PKG LOT B4 GAME = 2 FREE TIX. THE_REAL_SHAQ"

"Just saw [trendy new movie]. Went to restroom, missed best part. NEW BEAT DROPS NXT WK. BUY IT BYOTCHES! LUV Y'ALL. BRITNEYSPEARS"

"Off to bed now. DEMI'S WAITING! APLUSK (ASHTON KUTCHER)"

Most recently, though, an increasing number of thoughtful people involved in activities that might actually interest or benefit others have ventured into Twitterland. For example, Twitterers can follow the athletic and philanthropic pursuits of Lance Armstrong ("lancearmstrong"), breaking headlines from all variety of news organizations, and the prognostications of numerous forward-thinkers in the digital world. Users also can be alerted to the posting of each new LOLcat (visual jokes consisting of random cat photos adorned with giant, often hilarious captions) on I Can Has Cheezburger ("ICHCheezburger").

Twitter can be oddly addictive and has spawned third-party software (e.g., TweetDeck) that organizes the stream of messages, which otherwise becomes overwhelming. Tweets have exponentially gained appeal and utility by incorporating links to photos, articles, blog posts, etc. Thus, a journalist or elected official might post tweets and photos before or during a news event to describe the setting and atmosphere, then afterward post a tweet linking to a more comprehensive article on the subject.

On "barbeat," I will attempt to tweet on subjects of more gravity than what I am having for lunch. At the same time, it is not intended as a news service for the WSBA. My goal will be to alert followers to *Bar News* content and goings-on and mention key WSBA issues that arise. I am still a rookie at posting tweets, but I'll figure out how to incorporate photos and links to online sources.

How to join in: If you're a Twitterer already, just add "barbeat" to your list of friends to follow. If you aren't on Twitter, go to Twitter.com, sign up, and add "barbeat" as a friend. It's free and easy. You can request that I follow you, too. I will accept friend requests if I can, but I already follow a lot of people, so I may need to set a limit. You are competing for my attention with Shaq and Britney, after all.

Disclaimer: Although I will make "barbeat" tweets relevant to WSBA, *Bar News*, and this column, the posts will be created by me alone. They will not be pronouncements of the WSBA. I do not intend to pontificate, but any opinions expressed will be mine, not those of WSBA leadership or staff. Obviously, I will refrain from posting any defamatory, confidential, or vitriolic material and ask that you observe the same rules in any replies or direct messages you might post.

"Egg salad for lunch again. Tired of it. Just saw Hangover. Went to restroom, missed best part. Off to bed now. FOLLOW BARBEAT ON TWITTER!"

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